THE

CRIMINAL LAW CONSOLIDATION

AND

AMENDMENT ACTS

OF

1869, 32-33 VICT.,

FOR THE

DOMINION OF CANADA,

AS AMENDED AND IN FORCE

ON THE 1ST DAY OF NOVEMBER, 1874, IN THE PROVINCES OF ONTARIO, QUEBEC, NOVA SCOTIA, NEW BRUNSWICK, MANITOBA, AND ON THE 1ST DAY OF JANUARY, 1875, IN BRITISH COLUMBIA.

WITH

NOTES, COMMENTARIES, PRECEDENTS OF INDICTMENTS, &c., &c.

BY

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VOL. II.

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1875.

PREFACE.

This Volume will be found to contain the Criminal Law Procedure Act of 1869, with extensive annotations. For easy reference, the Statutes extending the Criminal Law Consolidation Acts to British Columbia and Manitoba have been inserted in this Volume: all the Statutes on Criminal Law, of general importance, passed since 1869, and not inserted in the first Volume, will also be found in the following pages, including those passed at the last Session of Parliament (1875). The text of the Statutes of 1869, following the Procedure Act, including the General Repeal Act, has also been given, with the exception of the "Acts respecting Justices of the Peace," 32-33 *Vic. chapters* 30 *and* 31, which belong to a separate branch of our Criminal Laws.

The following note from C. S. Greaves, Esq., Q. C., who, before the Select Committee of the House of Commons, in England, on the Homicide Bill, was called "the most eminent living writer on the subject" (of Criminal Law), will perhaps induce our law-givers to review the new clauses of the Larceny and Forgery Acts, to which objection was taken in the first Volume. Mr. Greaves' reply to the remarks (*page* 534 *of the* 1*st Vol.*) on Leonard's case will be read with interest. The principles of the law on the subject, as exposed by Mr. Greaves, are clear and undeniable. The difficulty lies in their application:

"11, Blandford Square,
"February 18th, 1875.

"*Mr. Greaves presents his respectful compliments to Mr. Justice Taschereau, and begs very cordially to thank him for his very valuable present, and still more so for the very great attention and weight which he has given to Mr. Greaves' notes and observations. It is indeed a very great gratification to Mr. Greaves to think that he may have been of some use towards the completion of the Canada Criminal Law. Mr. Greaves has not been able to do more than cursorily look into the book; but he has seen quite enough to satisfy him that it has been prepared with great care and ability; and he fully agrees with almost every remark in it, and especially with the objections to the new Larceny and Forgery clauses. On* one *point* only, *Mr. Greaves would crave leave to make the enclosed reply.*

Page 534 (of first Volume).—Greaves replies: "When an offence is committed through the agency of an innocent person, the employer, though absent when the act is done, is answerable as principal.—1 *Russell, C. & M.* 53; *Kel.* 52. If a madman, or a child not at years of discretion, commits murder or other felony on the incitement of another, the latter, though absent, is guilty as principal; otherwise he would be wholly unpunishable.—*Foster*, 349. Every act done by an innocent agent is in point of law exactly the same as if it were done at the same time and place by the employer. In burglary, if a man in the night breaks a window and inserts an instrument through the hole, and draws out any chattel, he is not only guilty of burglary with intent to steal, but of burglary *and* stealing *in* the house. The amotion by the instrument is the same as if it were by the prisoner's hand. Now, an innocent agent is merely the living instrument (Εμψυχον ὀργανον. Arist. Eth. 8, c. 13) of the employer. Then it is clear that any terror, which is sufficient to overpower a reasonably firm mind, will make an innocent agent; and the threats of an *armed mob* to a *single* individual are certainly sufficient to constitute such terror. In Leonard's case, therefore, the prosecutor was an innocent

agent; and the moment he asported any of the provisions in the house a single inch, a larceny was committed *in the house;* and that was a larceny by the prisoner, for the prosecutor was his innocent agent. In the case put, therefore, the prisoner was guilty of larceny, though he never had the provisions; just as the inciter of an innocent agent is guilty of murder, though he may be miles off when the murder is committed. The rule as to innocent agency is exactly the same, whether the offence consists of an asportation, as in larceny, or of a single act, as in murder, by stabbing or shooting. The act is the act of the inciter in every case alike."

In Farrell's case, 2 *East, P. C.* 557 (*ante*, Vol. I., 462), the defendant, upon meeting a man carrying a bed, told him to lay it down or he would shoot him, and the man accordingly laid down the bed; but the defendant, before he could take it up so as to remove it from the place where it lay, was apprehended. The Judges held that the robbery was not complete. Was there not a motion of the bed, from the prosecutor's hands or arms to the ground? Was not the prosecutor then under the influence of terror caused by the defendant? Was not then, in law, the act by the prosecutor, in laying down the bed, the act of the prisoner? If so, ought not the prisoner to have been held guilty?

FRASERVILLE, RIVER DU LOUP, EN BAS, P.Q.,
2nd November, 1875.

A TABLE OF REGNAL YEARS,

FOR CONVENIENCE OF REFERENCE TO THE ENGLISH STATUTES AND LAW REPORTS.

Sovereigns.	Commencement of Reign.	Length of Reign
William I.	October 14, 1066	21
William II.	September 26, 1087	13
Henry I.	August 5, 1100	36
Stephen	December 26, 1135	19
Henry II.	December 19, 1154	35
Richard I.	September 23, 1189	10
John	May 27, 1199	18
Henry III.	October 28, 1216	57
Edward I.	November 20, 1272	35
Edward II.	July 8, 1307	20
Edward III.	January 25, 1326	51
Richard II.	June 22, 1377	23
Henry IV.	September 30, 1399	14
Henry V.	March 21, 1413	10
Henry VI.	September 1, 1422	39
Edward IV.	March 4, 1461	23
Edward V.	April 9, 1483	..
Richard III.	June 26, 1483	3
Henry VII.	August 22, 1485	24
Henry VIII.	April 22, 1509	38
Edward VI.	January 28, 1547	7
Mary	July 6, 1553	6
Elizabeth	November 17, 1558	45
James I.	March 24, 1603	23
Charles I.	March 27, 1625	24
The Commonwealth	January 30, 1649	11
Charles II.*	May 29, 1660	37
James II.	February 6, 1685	4
William and Mary	February 13, 1689	14
Anne	March 8, 1702	13
George I.	August 1, 1714	13
George II.	June 11, 1727	34
George III.	October 25, 1760	60
George IV.	January 29, 1820	11
William IV.	June 26, 1830	7
Victoria	June 20, 1837	—

* Although Charles II. did not ascend the throne until 29th May, 1660, is regnal years were computed from the death of Charles I., January 30, 649, so that the year of his restoration is styled the twelfth of his reign.

TABLE OF REGNAL YEARS—(*continued*).

1831	1 & 2 Wm. IV.	1854	17 & 18 Vic.
1832	2 & 3 ,,	1855	18 & 19 ,,
1833	3 & 4 ,,	1856	19 & 20 ,,
1834	4 & 5 ,,	1857	20 ,,
1835	5 & 6 ,,	1857	20 & 21 ,,
1836	6 & 7 ,,	1858	21 & 22 ,,
1837	7 Wm IV. and 1 Vic.	1859	22 ,,
1838	1 & 2 Vic.	1859	22 & 23 ,,
1839	2 & 3 ,,	1860	23 & 24 ,,
1840	3 & 4 ,,	1861	24 & 25 ,,
1841	4 & 5 ,,	1862	25 & 26 ,,
1841	5 ,,	1863	26 & 27 ,,
1842	5 & 6 ,,	1864	27 & 28 ,,
1843	6 & 7 ,,	1865	28 & 29 ,,
1844	7 & 8 ,,	1866	29 & 30 ,,
1845	8 & 9 ,,	1867	30 & 31 ,,
1846	9 & 10 ,,	1868	31 & 32 ,,
1847	10 & 11 ,,	1869	32 & 33 ,,
1848	11 & 12 ,,	1870	33 & 34 ,,
1849	12 & 13 ,,	1871	34 & 35 ,,
1850	13 & 14 ,,	1872	35 & 36 ,,
1851	14 & 15 ,,	1873	36 & 37 ,,
1852	15 & 16 ,,	1874	37 & 38 ,,
1853	16 & 17 ,,	1875	38 & 39 ,,

ERRATA ET CORRIGENDA.

In the seventh line, page 35, insert "Chap. 20" after "32-33 Vic."

In the nineteenth line, page 47, "seventy-second" instead of "twenty-second."

In the eighteenth line, page 74, insert "and" after "Sessions."

In the twenty-first line, page 85, insert "counts" instead of "courts."

In the twelfth line, page 92, insert "the offence" before "appear."

In the nineteenth line, page 198, the words "and frauds" to be erased.

In the twelfth line, page 205, insert "infamous" instead of "famous."

In the twenty-first line, page 206, insert "indifferent" instead of "indifferently."

In the thirteenth line, page 224, insert "Section 40" instead of "Chap. 40."

In the twelfth line, page 225, after "page 242," insert "18."

In the twenty-seventh line, page 260, insert "attempt to commit the" before "misdemeanor."

In the first line, page 261, insert "attempt to commit the" before "offence."

In the nineteenth line, page 261, insert "though" instead of "through."

In the eleventh line, page 265, insert "held" after "it was."

In the twentieth line, page 280, the comma should be after "assault" instead of after "also."

In the seventh line, page 408, insert "2 Burr." instead of "3 Burr."

In the first line, page 439, insert "within" instead of "without."

Page 511, after section 3, insert section 4 as follows: "The Act hereby amended shall be construed as if the provisions of this Act were substituted for the first section of the said Act."

TABLE OF STATUTES.

THE PROCEDURE ACT.

32-33 Vic., ch. 29.

THE SUMMARY TRIAL ACT.

32-33 Vic., ch. 32.

JUVENILE OFFENDERS' ACT.

32-33 Vic., ch. 33.

TABLE OF CASES CITED.

IN THE FIRST VOLUME.

TABLE OF CASES CITED.

IN THE SECOND VOLUME.

THE

CRIMINAL LAW

CONSOLIDATION AND AMENDMENT ACTS

OF 1869.

FOR THE

DOMINION OF CANADA.

AN ACT RESPECTING PROCEDURE IN CRIMINAL CASES AND OTHER MATTERS RELATING TO CRIMINAL LAW.

32-33 VICT., CHAP. 29.

WHEREAS by divers Acts passed during the now last and the present session of Parliament, certain provisions of the Statute Law of the several Provinces of Canada, respecting certain crimes and offences, have been assimilated, amended and consolidated, and extended to all Canada, and it is expedient in like manner, to assimilate, amend and consolidate, and to extend certain other provisions of the said Statute Law respecting procedure and other matters not included in the said Acts: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

INTERPRETATION CLAUSE.

Sect. 1.—In the interpretation of this Act, and of any Act of the Parliament of Canada relating to criminal law, unless there be something in the enactment or in the context indicating a different meaning, or calling for a different construction:

1.—The word "indictment" shall be understood to include "information," "inquisition" and "presentment" as well as indictment, and also any plea, replication or other pleading, and any record; and the term "finding of the indictment" shall include also "the taking of an inquisition," "the exhibiting an information" and "the making of a presentment;" and the word "property" shall be understood to include goods, chattels, money, valuable securities and every other matter or thing, whether real or personal, upon or with respect to which any offence may be committed; and the expression "district, county or place" shall include any division of any Province of Canada, for purposes relative to the administration of justice in criminal cases;

2.—Whenever, in any Act relating to any offence, whether punishable upon indictment or summary conviction, any word has been used or employed importing the singular number or the masculine gender only, in describing or referring to the offence or to the subject matter on or with respect to which it may be committed, or to the offender or the party affected or intended to be affected by the offence, such Act shall be understood to include several matters of the same kind, as well as one matter, and several persons as well as

one person, and females as well as males, and bodies corporate as well as individuals, and when a forfeiture or penalty is made payable to a party aggrieved it shall be payable to a body corporate in case such a body be the party aggrieved;

3.—Whenever a person doing a certain act is declared to be guilty of any offence, and to be liable to punishment therefor, it shall be understood that such person shall only be deemed guilty of such offence and liable to such punishment after being duly convicted of such act; and whenever it is provided that the offender shall be liable to different degrees or kinds of punishment, it shall be understood that the punishment to be inflicted, will, subject to the limitations contained in the enactment, be in the discretion of the court or tribunal before which the conviction takes place;

4.—The word "Penitentiary" shall be understood to mean the penitentiary for the Province in which the conviction takes place; and any person sentenced to imprisonment in the Penitentiary shall be subject to the provisions of the Statutes relating to such Penitentiary, and to all rules and regulations lawfully made under any such statute;

5.—The word "Justice" shall be understood to mean a Justice of the Peace;

6.—The expression "any Act" or "any other Act," when it occurs in this Act or in any other Act of the Parliament of Canada, relating to criminal law, shall include any Act passed or to be passed by the Parliament of Canada, or any Act passed by the Legislature of the late Province of Canada, or passed or to be passed by the Legislature of any Province of Canada,

or passed by the Legislature of any Province included in Canada, before it was included therein, unless there be something in the subject or context inconsistent with such construction.

The first part of this clause is taken from the 7 & 8 Geo. 4, ch. 28, s. 14; 13 & 14 Vict. ch. 21, s. 4 (Lord Brougham's Act); and 14 & 15 Vict., ch. 100, s. 30 of the Imperial Statutes.

It may be useful to insert here extracts from the clauses of the general "Interpretation Act," 31 Vict. ch. 1, which seem the most important in connection with our Criminal Statutes.

"The word 'shall' is to be construed as imperative, and the word 'may' as permissive."

"Whenever the word 'herein' is used in any section of an Act, it is to be understood to relate to the whole Act and not to that section only."

"Words importing the singular number or the masculine gender only, shall include more persons, parties or things of the same kind than one, and females as well as males, and the converse."

"The word 'person' shall include any body corporate and politic, or party, and the heirs, executors, administrators or other legal representatives of such person, to whom the context can apply according to the law of that part of Canada to which such context extends."

"The words 'writing,' 'written,' or any term of like import, shall include words printed, painted, engraved, lithographed, or otherwise traced or copied."

"The word 'month' shall mean a calendar month."

"The word 'oath' shall be construed as meaning a solemn affirmation whenever the context applies to any person and case, by whom and in which a solemn affirmation may be made instead of an oath, and in like cases the word 'sworn' shall include the word 'affirmed;' and in every case where an oath or affirmation is directed to be made before any person or officer, such person or officer shall have full power and authority to administer the same, and to certify its having been made; and the wilful making of any false statement in any such oath or affirmation shall be wilful and corrupt perjury; and the wilful making of any false statement in any declaration required or authorized by any Act, shall be a misdemeanor, punishable as wilful and corrupt perjury."

"The word 'sureties' shall mean sufficient sureties, and the word 'security' shall mean sufficient security, and where these words are used, one person shall be sufficient therefor, unless otherwise expressly required."

"The words 'superior courts' shall denote, in the Province of Ontario, the Court of Queen's Bench, the Court of Common Pleas, and the Court of Chancery in the said Province; in the Province of Quebec, the said words shall denote the Court of Queen's Bench and the Superior Court in and for the said Province; and in the Provinces of Nova Scotia and New Brunswick, the said words shall denote the Supreme Court in and for each of the said Provinces respectively."

By Sec. 2, 34 Vict., ch. 14, it is enacted that the general court then existing in the Province of Manitoba, and any court to be constituted in lieu of the

said court, shall have power to hear, try and determine all treasons, felonies and indictable offences committed in the said Province.

By Sec. 5 37 Vict., ch. 42, the same powers are given to the supreme court of British Columbia for any offences committed in the said Province.

The words "Registrar" or "Register" in any Act, applying to the whole Dominion, shall mean and include indifferently Registrars and Registers in the several Provinces constituting the Dominion, and their Deputies, respectively.

Any wilful contravention of any Act, which is not made any offence of some other kind, shall be a misdemeanor, and punishable accordingly—31 Vict. ch. 1.

Whenever any pecuniary penalty, or any forfeiture is imposed for any contravention of any Act—then, if no other mode be prescribed for the recovery thereof, such penalty or forfeiture shall be recoverable, with costs, by civil action or proceeding at the suit of the Crown only, or of any private party suing as well for the Crown as for himself, in any form allowed in such case by the law of that Province where it is brought—before any Court having jurisdiction to the amount of the penalty in cases of simple contract—upon the evidence of any one credible witness other than the plaintiff or party interested; and if no other provision be made for the appropriation of such penalty or forfeiture, one half thereof shall belong to the Crown, and the other half shall belong to the private plaintiff, if any there be, and if there be none, the whole shall belong to the Crown—31 Vict. ch. 1.

The word "Magistrate" shall mean a Justice of the Peace; the words "two Justices" shall mean two or more Justices of the Peace, assembled or acting together; and if anything is directed to be done by or before a Magistrate or a Justice of the Peace, or other Public Functionary or Officer, it shall be done by or before one whose jurisdiction or powers extend to the place where such thing is to be done: and whenever power is given to any person, officer or functionary to do or to enforce the doing of any act or thing, all such powers shall be understood to be also given as are necessary to enable such person, officer or functionary to do or to enforce the doing of such act or thing—31 Vict. ch. 1.

If, in any Act, any party is directed to be imprisoned or committed to prison, such imprisonment or committal shall, if no other place be mentioned or provided by law, be in or to the common gaol of the locality in which the order for such imprisonment is made, or if there be no common gaol there, then in or to that common gaol which is nearest to such locality; and the keeper of any such common gaol shall receive such person, and him safely keep and detain in such common gaol under his custody until discharged in due course of law, or bailed in cases in which bail may, by law, be taken—31 Vict. ch.1.

Where forms are prescribed slight deviations therefrom, not affecting the substance or calculated to mislead, shall not vitiate them—31 Vict. ch. 1.

In the Province of Manitoba, any common gaol is "the Penitentiary"—sect. 7, 34 Vict. ch. 14.—The same

clause is re-enacted for British Columbia, by sect. 6, 37 Vict. ch. 42.

In the Provinces of Nova Scotia and New Brunswick, the interpretation of certain words in the 32-33 Vict. ch. 32, "*An Act respecting the prompt and summary administration of Criminal Justice in certain cases*," is regulated as follows by the 37 Vict. ch. 40.

"The expression 'a competent Magistrate,' in the said Act, shall, as respects the Province of Nova Scotia or the Province of New Brunswick, mean and include any Recorder, Judge of a County Court, Stipendiary Magistrate or Police Magistrate, acting within the local limits of his jurisdiction, as well as any functionary included by the said expression as respects either of the said Provinces, under the terms of the said Act; and the expression 'the Magistrate' in the said Act, shall, as respects either of the said Provinces, mean a competent Magistrate, as above defined; and the said Act shall, from and after the passing of this Act, be construed and have effect accordingly."

In British Columbia, by 37 Vict. ch. 42, schedule A, the meaning of the expression "competent Magistrate" is declared to be any two Justices of the Peace sitting together, as well as any functionary or tribunal having the power of two Justices of the Peace in the 32-33 Vict. ch. 32, "*An Act respecting the prompt and summary administration of criminal justice in certain cases.*"

By the same Act, in the same Province, the expression "any two or more Justices" includes any Magistrate having the power of two Justices of the Peace,

in the 32-33 Vict. ch. 33, "*An Act respecting the trial and punishment of juvenile offenders.*"

By the General Repeal Act, 32-33 Vict. ch. 36, sec. 8, it is enacted that any Judge of the Sessions of the Peace, or any district Magistrate in the Province of Quebec, shall in all cases have all the power vested in two Justices of the Peace by any Act mentioned in any Act relating to criminal law, in force in that Province.

APPREHENSION OF OFFENDERS, WITHOUT WARRANT, ETC.

SECT. 2.—Any person found committing an offence punishable either upon indictment, or upon summary conviction, may be immediately apprehended by any constable or peace officer, without a warrant, or by the owner of the property on or with respect to which the offence is being committed, or by his servant or any other person authorized by such owner, and shall be forthwith taken before some neighbouring Justice of the Peace, to be dealt with according to law.

By the Coin Act, 32–33 Vict. ch. 18, sec. 33, it is enacted that "It shall be lawful for any person whatsoever to apprehend any person who is found committing any indictable offence against this Act, and to convey or deliver him to some peace officer, constable, or officer of police, in order to his being conveyed, as soon as reasonably may be, before a Justice of the Peace or some other proper officer, to be dealt with according to law."

By the Act respecting offences against the person, 32–33 Vict. ch. 20, sec. 37, it is enacted that "Whosoever wilfully disturbs, interrupts, or disquiets any assemblage of persons met for religious worship, or for any moral, social, or benevolent purpose, by profane discourse, by rude or indecent behaviour, or by making a noise, either within the place of such meeting or so near to it as to disturb the order or solemnity of the meeting, may be arrested on view by any peace officer present at such meeting, or by any other person present thereto verbally authorized by any Justice of the Peace present thereat, and detained, until he can be brought before a Justice of the Peace."

By the Larceny Act, 32–33 Vict. ch. 21, sec. 117, it is enacted that "Any person found committing any offence punishable either upon indictment or upon summary conviction, by virtue of this Act, may be immediately apprehended, without a warrant, by any person, and forthwith taken, together with the property, if any, on or with respect to which the offence is committed, before some neighbouring Justice of the Peace to be dealt with according to law."

By the Act respecting malicious injuries to property, 32–33 Vict. ch. 22, sec. 69, it is enacted that "Any person found committing any offence against this Act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken

before some neighbouring Justice of the Peace, to be dealt with according to law."

By the Act for the better preservation of the peace in the vicinity of public works, 32-33 Vict. ch. 24, sec. 8, it is enacted that "Any Commissioner or Justice, Constable or Peace Officer, may arrest and detain any person employed on any such railway, canal, or other work, found carrying any such weapon as aforesaid, within any place where this Act is at the time in force, at such time and in such manner as in the judgment of such Commissioner, Justice, Constable or Peace Officer, affords just cause of suspicion that they are carried for purposes dangerous to the public peace."

By the Act respecting certain offences relative to Her Majesty's army and navy, 32-33 Vict. ch. 25, sec. 7, it is enacted that "Any person reasonably suspected of being a deserter from Her Majesty's service may be apprehended and brought for examination before any Justice of the Peace, and if it appears that he is a deserter, he shall be confined in gaol until claimed by the military or naval authorities, or proceeded against according to law."

By the Act respecting cruelty to animals, 32-33 Vict. ch. 27, sec. 4, it is enacted that, "When any offence against this Act is committed, any Constable or other Peace Officer, or the owner of such cattle, animal or poultry, upon view thereof, or upon the information of any other person (who shall declare his or their name or names and place or places of abode to the said Con

stable or other Peace Officer) may seize and secure, by the authority of this Act, and forthwith, and without any other authority or warrant, may convey any such offender before a Justice of the Peace, within whose jurisdiction the offence has been committed, to be dealt with according to law"

By the Act respecting riots and riotous assemblies, 31 Vict. ch. 70, sec. 4, it is enacted that "If twelve or more of the persons so unlawfully, riotously and tumultously assembled continue together, after proclamation made in manner aforesaid, and do not disperse themselves within one hour, then every Justice of the Peace, Sheriff, and Deputy Sheriff of the district and county where such assembly may be, and also every High and Petty Constable, and other Peace Officer within such district or county, and also every Mayor, Justice of the Peace, Sheriff and other head officer, High or Petty Constable, and other Peace Officer, of any city or town corporate, where such assembly may be, and any person or persons commanded to assist such Justice of the Peace, Sheriff or Deputy Sheriff, Mayor, Bailiff or other head officer aforesaid (who may command all Her Majesty's subjects of age and ability to be assisting to them therein) shall seize and apprehend the persons so unlawfully, riotously and tumultously continuing together, after proclamation made as aforesaid, and shall forthwith carry the persons so apprehended before one or more of Her Majesty's Justices of the Peace of the district, county or place where such persons are so apprehended, in order to their being proceeded against for such their offences according to law."

By the Act respecting the shipping of seamen, 36 Vict., ch. 129, sec. 94 (in force in Quebec, Nova Scotia, New Brunswick, and British Columbia only), it is enacted that " Whenever, either at the commencement or during the progress of any voyage, any seaman or apprentice neglects or refuses to proceed to sea in any ship registered in either of the said Provinces in which he is duly engaged to serve, or is found otherwise absenting himself therefrom without leave, the master or any mate, or the owner, ship's husband or consignee may, in any place in either of the said Provinces, with or without the assistance of the local police officers or constables (who are hereby directed to give the same if required), apprehend him without first procuring a warrant; and may thereupon in any case, and shall in case he so requires, and it is practicable, convey him before some Court capable of taking cognizance of the matter, to be dealt with according to law; and may, for the purpose of conveying him before such Court, detain him in custody for a period not exceeding twenty-four hours, or such shorter time as may be necessary, or may, if he does not so require, or if there is no such Court at or near the place, at once convey him on board; and if any such apprehension appears to the Court before which the case is brought to have been made on improper or on insufficient grounds, the master, mate, owner, ship's husband or consignee, who makes the same or causes the same to be made, shall incur a penalty not exceeding eighty dollars; but such penalty, if inflicted, shall be a bar to any action for false imprisonment in respect of such apprehension."

It must be admitted that this great defect of our Criminal Statutes Consolidation Acts, want of uniformity, is strikingly illustrated, in the various clauses above cited, concerning the apprehension of offenders. For instance, by the Coin Act, *any person* is empowered to arrest offenders against the Act, but only when committing *an indictable offence*. By the Larceny Act, this power is given against persons found committing an offence punishable either *by indictment*, or *summary conviction*.

By the Act respecting malicious injuries to property, *a peace officer*, or *the owner of the property*, or *some one authorized by him*, only, can apprehend an offender against the Act—not *any person*, as in the two other cases.

Then Sec. 2, of the Procedure Act (*ante*) is, in great part, nothing but the common law on the subject, and, in certain respects, is less comprehensive and extended than the common law. For instance, at common law, if a constable or peace officer sees any person committing a felony, he not only *may*, but he *must* and is *bound* to apprehend the offender. And not only a constable or peace officer, but "*all persons* who are present when a felony is committed, or a dangerous wound given, are *bound* to apprehend the offender, on pain of being fined and imprisoned for their neglect, unless they were under age at the time: (2 *Hawkins* 115); and it is *the duty* of *all* persons to arrest without warrant any person *attempting* to commit a felony: (*R.* vs. *Hunt*, 1 Mood. 93; *R.* vs. *Howarth*, 1 Mood. 207). So any person may arrest another for the purpose of putting a stop to a breach of the peace, com-

mitted in his presence (2 *Hawkins*, 115; 1 *Burn's Justice*, 295, 299; *Roscoe*, 240). A peace officer may arrest any person, without warrant, on a reasonable *suspicion of felony*, though that doctrine does not extend to misdemeanors. And even a private person has that right. But there is a distinction between a private person and a constable as to the power to arrest any one upon suspicion of having committed a felony, which is thus stated by Lord Tenterden, C. J., in *Beckwith* vs. *Philby*, 6 B. & C. 635:—

"In order to justify a private person in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has been actually committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities. This distinction is perfectly settled. The rule as to private persons was so stated by Genney, in the Year Book, 9 Edw. 4, already mentioned, and has been fully settled ever since the case of *Ledwith* vs. *Catchpole* (Cald. 291, A. D. 1783); *Greaves*, On Arrest without Warrant."

Any private person may also arrest a person found committing a misdemeanor. This doctrine having been denied, in England, by a correspondent of the *Times*, Mr. Greaves, Q. C., the learned framer of the English Criminal Law Consolidation Acts, published, on the question, an article, too long for insertion here, but from which the following extracts give fully the author's views on the question:—

"On these authorities it seems to be perfectly clear

that any private person may lawfully apprehend any person whom he may catch in the attempt to commit any felony, and take him before a justice to be dealt with according to law."

"I have now adduced abundantly sufficient authorities to prove that the general assertion in the paper, (in the *Times*) that 'a private individual is not justified in arresting without a warrant' a person found committing a misdemeanor, cannot be supported. On the contrary, those authorities very strongly tend to show that any private individual may arrest any person whom he catches committing any misdemeanor. It is quite true that I have been unable to find any express authority which goes to that extent; but it must be remembered that where the question turns on some common law rule, there never can have been any authority to lay down any general rule; each case must necessarily be a single instance of a particular class; and, as in larceny, notwithstanding the vast number of cases which have been decided, no complete definition of the offence has ever yet been given by any binding authority, so in the present case we must not be surprised if we find no general rule established."

"But when we find that all misdemeanors are of the same class; that it is impossible to distinguish in any satisfactory way between one and another, and that in the only case (*Fox* vs. *Gaunt*) where such a distinction was attempted, the court at once repudiated it; and when, on the question whether a party indicted for a misdemeanor was entitled to be discharged on *habeas corpus*, Lord Tenterden, C. J., said, in delivering the

judgment of the court, 'I do not know how, for this purpose, to distinguish between one class of crimes and another. It has been urged that the same principle will warrant an arrest in the case of a common assault. That certainly will follow': *Ex parte Scott*, 9 B. & C. 446. And when, above all, the same broad principle that it is for the common good that all offenders should be arrested, applies to every misdemeanor, and that principle has been the foundation of the decisions from the earliest times, and was the ground on which *Timothy* vs. *Simpson* was decided; the only reasonable conclusion seems to be that the power to arrest applies to all misdemeanors alike, wherever the defendant is caught in the act."

These authorities fully demonstrate that Sec. 2 of our Procedure Act is a useless enactment, of a nature to mislead. It can be of no effect whatsoever, except in offences punishable upon summary conviction, not otherwise provided for, as to the apprehension of offenders. If *any* person has the right to apprehend without warrant any one found committing *any* indictable offence, it was certainly unnecessary to say that a peace officer, or the owner of the property, on or with respect to which the offence is committed, has that right.

It has been held that where a statute gives a power to arrest a person *found committing an offence* (and these are the terms of Sec. 2 of the Procedure Act, and of the corresponding sections of the Consolidated Criminal Acts), he must be taken in the act, or in such continuous pursuit that from the finding until the apprehension, the circumstances constitute one transac-

tion: *Hanway* vs. *Boultbee*, 1 C. E. & P. 350; *R.* vs. *Curran*, 3 C. & P. 397; *R.* vs. *Howart*, 1 Mood. 207; *Roberts* vs. *Orchard*, 2 H. & C. 769; and therefore, if he was found in the next field with property in his possession suspected to be stolen out of the adjoining one, it is not sufficient: *R.* vs. *Curran*, 3 C. & P. 397; but if seen committing the offence it is enough, if the apprehension is on quick pursuit: *Hanway* vs. *Boultbee*, 4 C. & P. 350. The person must be immediately apprehended; therefore, probably the next day would not be soon enough, though the lapse of time necessary to send for assistance would be allowable: *Morris* vs. *Wise*, 2 F. & F. 51; but an interval of three hours between the commission of the offence and the discovery and commencement of pursuit is too long to justify an arrest without warrant under these statutes: *Downing* vs. *Cassel*, 36 L. J. M. C. 97.

The person must be forthwith taken before a neighbouring Justice, and, therefore, it is not complying with the statute to take him to the prosecutor's house first, though only half a mile out of the way: *Morris* vs. *Wise*, 2 F. & F. 51; unless, indeed, it were in the night time, and then he might probably be kept in such a place until the morning: *R.* vs. *Hunt*, 1 Mood. 93.

But no person can, in general, be apprehended without warrant for a mere misdemeanor not attended with a breach of the peace, as perjury or libel: *King* vs. *Poe*, 30 J. P. 178; and a private individual cannot arrest another, without warrant, on the ground of suspicion of his having been guilty of a misdemeanor; nor can, in this case, constables and peace officers:

Matthews vs. *Biddulph*, 4 Scott N. R. 54; *Fox* vs. *Gaunt*, 3 B. & Ad. 798; *Griffin Coleman*, 4 H. & N. 265. Neither can any person, not even a constable, arrest a person without a warrant on a charge of misdemeanor: *R.* vs. *Curran*, 1 Mood. 132; *Reg.* vs. *Phelps*, Car. & M. 185, except when such person is *found* committing the offence by the person making the arrest, in the cases, as ante, where the statute specially authorizes him to do so. And though *any* person can make an arrest to prevent a breach of the peace, or put down a riot or an affray, yet after the offence is over, even a constable cannot apprehend any person guilty of it, unless there is danger of its renewal: *Price* vs. *Seeley*, 10 Cl. & Hin. 28; *Baynes* vs. *Brewster*, 2 Q. B., 375; *Derecourt* vs. *Corbishley*, 24 L. J. Q. B. 313; *Timothy* vs. *Simpson*, 1 C. M. & R. 757; *Reg.* vs. *Walker*, Dears. 358. In *Reg.* vs. *Light*, Dears. & B. 332, it appeared that the constable, while standing outside the defendant's house, saw him take up a shovel and hold it in a threatening attitude over his wife's head, and heard him at the same time say, "If it was not for the policeman outside I would split your head open;" that in about twenty minutes afterwards the defendant left his house, after saying that he would leave his wife altogether, and was taken into custody by the constable, who had no warrant, when he had proceeded a short distance in the direction of his father's residence: the prisoner resisted and assaulted the constable, for which he was tried and found guilty, and, upon a case reserved, the Judges held that the conviction was right, and that the constable had the right to apprehend the defendant.

"A constable, as conservator of the peace," said Williams, J., "has authority, equally with all the rest of Her Majesty's subjects, to apprehend a man where there is reasonable ground to believe that a breach of the peace will be committed; and it is quite settled that where he has witnessed an assault he may apprehend as soon after as he conveniently can. He had a right to apprehend the prisoner, and detain him until he was taken before Justices, to be dealt with according to law. He had a right to take him, not only to prevent a further breach of the peace, but also that he might be dealt with according to law in respect of the assault which he had so recently seen him commit."

Arrest, without warrant, for contempt of Court.—Judges of a Court of Record have power to commit to the custody of their officer, *sedente curia*, by oral command, without any warrant made at the time: *Kemp* vs. *Neville*, 10 C. B. N. S. 523; 31 L. J. C. P. 158. This proceeds upon the ground that there is in contemplation of law a record of such commitment, which record may be drawn up when necessary: *Watson* vs. *Bodell* 14 M. & W. 70; 1 *Burn's* Just. 293; for the like reason no warrant is required for the execution of sentence of death: 2 *Hale*, 408. If a contempt be committed in the face of a court, as by rude and contumelious behaviour, by obstinacy, perverseness, or prevarication, by breach of the peace or any wilful disturbance whatever, the Judge may order the offender to be instantly, without any warrant, apprehended and imprisoned, at his, the Judge's, discretion, without any further proof or examination: 2 *Hawkins*, 221; *Cropper* vs. *Horton*, 8 D. & R. 166; *Rex* vs. *James*, 1 D. & R.

559; 5 B. & A. 894; but the commitment must be for a time certain, and if by a Justice of the Peace, for contempt of himself in his office, it must be by warrant in writing: *Mayhew* vs. *Locke*, 2 Marsh. 377; 7 Taunt. 63; and the jurisdiction with regard to contempt, which belongs to *inferior courts*, and in particular to the County Court, is confined to contempts committed in the court itself: *Ex parte Joliffe*, 42 L. J. Q. B. 121. This last case rests principally on the 9-10 Vic. ch. 95 (Imp), which gives to County Courts power to commit for contempt committed in face of the Court, but is silent as to contempt committed out of Court: see 4 *Stephen's* Com. 341.

Time, place and manner of arrest.—A person charged on a criminal account may be apprehended at any time in the day or night. The 29 Car. 2, ch. 7, sec. 6 prohibited arrests on Sundays, except in cases of treasons, felonies and breaches of the peace, but now, by the 32-33 Vic., ch. 30, *An Act respecting the duties of Justices of the Peace, out of Sessions, in relation to persons charged with indictable offences*, it seems that an arrest in any indictable offence may be executed on a Sunday. See 4 *Stephen's* Com., 347; 1 *Chitty*, 16; *Rawlins* vs. *Ellis*, 10 Jur. 1039. No place affords protection to offenders against the criminal law, and they may be arrested anywhere, and wherever they may be: *Bacon's Abr. Verb. Trespass.*

As to the manner of arresting without warrant by a private person, he is bound, previously to the arrest, to notify to the party the cause for which he arrests, and to require him to submit; but such notification is not necessary where the party is in the actual commission of the offence, or where fresh pursuit is made after any such offender, who, being disturbed, makes his escape; so a constable arresting, without warrant, is bound to notify his authority for such arrest, unless the offender be otherwise acquainted with it, except, as in the case of private individuals, where the offender is arrested in the actual commission of the offence, or on fresh pursuit: *R.* v. *Howarth*, 1 Mood. 207.

If a felony be committed, or a felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavours for preventing an escape, and if, in the pursuit, the felon be killed *where he cannot be otherwise overtaken*, the homicide is justifiable. This rule is not confined to those who are present so as to have ocular proof of the fact, or to those who first come to the knowledge of it, for if in these cases fresh pursuit be made, the persons who join in aid of those who began the pursuit are under the same protection of the law. But if he may be taken in any case without such severity, it is, at least, manslaughter in him who kills, and the jury ought to enquire whether it were done of necessity or not: 1 *East*, P. C. 298; but this is not extended to cases of misdemeanor or arrests in civil proceedings, though in a case of riot or affray, if a person interposing to part the combatants, giving notice to them of his friendly intention, should be assaulted by them or either of them and in the struggle should happen to kill, this will be justifiable homicide: *Foster*, 272. However, supposing a felony to have been actually committed, but not by the person suspected and pursued, the law does not afford the same indemnity to such as of their

own accord, or upon mistaken information that a felony had been committed, engage in the pursuit, how probable soever the suspicion may be; but constables acting on reasonable suspicion of felony are justified in proceeding to such extremities when a private person may not be: 2 *East*, P. C., 300; but the constable must know, or at least have reasonable ground for suspecting, that a felony has been committed; for a constable was convicted of shooting at a man, with intent to do him some grievous bodily harm, whom he saw carrying wood out of a copse which he had been employed to watch, and who, by running away, would have escaped if he had not fired, for unless the man had been previously summarily convicted for the same offence he had not committed a felony and, though he had been so previously convicted, the constable was not aware of it. And the conviction was affirmed by the Court of Crown Cases reserved, "We all think the conviction right," said Pollock, C. B., "the prisoner was not justified in firing at Waters, because the fact that Waters was committing a felony was not known to the prisoner at the time": *Reg.* vs. *Dadson*, 2 Den. 35.

PERSONS TO WHOM PROPERTY IS OFFERED MAY APPREHEND THE PARTY OFFERING THE SAME, IN CERTAIN CASES.

Sec. 3.—If any person to whom any property is offered to be sold, pawned or delivered, has reasonable cause to suspect that any such offence has been committed on or with respect to such property, he

may, and, if in his power, he shall apprehend and forthwith carry before a Justice of the Peace, the party offering the same, together with such property, to be dealt with according to law.

This clause does not apply only to cases of stolen goods, as the marginal summary, in the Statute, states it. The case of stolen goods is provided for by sec. 117 of the Larceny Act. The words *any such offence* in this clause refer to the preceding section, and mean *any* offence punishable either upon indictment, whether a felony or a misdemeanor, or upon summary conviction. So that by this clause, if goods are offered to a person, which this person has reasonable cause to suspect to have been smuggled, he may, and, if possible, he must, apprehend the party offering them. So of game killed within the close season, and, in fact, of every offence whatsoever.

As to what constitutes a reasonable cause, in such cases, depends very much on the particular facts and circumstances in each instance; the general rule being that the grounds must be such that any reasonable person, acting without passion or prejudice, would fairly have suspected the party arrested of being the person who committed the offence, though the words of the statute seem to authorize the apprehension of the person offering, whether *he* be suspected or not: *Allen* vs. *Wright*, 8 C. & P. 522. A bare surmise or suspicion is plainly insufficient: *Leete* vs. *Hart*, 37 L. J. C. P. 157; *Davies* vs. *Russell*, 5 Bing. 364.

If the conduct of the person arresting is impugned

in an action for false imprisonment, a question arises as to whom does it belong to decide whether the defendant had reasonable cause of suspecting the plaintiff. The authorities conflict upon the point. In *Davis* vs. *Russell*, 5 Bing 354, and in *Stonehouse* vs. *Elliott* 6 T. R. 315, the Court of Common Pleas held it to be the judge's province to decide whether the facts alleged constituted such reasonable cause, and for the jury to say whether the facts stated really existed, and the defendant acted upon their existence. But in *Wedge* vs. *Berkeley*, 6 A. &. E. 663, the Court of Queen's Bench considered the question of reasonable and probable cause, a question purely for the jury. In the later case, however, of *Broughton* vs. *Jackson*, 18 Q. B. 378, 21 L. J. Q. B. 263, it was treated as a question of law; and in the modern case of *Hailes* vs. *Marks*, 7 H. & N. 56; 30 L. J. Ex. 389, see also *Hogg* vs. *Ward*, 3 H. & N. 417; 27 L. J. Ex. 443, the Court of Exchequer held the question of reasonable cause to be purely one of law for the judge. It is to be observed, however, that *Bramwell*, B., grounds his decision upon the case of *Panton* vs. *Williams*, 2 Q. B. 169, without adverting to the fact that that was an action for malicious prosecution. It is submitted, however, that there is a clear distinction between the two cases, for whilst only judges or lawyers are competent to form an opinion upon what facts an action or an indictment would lie, and are thus the only persons competent to decide whether there was reasonable cause for instituting a prosecution, yet laymen are quite as competent as lawyers to say what affords a reasonable ground of suspicion against a particular person of having committed a

crime. And thus it may well seem that in the one form of action the judge may direct the jury as to the reasonableness of the cause for a prosecution, leaving the jury to ascertain the truth of the facts alleged; and in the other the jury may have the question of reasonable cause of suspicion entirely left to them. The varying circumstances of each case make it impossible to lay down any standard or fixed rule as to what is a reasonable ground of suspicion: *Hogg* vs. *Ward*, ubi sup.; *Broughton* vs. *Jackson*, ubi sup.

In a recent case of *Lister* v. *Perryman*, 39 L. J. Exch. 177, it was held that it is a rule of law that the jury must find the facts on which the question of reasonable and probable cause depends, but that the judge must then determine whether the facts found do constitute reasonable and probable cause, and that no definite rule can be laid down for the exercise of the judge's judgment. In an action for a malicious prosecution, although the question of reasonable and probable cause is an inference to be drawn by the judge from facts undisputed or found, yet the test is, not what impression the circumstances would make on the mind of a lawyer, but whether the circumstances warranted a discreet man in instituting and following up the proceedings: *Kelly* v. *Midland Great Western Railway of Ireland Company*, 7 Ir. R., C. L. 8—Q. B.

As framed, this clause is open to this absurdity, that if any person offers to sell any property which is reasonably suspected to have been obtained by any offence, to another person, such person not only may, but is required to apprehend the person offering the property; but if a person has any quantity of property

which is suspected to have been stolen, &c., in his possession, but does not offer it to any one, he cannot be apprehended under this clause; so that the right to apprehend under it depends on whether or not the offender offers the property to any person. It is true that, by the common law, any peace officer may lawfully apprehend a person in such a case, if there be reasonable suspicion of a felony having been committed, but a private person must not only have reasonable suspicion of a felony having been committed, but must also be able to prove that one has actually been committed, in order to justify him in apprehending any person in such a case: *Beckwith* vs *Philby*, 6 B. & C. 635, and if the case were only a misdemeanor, no person is authorized by the common law to apprehend after the misdemeanor has been committed unless with a warrant: *Fox* vs. *Gaunt*, 3 B. & Ad. 798. The consequence is that, for instance, any one who has obtained a drove of oxen by false pretences, may go quietly on his way, and no one, not even a peace officer, can apprehend him without a warrant; but if a man offer a partridge, supposed to have been killed in the close season, he not only may but is required to be apprehended by that person, and, if the words of the clause are strictly interpreted, whether the person so offering the article is himself even suspected of guilt. See *Greaves'* Consol. Acts, 188.

ARREST OF OFFENDERS CAUGHT IN THE ACT IN THE NIGHT-TIME.

Sec. 4.—Any person may apprehend any other person found committing any indictable offence in the

night, and shall convey or deliver him to some constable or other person, in order to his being taken, as soon as conveniently may be, before a Justice of the Peace, to be dealt with according to law.

This clause is taken from sec. 11, 14–15 Vic. ch. 19, of the Imperial Statutes, and is commented upon as follows, by Mr. Greaves, its author:

"As the law existed before this Statute passed, there were sundry cases, in which persons committing indictable offences by night could only lawfully be apprehended by certain specified individuals, amongst whom peace officers and constables were sometimes omitted. The consequence was, as might naturally be expected, that resistance was frequently made by offenders, and grievous, if not mortal injuries inflicted upon persons endeavouring to apprehend such offenders; indeed many melancholy instances have occurred where death has been occasioned in a nightly fray, and the party causing such death, though found committing an offence, for which he might have been lawfully apprehended by some one, has escaped the punishment he deserved for killing a person, who honestly believed he had not only a right, but was in duty bound to apprehend him, because it turned out, upon investigation on the trial, that such person was not lawfully entitled so to apprehend, through some cause or other, of which the party killing had no knowledge at the time. This clause, with a view to remedying all such cases, authorizes any person, be he who he may, to apprehend any person found committing any felony or indictable

misdemeanor in the night; and it is conceived that it will prove highly beneficial, as nothing can more strongly tend to the repression of offences than the certain knowledge that, if the party is found committing them by any one, such person may at once apprehend him."

The necessity of this enactment is not clearly seen, if, as demonstrated so well by Mr. Greaves himself (see, *ante*, remarks under section 2), *any* person can, at common law, apprehend any other person found committing *any* indictable offence, *at any time*. The Poaching Act was given by Mr. Greaves, as a reason for the necessity of this clause in England. Surely, this reason has no weight with us.

What is *night* under this clause? The Larceny Act defines it, but only for the purposes of that Act. Night, therefore, in this section, is not defined at all, and the time in which it begins and ends, in each case, with reference to this section, is regulated by the common law.

At common law, night is the time between sunset and sunrise: *Wharton*, law lexicon, *Verb Night;* 3 *Chitty*, 1104.

OTHER CASES IN WHICH A CONSTABLE MAY ARREST WITHOUT WARRANT.

Sec. 5.—Any constable or peace officer may, without a warrant, take into custody any person whom he finds lying or loitering in any highway, yard or other place, during the night, and whom he has good cause to suspect of having committed or being about to commit any felony, and may detain such person until he can be brought before a Justice of the Peace, to be dealt with according to law.

Sec. 6.—No person having been apprehended as last aforesaid shall be detained after noon of the following day without being brought before a Justice of the Peace.

Section 5 is taken from similar clauses in the Acts respecting larceny, and offences against the person, of the Imperial Statutes.

As to what is night under this clause, seems, as under the last section, to be governed by the common law.

SUMMARY PROCEEDINGS REGULATED.

Sec. 7.—The proceedings to be had before any Justice or Justices of the Peace when any offender is brought before him or them, are regulated by the "*Act respecting the duties of Justices of the Peace out of Sessions in relation to persons charged with indictable offences*," and the "*Act respecting the duties of Justices of the Peace out of Sessions, in relation to summary convictions and orders*," subject to any special provision contained in any Act relating to the particular offence with which such offender is charged.

These statutes are the 32-33 Vic., chapters 30 and 31.

On the general subject of arrest without warrant, the state of the law is far from being what it should

be. It must be remembered that if of all laws the criminal law should be the most generally known, certainly, if a distinction is to be made in this respect, as to the different parts of it, the law of arrest without warrant should be the first. Every one is constantly exposed to have to act under it, either private individuals or duly named constables; and it is certainly very hard to oblige any one to decide, in each case and every time he witnesses a criminal offence, whether that offence is a felony or a misdemeanor, before he acts or knows how to act in the matter. A great many improvements, in this respect as in many others, could be made in our law. Some remarks on the subject made by Mr. Greaves, in 1844, may be usefully reproduced here, they do not, perhaps, contain all that might be said on the question, but, as they are, might have been usefully referred to by the framers of our Procedure Act.

"As regards procedure for the purpose of preliminary inquiry on criminal charges, I think that the distinction that a constable may justify the apprehension of a party upon a reasonable suspicion of his having been guilty of a felony, without proof of any felony having been committed; but that a private person must not only prove that he had reasonable ground to suppose that the party had committed a felony, but also that a felony had been, in fact, committed: *Beckwith* vs. *Philby*, 6 B. & C. 635; *Ledwith* vs. *Catchpole*, Cald. 291, had better be abolished, and the rule established that every person may justify the apprehension of an individual on reasonable suspicion of a felony having been committed, and that if an action be brought

against him, he may justify the apprehension under the general issue, 'Not Guilty,' as it is next to impossible to state the grounds of suspicion on the record in such a manner as to hold good on special, or perhaps general demurrer, although they may be such as to satisfy any jury that the party had reasonable and just cause to suspect that the party apprehended had been guilty of felony.

"Next, I think the distinction between felony and misdemeanor, that the party may in the former be apprehended at any time after its commission, while in the latter the party can only be apprehended while committing the offence, ought to be abolished, as leading to much litigation, and preventing many offenders being brought to justice. If a man steal sixpence, he may be apprehended at any time and any place; if he obtain £100 by false pretences, he cannot be apprehended at all, except in the very act: *Fox* vs. *Gaunt*, 3 B. & Ad. 798.

"Next, I think the jurisdiction of constables ought not to be limited to their parishes or townships, but ought to extend over a considerable district round.

"A prize-fight begins in A.; the constable of A. stops it in A.; the parties then walk one hundred yards out of A. into B., and commence fighting again; the constable of A. is *functus officio, qua.* constable of A., and, except as a private individual cannot interfere. This ought not to be. Why should the constables appointed under the Municipal Corporation Act have jurisdiction over fifteen miles round their borough, and the parish constables be limited to their own district?

"The preceding observations have been made with reference to the power to apprehend without warrants."

VENUE, PLACE OF TRIAL, &C.

Sec. 8.—When any felony or misdemeanor is committed on the boundary of two or more districts, counties or places, or within the distance of one mile of any such boundary, or in any place with respect to which it may be uncertain within which of two or more districts, counties or places it is situate, or when any felony or misdemeanor is begun in one district, county or place, and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined and punished, in any one of the said districts, counties or places, in the same manner as if it had been actually and wholly committed therein.

This clause is taken from the 7 Geo. 4, ch. 64, sec. 12, of the Imperial Acts.

The *venue* is the place laid in the indictment where the offence was committed, and from whence the jury are to come to try the fact.

The distance of one mile mentioned in the above clause is to be measured in a direct line from the border, and not by the nearest road: *Reg.* vs. *Wood*, 5. Jur. 225.

This clause does not enable the prosecutor to *lay* the offence in one county and *try* it in the other, but only to lay *and* try it in either: *Reg.* vs. *Mitchell*, 2 Q. B.

636; see also on this clause: *Reg.* vs. *Jones*, 1 Den. 551, and *Reg.* vs. *Leech*, Dears. 642.

Murder, like all other offences, must regularly, according to the common law, be inquired of in the county in which it was committed. It appears, however, to have been a matter of doubt at the common law, whether when a man died in one county of a stroke received in another, the offence could be considered as having been completely committed in either county; but by the 2 & 3 Edw. 6, ch. 24, sec. 2, it was enacted that the trial should be in the county where the death happened. And by 2 Geo. 2, ch. 21, it was enacted that where any person feloniously stricken or poisoned in England shall die of such stroke or poisoning upon the sea or out of England, or being feloniously stricken or poisoned upon the sea or out of England, shall die of the same in England, the offence may be tried either where the death, poisoning or stroke shall respectively happen. But these two Statutes, which were part of the Criminal Law introduced in this country, are now replaced respectively by the above section of the procedure Act, and section 9 of the 32-33 Vic., ch. 20, *infra*.

Under the said section of the Procedure Act, where the blow is given in one county, and the death takes place in another, the trial may be in either of these counties: 1 *Russell*, 753. This clause applies to coroners, when a felony has been committed, but not when the death is the result of an accident: *Reg.* vs. *Great Western Railway Company*, 3 Q. B. 333, and *note by Greaves*, 1 *Russell*, 754; *Reg.* vs. *Grand Junction R. Co.* 11 A. & E. 128. In *Coombe's* case: 1 Leach, 388; 1 *East* P. C. 367, it

was held that where a man in a ship at a short distance from the shore was shot by a person on the shore and died instantly, the offender was triable by the Admiralty Court. It must be remembered that the 2 & 3 Edw. 6, above mentioned, was then in force in England, and though the 2 George 2, ch. 21, similar to sec. 9 of 32–33 Vic. of our Statutes, was also in force, it was considered in *Coombe's* case that both the stroke and the death had taken place upon the high seas. Now, under sec. 8 of the Procedure Act, the offence under such circumstances would probably be punishable either as committed on shore, whence the shot was fired, or within the limits of the Admiralty Courts, where the offence was completed by the death of the party struck. But the courts of this country would have no jurisdiction, if the party killed was, when he was shot, upon the high seas on board a foreign ship: *Reg.* vs. *Lewis*, Dears. & B. 182; 1 *Bishop's* Cr. L. 112; 1 Cr. Proced. 51, 53; *Archbold*, 29, even if the shot was fired by a British subject, from British territory, and even if the party killed was a British subject. In other words, to give an illustration of the law as it seems to be, on this subject, if a man standing on British territory, near the boundary line, shoots at and kills a man then standing on United-States territory, he is not liable to answer for that homicide before the Canadian Courts.

By sec. 9 of the 32–33 Vic., ch. 20, *an Act respecting offences against the person*, it is provided that "When any person, being feloniously stricken, poisoned or otherwise hurt, upon the sea, or at any place out of Canada, shall die of such stroke, poisoning or hurt in

Canada, or being feloniously stricken, poisoned, or otherwise hurt at any place in Canada, shall die of such stroke, poisoning or hurt upon the sea, or at any place out of Canada, every offence committed in respect of any such case, whether the same amounts to murder or manslaughter or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined and punished in the district, county or place in Canada in which such death stroke, poisoning or hurt happens, in the same manner in all respects as if such offence had been wholly committed in that district, county or place": 24–25 Vic., ch. 106, sec. 10; Imp. 12–13 Vic., ch. 96, sec. 3; 23–24 Vic., ch. 122.

The words "dealt with" apply to justices of the peace; "inquired of" to the grand jury, "tried" to the petit jury and "determined and punished" to the Court: by Lord Wensleydale in *Rex.* vs. *Ruck*, *note Y*, 1 *Russell*, 757.

This interpretation may be extended to the same words in sections 8, 9 and 10 of the Procedure Act of 1869.

In *Reg.* vs. *Lewis*, Dears. & B. 182, a wound was inflicted by an alien on an alien in a foreign vessel, bound to England, of which wound the alien died in England, immediately after landing. The offender was tried and convicted of manslaughter, but upon a case reserved, the Court of Criminal Appeal held that the above section of the Statute did not apply to such a case, and quashed the conviction. The judges said that this section was not to be construed as making a homicide cognizable in England by reason only of the

death occurring there, unless it would have been so cognizable in case the death had ensued at the place where the blow was given. In this case, the injury which caused the death was inflicted by one foreigner upon another on board a foreign vessel upon the high seas, and, consequently, if death had then and there followed, no offence cognizable by the law of this country had taken place: see 1 *Bishop's* Cr. L. 112, 1 Cr. Proced. 51, 53.

By Sec. 136 of the Procedure Act of 1869, *post*, it is enacted that:

"When any felony punishable under the laws of Canada has been committed within the jurisdiction of any Court of Admiralty in Canada, the same may be dealt with, inquired of and tried and determined in the same manner as any other felony committed within that jurisdiction."

See 1 *Russell*, 762, as to offences committed within the jurisdiction of the Admiralty; also *Archbold*, 29, 30; 1 *Burn's* Just., 42.

By the Imperial *Merchant Shipping Amendment Act*, 30-31 Vic., ch. 124, sec. 11, it is enacted that:

"If any British subject commits any crime or offence on board any British ship, or on board any foreign ship to which he does not belong, any Court of Justice in Her Majesty's Dominions, which would have had cognizance of such crime or offence if committed on board a British ship within the limits of the ordinary jurisdiction of such Court, shall have jurisdiction to hear and determine the case as if the said crime or offence had been committed as last aforesaid."

And by the *Courts (Colonial) Jurisdiction Act*, 1874, —37 Vic., ch. 27, Imperial,—it is enacted that:

"Whereas by certain Acts of Parliament jurisdiction is conferred on Courts in Her Majesty's colonies to try persons charged with certain crimes or offences and doubts have arisen as to the proper sentence to be imposed upon conviction of such persons. . . . . When, by virtue of any Act of Parliament now or hereafter to be passed, a person is tried in a court of any colony for any crime or offence committed upon the high seas, or elsewhere out of the territorial limits of such colony and of the local jurisdiction of such court, or, if committed within such local jurisdiction, made punishable by that Act, such person shall, upon conviction, be liable to such punishment as might have been inflicted upon him if the crime or offence had been committed within the limits of such colony and of the local jurisdiction of the court, and to no other, anything in any Act to the contrary notwithstanding: Provided always that if the crime or offence is a crime or offence not punishable by the laws of the colony in which the trial takes place, the person shall, on conviction, be liable to such punishment (other than capital punishment) as shall seem to the court most nearly to correspond to the punishment to which such person would have been liable in case such crime or offence had been tried in England."

By 34 Vic., ch. 14, "*An Act to extend to the Province of Manitoba certain of the Criminal Laws now in force in the other Provinces of the Dominion*," it is enacted by sec. 2, that: The Court known as the General Court, now and heretofore existing in the Province of Manito-

ba, and any Court to be hereafter constituted by the Legislature of the said Province, and having the powers now exercised by the said General Court, shall have power to hear, try and determine in due course of law *all treasons, felonies and indictable offences committed in any part of the said Province*, or in the territory which has now become the said Province.

By 37 Vic., ch. 42, "*An Act to extend to the Province of British Columbia certain of the Criminal Laws now in force in other Provinces of the Dominion*," it is enacted by sec. 5 that:

"The Supreme Court of British Columbia, and any Court to be hereafter constituted by the Legislature of the said Province, and having the powers now exercised by the said Court, shall have power to hear, try and determine *all treasons, felonies and indictable offences whatsoever mentioned in any of the said Acts, which may be committed in any part of the said Province.*"

Besides the Statutes above referred to, there are many enactments, creating exceptions to the rule of the common law that offences must be inquired of and tried in the county in which they were committed.

By sec. 8 of 32–33 Vic., ch. 23, "*An Act respecting perjury*," it is enacted that any person accused of perjury may be tried, convicted and punished in any district, county or place where he is apprehended or is in custody. This enactment is not extended to subornation of perjury.

By sec. 3 of the same Act, as amended by 33 Vic., ch. 26 (1870), it is enacted that "Any person who wilfully and corruptly makes any false affidavit, affirmation or declaration, out of the Province in which it is to be used, but within the Dominion of Canada, before any functionary authorized to take the same for the purpose of being used in any Province of Canada, shall be deemed guilty of perjury, in like manner as if such false affidavit, affirmation or declaration had been made in the Province in which it is used, or intended to be used before a competent authority; and such person may be dealt with, indicted and tried, and, if convicted, may be sentenced, and the offence may be laid and charged to have been committed in that district, county or place in which he has been apprehended or is in custody."

By sec. 29 of the *Coin Act*, 32–33 Vic., ch. 18, it is enacted that:

"Where any person tenders, utters or puts off any false or counterfeit coin in any one Province of Canada, or in any one district, county or jurisdiction therein, and also tenders, utters, or puts off any other false or counterfeit coin, in any other province, district, county or jurisdiction, either on the day of such first-mentioned tendering, uttering or putting off, or within the space of ten days next ensuing, or where two or more persons, acting in concert in different provinces, or in different districts, counties or jurisdictions therein, commit any offence against this Act, every such offender may be dealt with, indicted, tried and punished, and the offence laid and charged to have been com-

mitted in any one of the said provinces or districts, counties or jurisdictions, in the same manner in all respects, as if the offence had been actually and wholly committed within one province, district, county or jurisdiction."

By sec. 48, of the 32–33 Vic., ch. 19, *An Act respecting forgery*, it is enacted that:

"Whosoever commits any offence against this Act, or commits any offence of forging, or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case be indictable at common law or by virtue of any Act passed or to be passed, may be dealt with, indicted, tried and punished in any district, county or place in which he is apprehended or in custody, in the same manner in all respects as if the offence had been actually committed in that district, county or place; and every accessory before or after the fact to any such offence, if the same be a felony, and every person aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished, in any district, county or place in which he shall be apprehended or be in custody, in the same manner in all respects as if his offence, and the offence of his principal, had been actually committed in such district, county or place."

By sec. 71 of the 32-33 Vic. ch. 20, *An Act respecting offences against the person*, it is enacted, as to the crime of kidnapping, that: "Every offence against the

next preceding section but one may be tried either in the district, county or place in which the same was committed, or in any district, county or place into or through which any person so kidnapped or confined was carried or taken while under such confinement; but no person who has been once duly tried for any such offence, shall be liable to be again indicted or tried for the same offence."

By sec. 121 of the 32-33 Vic. ch. 21, *An Act respecting larceny*, it is enacted that: "If any person has in his possession in any one part of Canada, any chattel, money, valuable security or other property whatsoever, which he has stolen or otherwise feloniously or unlawfully taken or obtained, by any offence against this Act, in any other part of Canada he may be dealt with, indicted, tried and punished for larceny or theft in that part of Canada where he so has such property, in the same manner as if he had actually stolen or taken or obtained it in that part; and if any person in any one part of Canada receives or has any chattel, money, valuable security or other property whatsoever which has been stolen or otherwise feloniously or unlawfully taken or obtained in any other part of Canada, such person knowing such property to have been stolen or otherwise feloniously or unlawfully taken or obtained, he may be dealt with, indicted, tried and punished for such offence in that part of Canada where he so receives or has such property, in the same manner as if it had been originally stolen or taken or obtained in that part."

By sec. 72 of the same Act (*on larceny*), it is enacted that:

"Every offender against this and the last preceding section may be dealt with, indicted, tried and punished either in the district, county or place in which he is apprehended or is in custody, or in which he has committed the offence." Sections 71 and 72 are enactments on larceny and embezzlement by government and municipal officers.

By sec. 105, of the same Act (*on larceny*), it is enacted that: "Whosoever receives any chattel, money, valuable security or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, converted or disposed of, may, whether charged as an accessory, after the fact to the felony, or with a substantive felony, or with a misdemeanor only, be dealt with, indicted, tried and punished in any county, district or place in which he has or has had any such property in his possession, or in any county, district or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county, district or place where he actually received such property."

By sec. 112 of the same Act (*on larceny*), it is enacted that:

"If any person brings into Canada, or has in his possession therein, any property stolen, embezzled, converted, or obtained by fraud or false pretences in

any other country, in such manner that the stealing, embezzling, converting, or obtaining it in like manner in Canada, would, by the law of Canada, be a felony or misdemeanor; then the bringing such property into Canada, or the having it in possession therein, knowing it to have been so stolen, embezzled or converted, or unlawfully obtained, shall be an offence of the same nature, and punishable in like manner as if the stealing, embezzling, converting or unlawfully obtaining such property had taken place in Canada, and such person may be tried and convicted in any district, county or place in Canada, into or in which he brings such property, or has it in possession."

By sec. 66 of the same Act (*on larceny*), it is enacted, on the offence of stealing from any ship wrecked or in distress, that:—"The offender may be indicted and tried either in the district, county or place in which the offence has been committed, or in any district, county or place next adjoining, or in which he has been apprehended or is in custody.

By sec. 58, of 32-33 Vic., ch. 20, *An Act respecting offences against the person*, it is enacted, on the offence of bigamy, that:—"Any such offence may be dealt with, inquired of, tried, determined and punished in any district, county or place in Canada, where the offender is apprehended or is in custody, in the same manner in all respects as if the offence had been actually committed in that district, county or place."

By 31 Vic. ch. 14, sec. 4, *An Act to protect the in-*

habitants of Canada against lawless aggression from subjects of foreign countries, it is enacted that:

"Every subject of her Majesty and every citizen or subject of any foreign state or country, who has at any time heretofore offended, or may at any time hereafter offend against the provisions of this Act, is and shall be held to be guilty of felony, and may, notwithstanding the provisions hereinbefore contained, be prosecuted and tried in any county or district of the Province in which such offence was committed before any court of competent jurisdiction, in the same manner as if the offence had been committed in such county or district, and upon conviction shall suffer death as a felon."

By sec. 83 of the 31 Vic., ch. 10, *An Act for the regulation of the postal service*, it is enacted that:

"Any indictable offence against this Act may be dealt with, indicted and tried and punished, and laid and charged to have been committed either in the district or county or place where the offence is committed, or in that in which the offender is apprehended or is in custody, as if actually committed therein;

"2.—And where the offence is committed in or upon, or in respect of a mail, or upon a person engaged in the conveyance or delivery of a post letter-bag, or post letter, or chattel, or money, or valuable security sent by post, such offence may be dealt with and inquired of, tried and punished and charged to have been committed as well within the district, county or place in which the offender is apprehended or is in custody, as in any district, county or place through any part

whereof such mail, person, post letter-bag, post letter, chattel, money or valuable security, passed in the course of conveyance and delivery by the post, in the same manner as if it had been actually committed in such district, county or place;

"3.—And in all cases where the side or centre or other part of a highway, or the side bank, centre or other part of a river or canal, or navigable water, constitutes the boundary between two districts, counties or places, then to pass along the same, shall be held to be passing through both;

"4.—And every accessory before or after the fact, if the offence be felony, and every person aiding or abetting, or counselling, or procuring the commission of any offence if the same be a misdemeanor, may be dealt with, indicted, tried and punished as if he were a principal, and his offence may be laid and charged to have been committed in any district, county or place, where the principal offence might be tried."

By sec. 8 of the 31 Vict., ch. 72, *An Act respecting accessories to and abettors of indictable offences*, it is enacted that:

"Where any felony has been wholly committed within Canada, the offence of any person who is an accessory, either before or after the fact, to such felony, may be dealt with, inquired of, tried, determined and punished by any Court which has jurisdiction to try the principal felony, or any felonies committed in any district, county or place in which the act, by reason whereof such person shall have become such accessory, has been committed; and in every other case the

offence of any person who is an accessory, either before or after the fact, to any felony, may be dealt with, inquired of, tried, determined and punished by any Court which has jurisdiction to try the principal felony, or any felonies committed in any district, county or place in which such person is apprehended or is in custody, whether the principal felony has been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, or whether within Her Majesty's dominions or without, or partly within Her Majesty's dominions and partly without: Provided that no person once duly tried, either as an accessory before or after the fact, or for a substantive felony under the provisions hereinbefore contained, shall be liable to be afterwards prosecuted for the same offence."

This last clause is amended by 32-33 Vic., ch. 17, sec. 2, as follows:—"So much of the eighth section of the twenty-second chapter of the Statutes of the same year, as relates to felonies which shall not have been wholly committed within Canada, and to persons who shall be accessories to such felonies, is hereby repealed."

By the 31st Vic., ch. 6, *An Act respecting the Customs*, sec. 19, it is enacted that:

"All penalties and forfeitures incurred under this Act, or any other law relating to the Customs, or to trade or navigation, may be prosecuted, sued for and recovered in the superior Courts of Law, or Court of Vice Admiralty, having jurisdiction in that Province

in Canada where the cause of prosecution arises, or wherein the defendant is served with process; and if the amount or value of any such penalty or forfeiture does not exceed two hundred dollars, the same may, in the Provinces of Ontario, Quebec and New Brunswick respectively, also be prosecuted, sued for and recovered in any County Court or Circuit Court having jurisdiction in the place where the cause of prosecution arises, or where the defendant is served with process."

See sec. 102 of the same Act, as to the venue, in certain cases, in Ontario, New Brunswick and Nova Scotia.

By the 31st Vic., ch. 8, sec. 156, *An Act respecting the Inland Revenue*, it is enacted that:

"All penalties and forfeitures incurred under this Act, or any other law relating to Excise, may be prosecuted, sued for and recovered in the Superior Courts of Law, or court of Vice-Admiralty having jurisdiction in that Province in Canada where the cause of prosecution arises, or wherein the defendant is served with process:—and if the amount or value of any such penalty or forfeiture does not exceed five hundred dollars, the same may also be prosecuted, sued for and recovered in any County Court or Circuit Court having judisdiction in the place where the cause of prosecution arises or where the defendant is served with process."

By the 36 Vic. ch. 55, sec. 21, *An Act respecting Wreck and Salvage*, it is enacted that:

"Any person charged with a felony or misdemeanor

under this Act may be indicted and prosecuted, and the venue may be laid in any county or locality."

By the 33-34 Vic. ch. 90, *Imperial*, sections 16 and 17, *the Foreign Enlistment Act*, (with our Statutes of 1872) it is enacted that:

"Any offence against this Act shall, for all purposes of and incidental to the trial and punishment of any person guilty of any such offence, be deemed to have been committed either in the place in which the offence was wholly or partly committed, or in any place within Her Majesty's dominions in which the person who committed such offence may be.

"Any offence against this Act may be described in any indictment or other document relating to such offence, in cases where the mode of trial requires such a description, as having been committed at the place where it was wholly or partly committed, or it may be averred generally to have been committed within Her Majesty's dominions, and the venue or local description in the margin may be that of the county, city, or place in which the trial is held."

It is a general rule that where a Statute creating an offence directs that it may be tried in the locality where the offender is apprehended, without containing any negative words, the provision is only cumulative, and he may still be tried where the offence was committed: 1 *Chitty*, 182

OFFENCES ON PERSONS OR PROPERTY IN TRANSITU, OR ON HIGHWAYS, &c., &c., &c.

Sec. 9.—When any felony or misdemeanor is committed on any person, or on or in respect of any property, in or upon any coach, waggon, cart or other carriage whatever, employed in any journey, or is committed on any person, or on or in respect of any property on board any vessel, boat or raft whatever, employed in any voyage or journey upon any navigable river, canal or inland navigation, such felony or misdemeanor may be dealt with, inquired of, tried, determined and punished, in any district, county or place through any part whereof such coach, waggon, cart, carriage or vessel, boat, or raft, passed in the course of the journey or voyage, during which such felony or misdemeanor was committed, in the same manner as if it had been actually committed in such district, county or place.

Sec. 10.—In all cases where the side, centre, bank or other part of any highway, or of any river, canal, or navigation, constitutes the boundary of any two districts, counties or places, any felony or misdemeanor mentioned in the two last preceding sections may be dealt with, inquired of, tried, determined and punished in either of such districts, counties or places, through or adjoining to, or by the boundary of any part whereof such coach, waggon, cart, carriage or vessel, boat or raft, passed in the course of the journey or voyage during which such felony or misdemeanor was committed, in the same manner as if it had been actually committed in such district, county or place.

These two clauses are taken from the 7 Geo. 4, ch. 64, sec. 13, of the Imperial Statutes.

This enactment is not confined in its operation to the carriages of common carriers or to public conveyances, but if property is stolen from any carriage employed on any journey, the offender may, by virtue of the above section, be tried in any county through any part whereof such carriage shall have passed in the course of the journey during which such offence shall have been committed: *Reg.* vs. *Sharpe*, Dears. 415.

As to the effect of the words "in or upon" in this section, see *Rex* vs. *Sharpe*, 2 Lewin, 233.

Where the evidence is consistent with the fact of an article having been abstracted from a railway carriage, either in the course of the journey through the County of A., or after its arrival at its ultimate destination in the County of B., and the prisoner is indicted under the above section, the case must go to the jury, who are to say whether they are satisfied that the larceny was committed in the course of the journey or afterwards *Reg.* vs. *Pierce*, 6 Cox, 117.

CHANGE OF VENUE.

Sec. 11.—Whenever it appears to the satisfaction of the Court or Judge hereinafter mentioned, that it is expedient to the ends of justice that the trial of any person charged with felony or misdemeanor should be held in some district, county or place other than that in which the offence is supposed to have been committed, or would otherwise be triable, the Court at which

such person is or is liable to be indicted, may at any term or sitting thereof, and any Judge who might hold or sit in such Court may at any other time, order, either before or after the presentation of a bill of indictment, that the trial shall be proceeded with in some other district, county or place within the same Province, to be named by the Court or Judge in such order; but such order shall be made upon such conditions as to the payment of any additional expense thereby caused to the accused, as the Court or Judge may think proper to prescribe;

2.—Forthwith upon the order of removal being made by the Court or Judge, the indictment, if any has been found against the prisoner, and all inquisitions, informations, depositions, recognizances and other documents whatsoever relating to the prosecution against him, shall be transmitted by the officer having the custody thereof to the proper officer of the court at the place where the trial is to be had, and all proceedings in the case shall be had, or, if previously commenced, shall be continued in such district, county or place as if the case had arisen or the offence had been committed therein;

3.—The order of the Court or of the Judge, made under the first sub-section of this section, shall be a sufficient warrant, justification and authority to all sheriffs, gaolers, and peace officers for the removal, disposal and reception of the prisoner in conformity with the terms of such order; and the sheriff may appoint and empower any constable to convey the prisoner to the gaol in the district, county or place in which the trial is ordered to be had;

4.—Every recognizance which may have been entered into or shall be entered into for the prosecution of any person, and every recognizance, as well of any witness to give evidence, as of any person for any offence, shall in case any such order, as provided by sub-section number one of this section, is made, be obligatory on each of the parties bound by such recognizance as to all things therein mentioned with reference to the said trial, at the place where such trial is so ordered to be had, in like manner as if such recognizance had been originally entered into for the doing of such things at such last mentioned place: provided that notice in writing shall be given either personally or by leaving the same at the place of residence of the parties bound by such recognizance as therein described, to appear before the Court, at the place where such trial is ordered to be had.

By this section the Court or Judge has a discretionary power of a wide extent: "*Provided that it appears to the satisfaction of the Court or Judge*" says the Statute, and when the Court or Judge declares that it so appears the matter *quoad hoc* is at an end, the venue is changed and the trial must take place in the district, county or place designated in the order. But in the exercise of this discretionary power, the Judge is not to be governed by arbitrary motives. "Discretion, when applied to a court of justice, means sound discretion guided by *law*: it must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular": per *Lord Mansfield, in Rex* vs. *Wilkes*, 4 Burr, 2539. If not guided by these rules

"the law of discretion is the law of the tyrant, and a judge who relies on that law, is a tyrant on the bench": per *Lord Denman*, and repeated by *Chief Justice Duval*, 11 L. C. Jurist, 167.

The words of the Statute require that the Court or Judge be satisfied that the change of venue *is expedient to the ends of justice*. It is obvious that it would be impossible to foresee all the cases in which such expediency could be said to be satisfactorily established. The judge must be governed by the special facts and circumstances of each case, remembering, as said by Mr. Justice Sanborn: *In re ex parte Brydges*, 18 L. C. Jurist, 141, that "the common law discourages change of venue, and it is only to be granted with caution and upon strong grounds."

The following cases decided in England under the old law may be usefully noticed here:

Where there was a prospect of a fair trial the Court refused to change the venue, though the witnesses resided in another county: *Reg.* vs. *Dunn*, 11 Jur. 287 —*B. C.—Patteson.*

The Court will not permit the venue in an indictment to be changed for any other cause than the inability to obtain a fair trial in the original jurisdiction: *Reg.* vs. *Patent Eureka and Sanitary Manure Company*, 13 L. T., N. S. 365, Q. B.

The Court has no power to change the venue in a criminal case, nor will they order a suggestion to be entered on the roll to change the place of trial in an information for libel, on the ground of inconvenience and difficulty, in securing the attendance of the de-

fendant's witnesses: *Reg.* vs. *Cavendish*, 2 Cox, C. C. 176.

The Court will remove an indictment for a misdemeanor from one county to another, if there is reasonable cause to apprehend or suspect that justice will not be impartially administered in the former county: *Rex* vs. *Hunt*, 3 B. & A. 444; 2 *Chit.* 130.

The Court has a discretionary power of ordering a suggestion to be entered on the record of an indictment for felony, removed thither by certiorari, for the purpose of awarding the jury process into a foreign county; but this power will not be exercised unless it is absolutely necessary for the purpose of securing an impartial trial: *Rex* vs. *Holden*, 2 N. & M. 167; 5 B. & Ad. 347.

In the case of *Rex* vs. *Harris et al.*, 3 Burr., 1330, the private prosecutors, in their affidavit on an application made by them for a change of the venue, went no further than to swear generally "that they *verily believed* that there could not be a fair and impartial trial had by a jury of the City of Gloucester," without giving any particular reasons or grounds for entertaining such a belief. The case to be tried was an information against the defendants, as aldermen of Gloucester, for a misdemeanor in refusing to admit several persons to their freedom of the city, who demanded their admission, and were entitled to it, and, in consequence, to vote at the then approaching election of members of Parliament for that city, and whom the defendants did admit after the election was over; but would not admit them till after the election, and thereby deprived them of their right of voting at it. The prosecutors had moved for this rule, on a supposition

"that the citizens of the city could not but be under an influence or prejudice in this matter." The application was refused.

"There must be a clear and solid foundation for it," said *Lord Mansfield*; "now, in the present case, this general swearing to apprehension and belief only is not a sufficient ground for entering such a suggestion, especially as it is sworn on the other side that there is a list returned up, consisting of above six hundred persons duly qualified to serve. Surely a person may espouse the interest of one or another candidate at an election, without thinking himself obliged to justify, or being even inclined to defend, the improper behaviour of the friends or agents of such candidate."

"The place of trial," said *Mr. Justice Denison*, "ought not to be altered from that which is settled and established by the common law, unless there shall appear a clear and plain reason for it, which cannot be said to be the present case."

"Here is no fact suggested," said *Mr. Justice Foster*, "to warrant the conclusion that there cannot be a fair and impartial trial had by a jury of the City of Gloucester. It is a conclusion without premises. The reason given, or rather the *supposition*, would hold as well, in all cases of riots at elections. This is no question relating to the interest of the voters; it is only whether the defendants, the persons particularly charged with this misdemeanor, have personally acted corruptly or not."

"There was no rule better established," said *Mr. Justice Wilmot*, "than that all causes shall be tried in the county, and by the neighbourhood of the place where

the fact is committed; and, therefore, that rule ought never to be infringed, unless it plainly appears that a fair and impartial trial cannot be had in that county; . . . . . It does not follow that because a man voted on one side or on the other he would therefore perjure himself to favour that party when sworn upon a jury. God forbid! The freemen of this corporation are not at all interested in the personal conduct of these men upon this occasion; the same reasoning would just as well include all cases of election riots."

It may be remarked on this case: (1.) That the application for a change of the venue was made by the prosecution; there is no doubt that much stronger reasons must then be given than if the application was made by the defendant: (2.) That the case dates from 1762, and that in some of the more recent cases on this point, the Courts seem to have granted such an application, *on the part of the defendant*, with less reluctance. This is easily explained: it must have been an unheard of thing, at first, to change the venue, at common law, at the time where the jurors themselves were the witnesses and the only witnesses; where they were selected for each case because they were supposed to know the facts; where no other witnesses, no evidence whatever was offered to them, it may well be presumed that a change in the venue was not allowable under any circumstances. The rule must then invariably, inflexibly, have been that the venue should always be laid in the county where the offence was committed. The strictness of the rule can have been relaxed only by degrees, and even when, for a long period, the

strongest reason in support of it had ceased to exist, by the changes which have given us the present system of jury trial, it is not surprising to find the judges still adhering to it as much as possible. But, insensibly, a change is perceptible in the decisions, and now, under our statute, there is no doubt that every time, for any reason whatever, *it is expedient to the ends of justice* that a change in the venue, upon any criminal charge should take place, it should be granted, whether applied for by the prosecution or by the defence.

Another decision, in England, on the question may be noticed here:

The Court removed an indictment from the Central Criminal Court, and changed the venue from London to Westminster, where it was a prosecution instituted by the Corporation of London for a conspiracy in procuring false votes to be given at an election to the office of bridgemaster: *Reg.* vs. *Simpson*, 5 Jur. 462, —*B. C.*

A recent case, in the Province of Quebec, gave rise to a full discussion on sect. 11 of the Procedure Act and the interpretation which shall be given to it: *Reg.* vs. *Brydges*, 18 L. C. Jurist, 141.

In this case, a coroner's jury in the district of Quebec returned a verdict of manslaughter against the defendant, a resident of Montreal. The coroner issued his warrant, upon which the defendant was arrested; he gave bail, and then, in Montreal, before Mr. Justice Badgley, a Judge of the Court of Queen's Bench, made application in Chambers for a change in the venue; the only affidavit, in support of the application, was the defendant's, who swore that he could not have a

fair trial in the district of Quebec. The Crown was served with a notice of the application, and resisted it. Mr. Justice Badgley, however, granted it, and ordered that the trial should take place in Montreal, deciding (1.) that, under the statute, a judge of the Court of Queen's Bench, in chambers in Montreal, may order the change of the venue from Quebec to Montreal, of the trial of a person charged with the commission of an offence in the Quebec district, and (2.) that this order may be given immediately after the arrest of the prisoner.

On this last point, there is no room for doubt. By the statute, as soon as a person is *charged* with an offence, the application can be made, and there is no doubt, that in *Brydges'* case, such an application could even have been made before the issuing of the warrant of arrest against him. The finding by the coroner's inquisition of manslaughter against him was the *charge*. From the moment this finding was delivered by the jury, Brydges *stood charged* with manslaughter. In fact, this finding was equivalent to a true bill by a grand jury, and upon it, he had, if remaining intact, to stand his trial, whether or not a bill was later submitted to the grand jury, whether the grand jury found "a true bill," or a "no bill" in the case. See *Rex* vs. *Maynard*, Russ. & Ry. 240; *Rex* vs. *Cole*, 2 Leach, 1,095; and the authorities cited in *Reg.* vs. *Tremblay*, 18 L. C. Jurist, 158.

Upon the other point decided, in this case, by Mr. Justice Badgley, as to the jurisdiction he had to grant the order required, there seemed at first to be more doubt. But the question was set at rest, by the judgment afterwards given in the case by MM. Justices Ramsay and Sanborn, who entirely concurred with Mr. Justice Badgley in his ruling on the question, as follows:

Ramsay, J.—"Before entering on the merits of these rules it becomes necessary to deal with a question of jurisdiction which has been raised on the part of the Crown. It is urged that this case is not properly before us, and that if it is, that the law under which it is brought before the Court, sitting in this district, is of so inconvenient and dangerous a character that it should be altered. With the inconvenience of the law we have nothing to do; neither ought we to express any opinion as to whether the grounds on which the learned Judge who gave the order to change the venue, were slight or not, provided he had jurisdiction. The whole question rests on the interpretation of section 11 of the Criminal Procedure Act of 1869: 32 & 33 Vic. c. 29. That section is in these words: 'Whenever it appears to the satisfaction of the Court or Judge hereinafter mentioned, that it is expedient to the ends of justice that the trial of any person charged with felony or misdemeanor should be held in some district, county or place other than that in which the offence is supposed to have been committed, or would otherwise be triable, the Court at which such person is or is liable to be indicted, may at any term or sitting thereof, and *any Judge who might hold or sit in such Court*, may at any other time, order, either before or after the presentation of a bill of indictment, that the trial shall be proceeded with in some other district, county or place within the same Province, to be named by the Court or Judge in

such order, &c. We have only to ask whether, at the time this order was given, Judge Badgley was a Judge who might hold or sit in the Court of Queen's Bench. If so, he had jurisdiction.

"But we are told that the statute evidently intended that the judge giving the order should be actually sitting in the district in which the offence is alleged to have taken place. There is no trace of any such intention in the statute, and there is no rule of interpretation of statutes so well established as this, that where the words of a statute are clear and sufficient they must be taken as they stand. If courts take upon themselves, under the pretext of interpreting the law to diminish or extend the clearly expressed scope of a statute, they are usurping the powers of the legislature, and assuming a responsibility which in no way devolves on them. In the particular case before us it does not appear clear to my mind that it was the intention of the legislature to limit the power to change the venue to a judge sitting in the district where the offence was said to be committed. In the first place, our statute goes far beyond the old law, which, I believe is still unchanged in England. Not only is the power given here to a judge in chambers to change the venue, but he may do so before the bill of indictment is either laid or found. The object then was to protect a man from being even put to trial by a prejudiced grand jury, and this could only be effectually done by giving the power to any judge who could hold or sit in the court to change the venue, for it will be observed that in 1869, when the Act was passed, there were many districts in this Province in which there

was no resident judge, and in Ontario the judges of the Superior Courts of Law all live in Toronto, and, so far as I know, in each of the other Provinces, they live in the capital town. Unless, then, there was to be a particular provision for the Province of Quebec the law had to be drawn as we find it. Besides this the Court of Queen's Bench is not for the district, but for the whole Province. The object of dividing the Province into districts is for convenience in bringing suits, but the jurisdiction of the court is general. This has never been doubted, and it has been the practice both in England and in this country to bail in the place where the prisoner is arrested. In the case of *Blossom* where the taking of bail was vigorously resisted by the Crown, this court, sitting at Quebec, bailed the prisoner, who was in gaol here. This is going a great deal farther, but the power of the court to bail was not, and I think could not be questioned. We are told that great inconvenience might arise if this statute be not restrained. This is really no valid objection to the law. There are no facultative acts which may not be abused one way or another. A discretionary power involves the possibility of its indiscreet exercise, but that is not ground for us to annul the law creating it. In this case the inconveniences referred to are not specially apparent—the prisoner arrested in Montreal was bailed there, and made his application to have the venue changed to the district where he resided and where he actually was. The order made by Mr. Justice Badgley could hardly then be used as a precedent for an abusive use of the statute. It must be understood in saying this I do not refer to the sufficiency or

insufficiency of the affidavit on which the order was given, which is not in any way before us, but solely to the circumstance of the accused being actually before the judge here. As the point is a new one, and as questions of jurisdiction are always delicate, we would willingly have reserved it for the decision of all the judges; but the Act allowing us to reserve cases is unfortunately as much too narrow as the statute before us appears to Mr. Ritchie to be too wide in its phraseology. We can only reserve after conviction, and irregular reservations for the opinion of the judges have no practically good results. We must, therefore, give the judgment to the best of our ability, and I must say for my own part that I cannot see any difficulty in the matter. The words of the statute are perfectly unambiguous, and there is no reason to say that they lead to any absurd conclusion."

Sanborn, J.—"First, as to the jurisdiction. It is objected that the venue was improperly changed, and that this inquisition ought to be before the Court at Quebec. If we are not 'legally' possessed of the inquisition, of course, we cannot entertain these motions to quash. This has been fully and exhaustively treated by the President of the Court. It is merely for us to inquire, had Mr. Justice Badgley the power to order the trial to take place here instead of in the district of Quebec, where the accident occurred? The 11th section of the Criminal Procedure Act undoubtedly gives that power. He was a judge, entitled to sit at the Court *where the party was sent for trial.* The jurisdiction of any of the judges of the Queen's Bench is not local for any district, but extends to all parts of the Province"

The words "he was a judge, entitled to sit at the court *where the party was sent for trial*" in Mr. Justice Sanborn's remarks appear, not supported by the statute. It is the court at which the party charged with a crime was at first liable to be indicted, or any judge who might hold or sit in *that Court*, who have jurisdiction in the matter, *not the Court where the party is sent for trial, nor a Judge who can hold and sit in such last mentioned Court.* Of course, in Brydges' case this distinction could not be made, as Mr. Justice Badgley, who gave the order to change the venue, could sit in the court at Quebec as well as in Montreal, and in Montreal as well as in Quebec. But suppose that such an application is made to a judge who can hold or sit in a Court of Quarter Sessions, at which the party charged is *or is* liable to be indicted, and there are not many cases where a party accused is *not liable* to be indicted before the Court of Quarter Sessions (see post, sec. 12 of the Procedure Act of 1869), the statute gives jurisdiction only to the Court of Quarter Sessions of and for the locality where the trial should take place, in the ordinary course of law, or to a judge thereof, and not to a court or judge of another locality; and the judge of the Quarter Sessions for Montreal, for instance, could not, in a case from the district of Quebec, order the trial to take place in Montreal, though he would be a judge entitled to sit at the court *where the party was sent for trial.*

This clause of the statute may lead to absurd conclusions, though Mr. Justice Ramsay seems to think the contrary. For example, a prisoner is brought up for arraignment before the Court of Queen's Bench sitting

at Quebec, at the very same moment, or at any time before the beginning of the trial (and the trial is not begun before a jury is impanelled and charged with the prisoner), comes an order to the Clerk of the Court, given by a Judge, in Montreal, in chambers, ordering the removal of the case from Quebec to Montreal. As the law stands, the proceedings at Quebec are at end, and the indictment, deposition, documents, &c., &c., must all be removed to Montreal. So, a Judge of the Court of Queen's Bench, in Montreal, can order that a case of the district of Three Rivers shall be tried in the district of Gaspé !!

SPECIAL ENACTMENT FOR THE PROVINCE OF QUEBEC.

By Sec. 8, of the 27–28 Vic., ch. 41, it is enacted that:

Any person in Her Majesty's Military or Naval Service, or any seaman or mariner usually employed upon seagoing vessels, or *any other person temporarily within the limits of Lower Canada, and* having no legal domicile therein, charged with the commission of any *felony and* imprisoned upon such charge, may be removed for trial, under an order to that effect from the Court having criminal jurisdiction *where such prisoner is so imprisoned*, or any Judge thereof, either *before or after* the presentation of a bill of indictment against him, to any district other than that in which the offence is committed, if on application to that effect on behalf of the Crown, it be shewn to the satisfaction of the Court in term or of any Judge thereof in vacation, that the trial may be proceeded with in such other District at an

earlier period than in the District in which the prisoner is in custody; but all additional expense thereby caused to the prisoner in procuring the attendance of witnesses shall be paid by the Crown.

Sub-sections 2 and 3 provide for the proceedings and transmission of indictment, and other papers upon such order.

JURISDICTION OF COURTS, ETC.

Sec. 12.—No Court of General or Quarter Sessions or Recorder's Court, nor any Court but a Superior Court having criminal jurisdiction shall have power to try any treason, or any felony punishable with death, or any libel.

So that, in Canada, the Courts of Quarter Sessions have jurisdiction in all cases, except in:

(1.) Treason: Sec. 12, Procedure Act of 1869, 31 Vic. ch. 69. (2.) Murder: 32-33 Vic., ch. 20, sec. 1. (3.) Administering poison or wounding with intent to murder 32-33 Vic., ch. 20, sec. 10. (4.) Rape: 32-33 Vic., ch. 20, sec. 49, *as amended by* 36 Vic., ch. 50. (5.) Carnally knowing a girl under ten years of age: 32-33 Vic., ch. 20, sec. 51. (6.) Libel: sec. 12, Proced. Act of 1869. (7.) Any of the misdemeanors provided for in sections 76 to 91, both inclusive, of the Larceny Act: 32-33 Vic., ch. 21, sec. 92. (8.) Any of the felonies provided for by sections 27, 28 and 39, of the Act respecting offences against the person: 32-33 Vic., ch. 20, sec. 48. (9.) Perjury: By common law; *Dickinson's* Quarter Sessions, 158. (10.) Subornation of perjury: By common law;

Dickinson's Quarter Sessions, 158. (11.) Forgery: By common law, *loc. cit.* (12.) Counterfeiting coin, which was treason by different statutes: 1 East, P. C. 158; 5 *Burn's* Justice, 1022; 2 *Hale,* 44, 45; 25 Edw. III., ch. 2, sec. 7, and 31 Vic., ch. 69, sec. 7. (13.) Bribery, personation or other corrupt practices in elections for the Dominion Parliament: 37 Vic., ch. 9, sec. 118. This clause is so worded, that it may, perhaps, be held to extend to elections for the local legislatures and the municipal elections. (14.) The offences punishable with death, provided for by "An Act to protect the inhabitants of Canada against lawless aggressions from subjects of foreign countries at peace with Her Majesty": 31 Vic., ch. 14, sec. 4; Proced. Act of 1869, sec. 12.

The following passage from *Archbold's* Quarter Sessions, p. 5, on the jurisdiction of the Courts of Quarter Sessions, explains fully what our law is on the subject, independently of our statutory enactments. It will be seen, *in fine*, that such enactments as the one contained in sec. 2, 31 Vic., ch. 15 of our statutes, do not take away the jurisdiction of the Court of Quarter Sessions.

"Some doubts were formerly entertained as to the construction that ought to be given to the words '*Felonies*' and '*Trespasses*' in the above commission; some held that they included only such felonies and misdemeanors against the peace, of which cognizance was given to justices of the peace by the express words of a statute or statutes; others held that as the commission was created by statute, namely, in pursuance of

Stat. 34 Ed. III., ch. 1, these words must be deemed to include only such offences as were felonies and trespasses at the time of the passing of the Act, and that if justices have jurisdiction of any offence created since, it must be given to them by the express words of the statute creating the offence. But these constructions seem very unsatisfactory, if, according to the first of them, we are to hold that the Courts of Quarter Sessions are to exercise jurisdiction only in those cases where cognizance of an offence is specially given them by some statute, the court will have cognizance of very few offences indeed, and no jurisdiction in most of the cases in which we see them continually exercise it; and if, according to the second construction, we confine their authority under the commission to offences which were felonies and trespasses at the time of the passing the Statute 34 Ed. III., ch. 1, then we shall have the absurdity of a commission being granted in the nineteenth century to justices giving them authority to hear and determine such offences only as were felonies and trespasses in the year 1360. There is nothing in the Act itself or the commission, which at all obliges us to give them so narrow a construction; and in modern times the general opinion of the profession, sanctioned by cases which shall presently be mentioned, is, that with the exception of perjury at common law and forgery, the Court of Quarter Sessions has jurisdiction by virtue of the commission of all felonies whatsoever, murder included, though not specially named, and of all indictable misdemeanors, whether created before or after the date of the ommission. In fact, the only restriction upon their jurisdiction up to the time of the

passing of the 5 & 6 Vic., ch. 38 (30th June, 1842), hereafter mentioned, appears to have been the proviso contained in the commission of the peace; but if they thought fit, even in capital cases, to proceed to judgment, such judgment would have been valid until reversed for real error in the judgment, or for substantial defect appearing on the face of the record. As to the word 'trespasses,' the word used, when the commissions were in Latin, was 'transgressiones,' which was a word of very general meaning, including all the inferior offences under felony, and also those injuries for which the modern action of trespass now lies; it was usually rendered into law French, by the word 'trespass,' and that is the word used in the original French of the above stat. of Ed. III., and it is there rendered into English by the word 'trespasses.' In perjury at common law, it is indeed settled, that an indictment will not lie for it in a Court of Quarter Sessions; but perjury under the statute 5 Eliz., ch. 9, is within the jurisdiction of the sessions, by the express words of the Act. Forgery at common law also is not cognizable by the Sessions; nor is forgery by statute, as we shall see presently, when we come to consider the jurisdiction of the sessions by statute. Where an indictment for soliciting a servant to steal the goods of his master was removed into the Court of King's Bench by writ of error, it was argued that the facts charged in the indictment did not amount to an offence at common law, or if they did, still it was not an offence indictable at Sessions, as it was no breach of the peace.

As to the first point, the Court held clearly that the facts stated did amount to an indictable offence; as to

the second point, Lord Kenyon, C. J., said, 'I am also clearly of opinion that it is indictable at the Quarter Sessions, as falling in with that class of offences, which being violations of the law of the land, have a tendency, as it is said, to a breach of the peace, and are, therefore, cognizable by that jurisdiction; to this rule there are, indeed, two exceptions, namely, forgery and perjury; why exceptions, I know not, but having been expressly so adjudged, I will not break through the rules of law; no other exceptions, however, have been allowed, and therefore this falls within the general rule.' The other judges being of the same opinion, the judgment was accordingly affirmed. So where an indictment for a conspiracy to charge a man with taking hair out of a bag belonging to one A. R., was preferred and found at Sessions, and the parties convicted upon it; and it was afterwards removed into the Court of King's Bench by certiorari, and a motion was then made in arrest of judgment, on the ground that the Sessions had no jurisdiction of conspiracy, any more than of perjury and forgery, it not being specified in their commission, nor jurisdiction of it given to them by any special statute; the Court, however, held that the Sessions had jurisdiction.

Lord Mansfield, C.J., said that as no case had been cited to show whether the Sessions had or had not jurisdiction, the question must be decided upon general principles; that as to the cases of perjury and forgery, mentioned in argument, they stood upon their own special grounds, and it had been determined that justices had no jurisdiction of them; but as to conspiracy, 'it is a trespass, and tres-

passes are indictable at sessions; though not committed *vi et armis*, they tend to a breach of the peace, as much as cheats, which are established to be within he jurisdiction of sessions.' Where, however, a statute creates a new offence, and directs it to be prosecuted before a Court of Oyer and Terminer, or gaol delivery, without mentioning the General or Quarter Sessions, that is deemed to be an implied exclusion of the jurisdiction of the sessions with respect to that particular offence. But where an indictment for lighting fires on the coast, contrary to 47 Geo. III., sec. 2, ch. 66, was preferred at the sessions, removed by certiorari, and tried at the Assizes; and it was objected for the defendant that the sessions had no jurisdiction, as the statute required that the offenders should be carried before a Justice of the Peace, and by him committed to the county gaol, 'there to remain until the next Court of Oyer and Terminer, great session or gaol delivery,' which amounted to an implied enactment that the indictment should be preferred in those courts only; the Court held that, as the offence was a misdemeanor only, and the defendant might be prosecuted for it without his being apprehended or in custody, the clause in the Act referred to did not prevent the indictment from being preferred at the sessions; they held the indictment, therefore, to have been properly originated, and passed sentence on the defendant."

In England now, there is a statute which takes away from the jurisdiction of the Courts of Sessions of the Peace a large number of offences, which these courts could heretofore try and determine. It is the

5 & 6 Vic. ch. 58 (passed 30th June, 1842). It might be introduced in Canada with advantage.

INDICTMENTS NEED NOT BE ON PARCHMENT.

Sec. 13.—It shall not be necessary that any indictment or any record or document relative to any criminal case, be written on parchment.

By the interpretation clause, sec. 1, *ante*, the word *indictment* includes *information*, *presentment*, and *inquisition*, as well as pleas, &c., &c., &c.

By the 4 Geo. 2, ch. 26, and 6 Geo. 2, ch. 14, "all indictments, informations, inquisitions and presentments shall be in English, and be written in a common legible hand, and not court hand, on pain of £50 to him that shall sue in three months."

They should be engrossed on plain parchment without a stamp. No part of the indictment must contain any abbreviation, or express any number or date by figures, but these as well as every other term used, must be expressed in words at length, except where a fac-simile of an instrument is set out: 3 *Burn's* Justice, 35: 1 *Chitty*, 175.

Formerly, like all other proceedings, they were in Latin, and though *Lord Hale*, Vol. i, p. 168, thinks this language more appropriate, as not exposed to so many changes and alterations, in modern times, "it was thought to be of very greater use and importance," says his annotator *Emlyn*, "that they should be in a lan-

gauge capable of being known and understood by the parties concerned, whose lives and liberties were to be affected thereby."

Before Confederation, in Ontario and Quebec, the indictment in cases of High Treason only had to be written on parchment: C. S. C., ch. 99, sec. 20.

By section 133 of the *British North America Act*, the French language may be used in any of the Courts of Quebec, and in any court established under that Act.

Though it is not now necessary to use parchment, Clerks of the Crown should remember that indictments are solemn public documents, and should be neatly engrossed on strong and wide paper of good quality. In some of the courts, there is too much parsimony in that respect.

Sec. 14.—When an indictment is found against any person for whose appearance at any court to answer the offence, a recognizance has been given, and such person is confined in any penitentiary or gaol within the jurisdiction of such court, under warrant of commitment, or under sentence for some other offence, the court may, by order in writing, direct the warden of the penitentiary or the keeper of such gaol to bring up such person to be arraigned on such indictment, without a writ of *Habeas Corpus*, and the warden or keeper shall obey such order.

It must be remembered, that, under this clause:

1. An indictment must have been found to empower the court to give the order mentioned.

2. The defendant must have given a recognizance for his appearance to answer the *same offence* as that charged in the indictment, but whether this recognizance is to appear before the court where the indictment is found, or any other court, is immaterial.

3. The defendant must be confined in a penitentiary or gaol within the jurisdiction of the court, *where, by his recognizance he was bound to appear*, not within the jurisdiction of the court *giving the order*: the words *such court* refer to *any* court. This is undoubtedly not what the legislature intended, but unfortunately it is what it has said.

So that suppose a person is arrested in Montreal and gives a recognizance to appear at the next term of the Court of Quarter Sessions, before this term of the Court of Quarter Sessions, he is convicted before the Court of Queen's Bench, in Montreal, of a different offence, and sentenced to imprisonment in the Montreal gaol; whilst he lies so imprisoned under this sentence, an order is given, under sec. 11 of the Procedure Act of 1869, *ante*, that the trial on the first offence shall take place before the Court of Quarter Sessions, at Quebec, where an indictment is found by the Grand Jury; then, under the statute, the Court of Quarter Sessions, at Quebec, may order the keeper of the Montreal gaol to bring down the prisoner to be arraigned on such indictment. But in a case where an indictment is found against a person already in custody for another offence in a gaol *within* the jurisdiction of the court where the

indictment is found, such an order to the keeper of such gaol cannot be given, if this person was under recognizance to appear for the same offence before any other court in another district or county. Absurd as it is this is what this clause says.

4. This order may be given only to have such person arraigned. Immediately after arraignment he must be returned to the place of confinement whence he came.

5. The warden of the penitentiary or the keeper of the gaol has *to bring* the prisoner before the court giving the order.

6. The order is to be given by the *court*, not by a judge.

ALLEGATIONS OF VENUE, ETC., IN INDICTMENTS.

Sec. 15.—It shall not be necessary to state any venue in the body of any indictment; and the district, county, or place named in the margin thereof, shall be the venue for all the facts stated in the body of the indictment; but in case local description be required such local description shall be given in the body thereof.

This section is taken from sec. 23, 14-15 Vic., ch. 100, of the Imperial Statutes, upon which Mr. Greaves says: "This section was framed with the intention of placing the statement of venue upon the same footing in criminal cases upon which it was placed in civil proceedings by Reg. Gen., H. T., 4 Wm. IV. By this section, in all cases, except where some local description is necessary, no place need be stated in the body of the indictment; thus in larceny, robbery, forgery, false pretences, &c., no venue need be stated in the body of the indictment. In such cases, before the passing of this Act, although it was considered necessary to state some parish or place, it was quite immaterial whether the offence was committed there or at any other parish in the county. On the other hand, in burglary, sacrilege, stealing in a dwelling house, &c., the place where the offence was committed must be stated in the indictment. It was necessary so to state it before the Act, and to prove the statement as alleged, and so it is still, subject ever to the power of amendment given by the first section." The *first section* here mentioned is reproduced as sect. 71 of our Procedure Act, see *post*.

The *venue*, that is, the county in which the indictment is preferred, is stated in the margin thus "*Middlesex*," or "*Middlesex*, to-wit," but the latter method is the most usual. In the body of the indictment a special venue used to be laid, that is, the facts were in general stated to have arisen in the county in which the indictment was preferred. But now by the 14 & 15 Vic. ch. 100, sec. 23, it is provided that, as in sec. 15 of our Procedure Act: 3 *Burn's* Justice, 21.

In *Archbold*, on this clause, we read, p. 49: "The place (or *special venue*, as it is technically termed) must be such as in strictness the jury who are to try the cause should come from. At common law, the jury, in strictness, should have come from the town, hamlet, or parish, or from the manor, castle, or forest,

or other known place out of a town, where the offence was committed, and for this reason, besides the county, or the city, borough, or other part of the county to which the jurisdiction of the Court is limited, it was formerly necessary to allege that every material act mentioned in the indictment was committed in such a place . . . . But now by Stat. 14-15, Vic. ch. 100 sec. 23," it shall not be necessary to state any venue in the body of any indictment, but the county, city, or other jurisdiction named in the margin thereof, shall be taken to be venue for all the facts stated in the body of such indictment: Provided that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment."

The cases in which local description is required, and in which, therefore, under the last part of sec. 15 of the Procedure Act of 1869, a local description is still necessary in the body of the indictment, are:

(1.) Burglary: 2 *Russell*, 47. (2.) House-breaking: *R.* vs. *Bullock*, 1 Mood. 324, note *a*. (3.) Stealing in a dwelling-house, under sections 61 and 62 of the Larceny Act: *R.* vs. *Napper*, 1 Mood. 44. (4.) Being found by night armed, with intent to break into a dwelling-house, under sec. 59 of the Larceny Act, and all the offences under sec. 49 to 60 of the Larceny Act: *Reg.* vs. *Jarrold*, L. & C. 320. (5.) Riotously demolishing churches, houses, machinery, &c., or injuring them, under sections 15 and 16 of the Act respecting malicious injuries to property: *R.* vs. *Richards*, 1 M & Rob. 177. (6.) Maliciously firing a dwelling-house, perhaps an

out-house, and probably all offences under sections 1, 2, 3, 4, 5, 6, 7, 8, 12, 13 and 14 of the Act as to malicious injuries to property, but not the offences under secs. 20, 21, 22 and 23 of the same Act: *R.* vs. *Woodward*, 1 Mood. 323. (7.) Forcible entry: *Archbold*, 50. (8.) Nuisances to highways: *R.* vs. *Steventon*, 1 C. & Kir. 55. (9.) Malicious injuries to sea-banks, mill-dams, or other local property: *Taylor's* Ev., 1 Vol., par. 227. (10.) Not repairing a highway; in which even a more accurate description is necessary, as the situation of the road within the parish, &c. (11.) Indecent exposure in a public place: *Reg.* vs. *Harris*, 11 Cox, 659.

But in most cases of variance between the proof and, the allegations in the indictment respecting the place, local description, &c., the courts would now allow an amendment.

It may well be said, with *Taylor*, on Ev., Vol. 1, par. 228:

"It would be extremely difficult to advance any sensible argument in favour of this distinction, which the law recognises between local and transitory offences. On an indictment, indeed, against a parish 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 parish charged, ... 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."

At all events, in offences not of local nature, it is clearly not now necessary to allege in the body of the indictment where the offence was committed, and it is the practice now, in England, not to do it. An indictment for larceny, for instance, runs thus:

Suffolk, to wit: The Jurors for our lady the Queen upon their oath present that J. S., on the first day of June, in the year of our Lord, one thousand eight hundred and sixty, three pairs of shoes of the goods and chattels of J. N., feloniously did steal, take and carry away, against the peace of our lady the Queen, her crown and dignity: *Archbold*, 313. In 11 Cox, 101, 526, 593, and 12 Cox, 23, 393 and 456, may be seen indictments, so without a *special venue*.

AS TO ABOLITION OF BENEFIT OF CLERGY.

Sec. 16.—Benefit of clergy is hereby declared to have been abolished, but such abolition does not prevent the joinder in an indictment of any counts which might have been joined but for such abolition.

This is the 7 & 8 Geo. IV., ch. 28, sec. 6 of the Imperial Statutes.

Lord Hale calls the benefit of clergy, "a kind of relaxation of the severity of the judgment of the law, and adds that "by the ancient privilege of the clergy and by the confirmation and special concession of the

Statute of 25 Edw. III., ch. 4 (A.D. 1351), the benefit of clergy was to be allowed in all treasons and felonies touching other persons than the King himself and his royal Majesty:" 1 *Hale*, 517.

The two following extracts will give, succinctly, the law of "benefit of clergy:"

"*Benefit of clergy* (*privilegium clericale*, Lat.), an arrest of judgment in criminal cases. The origin of it was this: Princes and States, anciently converted to Christianity, granted to the clergy very bountiful privileges and exemptions, and particularly an immunity of their persons in criminal proceedings before secular judges. The clergy afterwards increasing their wealth, number and power, claimed this benefit as an indefeasible right, which had been merely matter of royal favour, founding their principal argument upon this text of Scripture, 'Touch not mine anointed, and do my prophets no harm.' They obtained great enlargements of this privilege, extending it not only to persons in holy orders, but also to all who had any kind of subordinate ministration in the church, and even to laymen if they could read, applying it to civil as well as criminal causes. In criminal proceedings the prisoner was first arraigned, and then he might have claimed his benefit of clergy, by way of declinatory plea, or after conviction, by way of arrest of judgment. He was then, if a layman, burnt with a hot iron in the brawn of his left thumb, in order to show that he had been admitted to this privilege, which was not allowed twice to a layman. If a clerk he was handed over to the Ecclesiastical Court, and after the solemn farce of

a mock trial, he was usually acquitted, and was made a new and an innocent man. These exemptions at length grew so burthensome and scandalous, that the legislature, from time to time, interfered, until the 7 & 8 Geo. IV., ch. 28, s. 6, abolished benefit of clergy:" *Wharton*, Law Lexicon, *verb.* "benefit of clergy."

"This has now become a title of curiosity only, the Stat. 7 & 8 Geo. IV., ch. 28, having enacted by sec. 6, that benefit of clergy with respect to persons convicted of felony shall be abolished; and by sec. 7, that no person convicted of felony shall suffer death, unless for some felony which was excluded from the benefit of clergy before or on the first day of the then Session of Parliament (Feb. 8, 1827), or which should be made punishable with death by some statute passed after that day."

This benefit of clergy constituted in former times so remarkable a feature in criminal law, and a general acquaintance with its nature is still so important for the illustration of the books, that it may be desirable to subjoin farther notice on the subject. It originally consisted in the privilege allowed to a clerk in orders, when prosecuted in the temporal court, of being discharged from thence and handed over to the court christian, in order to make a canonical purgation, that is to clear himself on his own oath, and that of other persons as his compurgators. *Vide Reeves's* Hist. Eng. L. vol. 2, pp. 114, 134: 25 Edw. III. *st.* 3, 4, a privilege founded, as it is said, upon the text of Scripture, "Touch not mine anointed, and do my prophets no harm." In England this was extended by degrees to all who

could read, and so were capable of becoming clerks: *Reeves* ubi supra *et* vol. 4, p. 156. But by 4 Hen. VII, c. 13, it was provided, that laymen allowed their clergy should be burned in the hand, and should claim it only once; and as to the clergy, it became the practice in cases of heinous and notorious guilt, to hand them over to the ordinary, *absque purgatione facienda*, the effect of which was, that they were imprisoned for life: 4 *Bl.* Com. 369. Afterwards, by 18 Eliz. ch. 7, the delivering over to the ordinary was abolished altogether, but imprisonment was authorized in addition to burning in the hand. By 5 Ann, ch. 6, the benefit of clergy was allowed to those entitled to ask it, without reference to their ability to read. By 4 Geo. I. ch. 11; 6 Geo. I. ch. 23. and 19 Geo. II. ch. 74, the punishment of transportation was authorized in certain cases, in lieu of burning in the hand; and by the Act last mentioned the court might impose, instead of burning in the hand, a pecuniary fine, or (except in manslaughter) order the offender to be whipped. As to the nature of the offences to which the benefit of clergy applied, it had no application except in capital felonies, and from the more atrocious of these it had been taken away by various statutes prior to its late abolition by 7 & 8 Geo. IV. ch. 28, sec. 6. As the law stood at the time of that abolition, clerks in orders were, by force of the benefit of clergy, discharged in clergyable felonies without any corporal punishment whatever, and as often as they offended, and the only penalty being a forfeiture of their goods; and the case was the same with peers and peeresses, as to whom see. 4 & 5 Vict. c. 22; but they could claim it only for the first offence. As

to commoners also, they could have benefit of clergy only for the first offence, and they were discharged by it from the capital punishment only, being subject on the other hand, not only to forfeiture of goods, but to burning in the hand, whipping, fine, imprisonment, or in certain cases transportation in lieu of capital sentence": 1 *Hale*, note to Philadelphia edition, p. 517.

By the General Repeal Act of 1869, section 97 of chap. 99 of the Consolidated Statutes of Canada, remains in force. It is as follows:

"Benefit of clergy with respect to persons convicted of felony having been abolished in Upper Canada on the thirteenth day of February, 1833, and in Lower Canada from and after the first day of January, 1842, no person convicted of felony shall suffer death, unless it be for some felony which was excluded from the benefit of clergy by the law in force in that part of this province in which the trial is had, when the benefit of clergy was abolished therein, or which has been made punishable with death by some Actipassed since that time."

JOINDER OF OFFENCES.

In *Reg.* vs. *Jones*, 2 Camp. 131, Lord Ellenborough said, "In point of law, there is no objection to a man being tried on one indictment for several offences of the same sort. It is usual, in felonies, for the Judge, *in his discretion*, to call upon the counsel for the prosecution to select one felony, and to confine themselves to that; but this practice has never been extended to misdemeanors."

In *Rex* vs. *Benfield*, 2 Burr. 980, an information against five for riot and libel had been filed, on which three of them were acquitted of the whole charge, and Benfield and Saunders found guilty of the libel. It was objected that several distinct defendants charged with several and distinct offences cannot be joined together in the same indictment or information, because the offence of one is not the offence of the other. But it was determined that several offences may be joined in one and the same indictment or information, if the offence wholly arise from such a joint act as is criminal in itself, without any regard to any particular default of the defendant which is peculiar to himself; as for instance, it may be joint for keeping a gaming house, or for singing together a libellous song, but not for exercising a trade without having served an apprenticeship, because each trader's guilt must arise from a defect peculiar to himself, and 2 *Hawk.* L. C. 140, was said to be clear and express in this distinction.

In *Young's case*, 1 Leach 511, Buller, J. said: "In misdemeanors the case in Burrowes: *Rex* vs. *Benfield*, 2 Burr., 980, shews that it is no objection to an indictment that it contains several charges. The case of felonies admits of a different consideration; but, even, in such cases, it is no objection in this stage of the prosecution (writ of error). On the face of an indictment every count imports to be for a different offence, and is charged as at different times; and it does not appear on the records whether the offences are or are not distinct. But, if it appear before the defendant has pleaded, or the jury are charged, that he is to be tried for separate offences, it has been the practice of the

Judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in the challenge of the jury; for he might object to a juryman's trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the Judge who tries the prisoner does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed. I did it at the last Sessions at the Old Bailey, and hope that, in exercising that discretion, I did not infringe on any rule of law or justice. But, if the case has gone to the length of a verdict, it is no objection in arrest of judgment. If it were it would overturn every indictment which contains several counts."

In a recent case (A.D. 1869), *Reg.* vs. *Heywood*, L. & C. 451, this decision in Young's case was followed by the Court of Crown Cases Reserved, and it was *held*, that, although it is no objection in point of law to an indictment that it charges the prisoner with *several different* felonies in different courts, yet, as matter of practice a prisoner ought not, in general, to be charged with different felonies in different counts of an indictment: as, for instance, a murder in one count, and a burglary in another, or a burglary in the house of A. in one count, and a "distinct" burglary in the house of B. in another, or a larceny of the goods of A. in one count, and a "distinct" larceny of the goods of B., at a different time in another, because such a course of proceeding is calculated to embarrass the prisoner in his defence. And where it has been adopted, and an objection is taken to the indictment on that ground

before the prisoner has pleaded or the jury are charged, the judge *in his discretion may* quash the indictment, or put the prosecutor to elect. But it is no objection in arrest of judgment, or on a writ of error. Thus, where an indictment charged the prisoner in three several counts with three several felonies in sending three separate threatening letters, Byles, J., compelled the prosecutor to elect upon which count he would proceed: *R.* vs. *Ward*, 10 Cox, 42. And since different judgments are required, it seems that the joinder of a count for a felony with another for a misdemeanor, would be holden to be bad upon demurrer, or after a *general* verdict, upon motion in arrest of judgment: 1 *Starkie*, Cr. Pl. 43. But now, see sec. 32 of the Procedure Act of 1869, *post*.

So in *Reg.* vs. *Ferguson*, 1 Dears. 427, where the prisoner having been indicted for a felony and a misdemeanor in two different counts of one indictment, and found guilty, not *generally*, but of the felony only, the prisoner moved in arrest of judgment, against the misjoinder of counts, the judge reserved the decision, and Lord Campbell, C. J., delivering the judgment of the Court of Crown Cases Reserved, said: "There is really no difficulty in the world in this case, and I must say that I regret that the learned Recorder, for whom I have a great respect, should have thought it necessary to reserve it. The question is, whether the indictment was bad on account of an alleged misjoinder of counts. The prisoner was convicted on the count for felony only, and it is the same thing as if he had been convicted upon an indictment containing that single count; and it is allowed

that there was abundant evidence to warrant that conviction. There is not the smallest pretence for the objection, that the indictment also contained a count for misdemeanor, and it does not admit of any argument."

So in *Reg.* vs. *Holman*, L. & C. 177, where the prisoner was charged in an indictment by one count for embezzlement and the other for larceny as a bailee. *At the close of the case for the prosecution*, it was objected that the indictment was bad, for misjoinder of counts, and that the objection was fatal, although not taken till after plea pleaded and the jury had been charged; and, upon the court proposing to direct the counsel for the prosecution to elect on which count he would proceed, the prisoner's counsel further contended that the indictment was so absolutely bad that the election of counts was inadmissible.

The Court directed the counsel for the prosecution to elect on which count he would proceed, reserving, at the request of the prisoner's counsel, the points raised by him as above stated for the consideration of the Court for Crown Cases Reserved. The counsel for the prosecution elected to proceed on the second count, and upon that count the prisoner was convicted.

Where the defendant was indicted, in several counts, for stabbing with intent to murder, with intent to maim and disable, and with intent to do some grievous bodily harm, it was holden that the prosecutor was not bound to elect upon which count he would proceed, notwithstanding the judgment is by the statute different, being on the first count capital, and

on the others transportation: *Reg.* vs. *Strange*, 8 C. & P. 172; *Archbold*, 70.

When the enactment contained in sec. 51 of our Procedure Act of 1869 (see *post.*) was in force in England, as 7 Will. IV and 1 Vic., ch. 85, sec. 11, a prisoner was charged in one indictment with feloniously stabbing with intent—first, to murder; second, to maim; third, to disfigure; fourth, to do some grievous bodily harm; to which was added a count for a common assault. The case was far advanced before the learned Judge was aware of this, and at first he thought of stopping it; but as it was rather a serious one, he left the case, without noticing the last count, to the jury, who (properly as the learned Judge thought upon the facts) convicted the prisoner; and the counsel for the prosecution then, being aware of the objection of misjoinder, requested that the verdict might be taken on the last count for felony, which was done accordingly; and this was held right by all the Judges: *Reg.* vs. *Jones*, 2 Mood. 94.

So that here in Canada, now, it would seem that there can be, in principle, no objection to a count for a common assault, in an indictment for any of the felonies, where, under sec. 51 of our Procedure Act, the jury may find a verdict for a misdemeanor. But, of course, such a count is not necessary, as the jury may, in that case, convict of the misdemeanor, without its being alleged in the indictment: see *Bishop's* 1 Cr. Proc., 446.

If a count for a felony is joined with a count for

a misdemeanor, on motion to quash, or demurrer, it seems that the indictment should be quashed or the prosecutor ordered to proceed on one of the counts only. If the defendant does not take the objection and allows the trial to proceed, the conviction will be legal, if a verdict is taken *distinctly* on one of the counts. If a verdict is given of guilty generally, without specifying on which of the counts, the conviction will be held bad on motion in arrest of judgment, or in error, notwithstanding sec. 32 of the Procedure Act of 1869, though this clause is much more extensive than the corresponding English clause, 14–15 Vic., ch. 100, sec. 25, because, in fact, how could the judge know what sentence to give if it is not clear of what offence the jury have found the prisoner guilty: see 1 *Starkie*, Cr. Pl. 43; *Reg.* vs. *Jones*, 2 Mood. 94; *Reg.* vs. *Ferguson*, Dears. 427.

And though in law, the right to charge different felonies in one indictment cannot be denied, yet, in practice, the Court, in such a case, will always oblige the prosecutor to elect and proceed, on one of the charges only: *Dickinson's* Quarter Sessions, 190.

But the same offence may be charged in different ways, in different counts of the same indictment, to meet the several aspects which it is apprehended the case may assume in evidence, or in which it may be seen in point of law, and it is said in *Archbold*, p. 72: "Although a prosecutor is not, in general, permitted to charge a defendant with different felonies in differents counts, yet he may charge the same felony in different ways in several counts, in order to meet the facts or the case: as, for instance, if there be a doubt whether

the goods stolen, or the house in which a burglary or larceny was committed, be 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: see *R.* vs. *Egginton*, 2 Bos. & P. 508; *R.* vs. *Austin*, 7 C. & P. 196. And the verdict may be taken generally on the whole indictment: *R.* vs. *Downing*, 1 Den. C. C. 52; 2 C. & K. 382. But, inasmuch as the word 'felony' is not *nomen collectivum* (as 'misdemeanor' is, see *Ryalls* vs. *R.*, 11 Q. B. 781, 795), if the verdict and judgment, in such case, be against the defendant for 'the felony aforesaid,' it will be bad unless the verdict and judgment be warranted by each count of the indictment:" *Campbell* vs. *R.*, 11 Q. B. 799, 814; see 1 *Bishop's* Cr. Proced. 449.

"Indictments for misdemeanors may contain several counts for different offences, and, as it seems, though the judgments upon each be different: *Young* vs. *R.*, 3 T. R. 98, 105, 106; *R.* vs. *Toule*, 2 Marsh, 466; *R.* vs. *Johnson*, 3 M & Sel. 539; *R.* vs. *Kingston*, 8 East, 46; and see *R.* vs. *Benfield*, 2 Burr. 984; *R.* vs. *Jones*, 2 Camp. 131; *Dickinson's* Q. S. 190; *Starkie's* Cr. Pl. 43. Even where several different persons were charged in different counts, with offences of the same nature, the Court held that it was no ground for a demurrer, thought it might be for an application to the discretion of the Court to quash the indictment: *R.* vs. *Kingston*, 8 East, 41. Where two defendants were indicted for a conspiracy and a libel, and at the close of the case for the prosecution, there was evidence against both as to the conspiracy, but against one only as to the libel, the Judge then put the prosecutor to elect which charge he

would proceed upon: *R.* vs. *Murphy*, 8 C. & P. 297. On an indictment for conspiracy to defraud by making false lists of goods destroyed by fire, one set of counts related to a fire in June, 1864, and another to a fire in November, 1864. The prosecution was compelled to elect which charge of conspiracy should be first tried, and to confine the evidence wholly to that in the first instance: *R.* vs. *Barry*, 4 F. & F. 389. And on an indictment against the manager and secretary of a joint-stock bank, containing many counts, some charging that the defendants concurred in publishing false statements of the affairs of the bank, and others that they conspired together to do so, the prosecutors were put to elect on which set of counts they would rely: *R.* vs. *Burch*, 4 F. & F. 407. If, where there are several counts charging different offences in law, the judgment be entered up generally upon all, that the defendant '*for his said offences*' be adjudged, etc., and it appears that any count was bad in law, the judgment will be reversed in error: *O'Connell* vs. *R.*, 11 Cl. & Fin. 155. To prevent this, it is now usual, in cases of misdemeanor, to pronounce and enter up the same judgment separately, on each count of the indictment." *Archbold*, 72."

Where a prisoner is indicted for a felony, it is not necessary to prefer a separate bill against him for an attempt to commit it; and where he is indicted for a misdemeanor, it is not necessary to add another count for an attempt to commit it; because upon an indictment for the felony or misdemeanor, if, upon the trial, it appear that the defendant merely attempted to commit the offence, but did not complete it, the jury may acquit him of the offence charged, and find him guilty of the attempt: Procedure Act of 1869, Sec. 49.

So, upon an indictment for robbery, the prisoner may now be found guilty of an assault with intent to rob: *Larceny Act*, 32–33 Vic., ch. 21, sec. 40. So, upon an indictment for embezzlement, if the offence upon the evidence appear to be a larceny, the jury may acquit the prisoner of the embezzlement, and find him guilty of simple larceny, or of larceny as clerk or servant; or upon an indictment for larceny, if upon the evidence appear to be embezzlement, the jury may acquit of the larceny and find the party guilty of the embezzlement: *Larceny Act*, 32-33 Vic., ch. 21, sec. 74. So, if upon an indictment for obtaining money or goods by false pretences, the offence upon the evidence turn out to be larceny, the defendant, notwithstanding, may be convicted of the false pretences: *Larceny Act*, 32-33 Vic., ch. 21, sec. 93. So, if upon an indictment for larceny, the offence upon the evidence turn to be an obtaining by false pretences, the jury may acquit of the larceny and find the defendant guilty of obtaining by false pretences: *Larceny Act*, 32-33 Vic. ch. 21, sec. 99. So, upon an indictment for any misdemeanor, if the facts given in evidence amount to a felony, the defendant shall not on that account be acquitted of the misdemeanor, unless the court think fit to discharge the jury and order the defendant to be indicted for the felony: Procedure Act of 1869, sec. 90, see. *post*. But this provision applies only where the facts given in evidence prove the *act charged* in the indictment; "while they include such misdemeanor," says the statute. And if a

felony is proved, but no misdeameanor, the provision does not apply.

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., so proceeding to state the offence. The absence of the words "upon their oath aforesaid" would be a fatal and not amendable defect, but as to the particular count only: see *Archbold*, 73.

STATEMENT OF PARTNERSHIP, ETC., PROPERTY.

Sec. 17.—Whenever, in any indictment for felony or misdemeanor, it is requisite to state the ownership of any property, real or personal, which belongs to or is in possession of more than one person, whether such persons be partners in trade, joint tenants, parceners or tenants in common, it shall be sufficient to name one of such persons, and to state the property to belong to the person so named and another or others, as the case may be.

Sec. 18.—If in any indictment for felony or misdemeanor it be necessary for any purpose to mention any partners, joint tenants, parceners or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision and that of the last preceding section shall extend to all joint stock companies and trustees.

These two clauses are taken from the Imperial Act, 7 Geo. IV., ch. 64, sec. 14. Formerly, where goods

stolen were the property of partners, or joint-owners, all the partners or joint-owners must have been correctly named in the indictment, otherwise the defendant would have been acquitted.

The word "*Parceners*" refers to a tenancy which arises when an inheritable estate descends from the ancestor to several persons possessing an equal title to it: *Wharton*, Law Lexicon.

It must be remembered that the words of the statute, in sec. 17, are, "*another or others;*" and if an indictment allege property to belong to A. B. and *others*, and it appears that A. B. has only one partner, it is a variance.

The prisoner was indicted for stealing the property of G. Eyre "and *others*," and it was proved that G. Eyre had only one partner: it was held, per Denman, Com. Serj., that the prisoner must be acquitted: *Hampton's* case, 2 *Russell*, 303. So where a count for forgery laid the intent to be to defraud S. Jones "and *others*," and it appeared that Jones had only one partner, it was held that the count was not supported: *Reg.* vs. *Wright*, 1 Lewin, 268.

In *Reg.* vs. *Kealey*, 2 Den. 68, the defendant was indicted for the common law misdemeanor of having attempted, by false pretences made to J. Baggally and others to obtain from the said J. Baggally and others one thousand yards of silk, the property of the said J. Baggally and others, with intent to cheat the said J. Baggally and others of the same. J. Baggally and others were partners in trade, and the pretences were made to J. Baggally; but none of the partners were

present when the pretences were made, nor did the pretences ever reach the ear of any of them. It was objected that there was a variance, as the evidence did not show that the pretences were made to J. Baggally and others; but the objection was overruled by Russell Gurney, Esq., Q.C., and, upon a case reserved, the conviction was held right.

Greaves, in *note a*, 2 *Russell*, 304, says on this case: "It is clear that the 7 Geo. IV., ch. 64, sec. 14 (sec. 17 and 18, *ante*, of the Procedure Act of 1869) alone authorizes the use of the words 'and others;' for, except for that clause, the persons must have been named. There the question really was, whether that clause authorized the use of it in this allegation. The words are, 'whenever it shall be necessary to mention, *for any purpose whatsoever*, any partners, &c.' '(if it be necessary *for any purpose* to mention,' &c.: sec. 18, *ante*, of the Procedure Act of 1869). Now it is plain that the prisoner had applied to Baggally to purchase the goods of the firm, and the inference from the statement in the indictment is that he had actually made a contract for their purchase, and, if that contract had been alleged, it must have been alleged as a contract with the firm, and it was clearly correct to allege an attempt to make a contract as made to the firm also."

Now, such a variance, as mentioned in *Hampton's* and *Jones'* cases, *ante*, p. 94, would not be fatal, if amended: 3 *Burn's* Justice, 25; see sec. 71 of the Procedure Act of 1869, *post;* and *Reg.* vs. *Pritchard*, L. & C. 35: *Reg.* vs. *Vincent*, 2 Den. 464; *Reg.* vs. *Marks*, 10 Cox, 367.

It is not necessary that a strict legal partnership should exist. Where C. and D. carried on business in partnership, and the widow of C., upon his death, without taking out administration, acted as partner, and the stock was afterwards divided between her and the surviving partner, but, before the division, part of the stock was stolen; it was holden that the goods were properly described as the goods of D. and the widow: *Reg.* vs. *Gaby*, R. & R. 178.

And where a father and son carried on business as farmers; the son died intestate, after which the father continued the business for the joint benefit of himself and the sons next of kin; some sheep were stolen, and were laid to be the property of the father and the sons next of kin, and all the Judges held it right: *R.* vs. *Scott*, R. & R. 13.

In an indictment for stealing a Bible, a hymn-book, &c., &c., &c., from a Methodist chapel, the goods were laid as the property of John Bennett and others, and it appeared that Bennett was one of the Society, and a trustee of the chapel: Parke, J., held that the property was correctly laid in Bennett: *R.* vs. *Boulton*, 5 C. & P. 537; *Archbold*, 43.

In *Reg.* vs. *Pritchard*, L. & C. 35, it was held that the property of a banking co-partnership may be described as the property of one of the partners specially named and others, under the clause in question; but see now sec. 22 of the Procedure Act of 1869, *post*, as to bodies corporate, and the property under their control: *R.* vs. *Beacall*, 1 Mood. 15.

STATEMENT OF OWNERSHIP, ETC., IN CERTAIN CASES.

Sec. 19.—In any indictment for felony or misdemeanor committed: 1. In or upon, or with respect to any church, chapel, or place of religious worship,—or 2. To any highway, bridge, court-house, gaol, house of correction, penitentiary, infirmary, asylum, or other public buildings,—or 3. To any railway, canal, lock, dam or other public work erected or maintained in whole or in part, at the expense of the Dominion of Canada, or of any of the Provinces of which it is composed, or of any Municipality, County, Parish or Township, or other sub-division thereof,—or 4. With respect to any materials, goods or chattels belonging to or provided for, or at the expense of the Dominion or of any such Province, or of any Municipality or other sub-division thereof, to be used for making, altering or repairing any highway or bridge, or any court-house or other such building, railway, canal, lock, dam or other public work as aforesaid, or to be used in or with any such work, or for any other purpose whatever, it shall not be necessary to state any such property, real or personal, to be the property of any person.

Sec. 20.—In any indictment for felony or misdemeanor, committed in or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or any other thing erected or provided by any trustees or commissioners in pursuance of any act in force in Canada, or in any Province thereof, for making any turnpike road, or to any conveniences or appurtenances thereunto respectively belonging, or to any

materials, tools or implements provided for making, altering or repairing any such road, it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, without specifying the names of such Trustees or Commissioners.

Sec. 21.—In any indictment for any felony or misdemeanor committed on or with respect to any buildings, or any goods or chattels, or any other property, real or personal, in the occupation, or under the superintendence, charge or management of any public officer or commissioner, or any county, parish, township or municipal officer or commissioner, it shall be sufficient to state any such property to belong to the officer or commissioner in whose occupation, or under whose superintendence, charge or management such property is, and it shall not be necessary to specify the names of any such officers or commissioners.

Secs. 19 and 21 are taken, with some alterations, from the Imperial Act, 7 Geo. IV., ch. 64, secs. 15 and 16; and sec. 20, from sec. 17 of the same Act.

Under this last section it has been held that if a person employed by a trustee of turnpike tolls to collect them, lives in the toll house rent free, the property in the house, in an indictment for burglary, may be laid in the person so employed by the lessee, he having the exclusive possession, and the toll house not being parcel of any premises occupied by his employer: *R.* vs. *Camfield*, R. & M., C. C. R. 42.

The enactment contained in sec. 19 is not in the English Statute. It is a great improvement in the law, and might perhaps be extended. But sec. 21 seems to be, and will, in practice, prove to be a different enactment on the same subject. It must also be remarked that sec. 19 must not be interpreted in too wide a sense. For instance, if A steals from the person of B in a church, the section does not apply, and the property of the article stolen must be laid in B, as in ordinary cases. It is doubtful if, for instance, a larceny in a court-house of a chattel belonging to the court-house, would be covered by the clause: the word *in* is not repeated with the words *highway, bridge, court-house, gaol*, &c.; in fact, the clause as to these reads: "In any indictment for felony or misdemeanor committed with respect to any highway, bridge, court-house, &c.," leaving a doubt if it is not only as to these buildings or highways that the enactment is intended as destroying, demolishing, burning, &c., them. It would be safer in such cases to allege the ownership of the property, if possible, as allowed by section 21.

By the *Act for the Regulation of the Postal Service*, 31 Vic., ch. 10, sec. 84, it is enacted that: "In every case where an offence is committed in respect of a post-letter bag, or a post-letter, or other mailable, matter, chattel, money, or a valuable security, sent by post, in the indictment to be preferred against the offender, the property of such post-letter bag, post-letter, or other mailable matter, chattel, money, or valuable security, sent by post, may be laid in the Postmaster-general; but, except in the cases aforesaid, the property of any chattel or thing used or employed in the service of the post-office, or of moneys arising from duties of postage, shall be laid in Her Majesty, if the same be the property of Her Majesty, or if the loss thereof would be borne by the Dominion and not by any party in his private capacity."

Under the rule that a special enactment on a particular subject makes the law over a different general enactment, it is probable that an indictment relating to any chattel or thing used in the service of the post-office would be defective if it did not allege the ownership of the chattel or thing, in virtue of the above clause of the *Postal Service Act*, and, that in this case, sec. 19 of the Procedure Act of 1869 would not apply.

By sec. 72, of the *Larceny Act*, 32-33 Vic., ch. 21, moneys or valuable securities stolen or embezzled by persons in the public service or in the service of any municipality, may be described as the property of Her Majesty, or of the Municipality as the case may be.

By sec. 17, of the said *Larceny Act*, in any indictment for stealing, destroying, &c., wills, it shall not be necessary to allege that such will is the property of any person.

STATEMENT OF OWNERSHIP AS TO CORPORATE BODIES.

Sec. 22.—All property, real and personal, whereof any body corporate has, by law, the management, control

or custody, shall, for the purpose of any indictment, or proceeding against any other person for any offence committed on or in respect thereof, be deemed to be the property of such body corporate.

This clause is not in the English statutes, It is only declaratory of the common law, and it was held in England without this clause, that when goods of a corporation are stolen, they must be laid to be the property of the corporation in their corporate name and not in the names of the individuals who comprise it: *R.* vs. *Patrick & Pepper*, 1 Leach, 253. So in *Reg.* vs. *Freeman*, 2 *Russell*, 301, the prisoner was indicted for stealing a parcel, the property of the London and North Western Railway Company. The parcel was stolen from the Lichfield Station, which had been in the possession of the Company for three or four years, by means of their servants; but no statute was produced which authorized the Company to purchase the Trent Valley Line: an Act incorporating the Company was, however, produced. It was held that, as a corporation is liable in trover, trespass and ejectment, they might have an actual possession, though it might be wrongful, which would support the indictment.

In *Reg.* vs. *Frankland*, L. & C. 276, it was held: 1st. That the incorporation of a private company must be proved by legal and documentary evidence. 2nd. That partners in a company not incorporated, might be proved to be such by parol evidence. 3rd. That Thomas Bolland and others, who were described as in the indictment as the owners of the property embezzled, being partners in a company not incorporated,

the indictment was supported by proof that the money was the property of the company. See 32-33 Vic., chs. 12 and 13, as to incorporation of Joint-Stock Companies in the Dominion of Canada.

OMISSION OF CERTAIN AVERMENTS NOT FATAL.

Sec. 23.—No indictment shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "*as appears upon the record*," or "as appears by the record," or of the words "with force and arms," or of the words "against the peace," or for the insertion of the words "against the form of the statute," instead of the words "against the form of the statutes," or *vicé versâ*, *or for the omission of such words, or for the want of an addition or for an imperfect addition of any person mentioned in the indictment*, or for that any person mentioned in the indictment is designated by a name of office or other descriptive appellation instead of his proper name, or for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, or for stating the time imperfectly, or for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, or for want of a proper or perfect venue, or for want of a proper or formal conclusion, or for want of or imperfection in the addition of any defendant, of for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in

any case where the value or price, or the amount of damage, injury or spoil, is not of the essence of the offence.

This clause is taken from the Imperial Act, 14–15 Vic. ch. 100, sec. 24. The words in *italics* are not in the Imperial Act.

By this enactment no objection can be taken against an indictment in the following cases:

1.—The want of the averment of any matter unnecessary to be proved.

2.—The omission of the words "as appears upon the record."

3.—The omission of the words "as appears by the record."

4.—The omission of the words "with force and arms."

5.—The omission of the words "against the peace."

6.—The insertion of the words "against the form of the statute" instead of "against the form of the statutes," and vice versa.

7.—The omission of such words.

8.—Want of, or imperfection in the addition of any person mentioned in the indictment.

9.—That any person is designated by a name of office, or other descriptive appellation instead of his proper name.

10.—Omitting to state the time at which any offence was committed in any case where time is not of the essence of the offence.

11.—Stating the time imperfectly.

12.—Stating the offence to have been committed on a

day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened.

13.—Want of a proper or perfect venue.

14.—Want of a proper or formal conclusion.

15.—Want of, or imperfection in the addition of any defendant.

16.—Want of the statement of the value or price of any matter or thing, or the amount of damage, injury or spoil, in any case where the value or price, or the amount of damage, injury or spoil is not of the essence of the offence.

On the first, second and third cases, no remarks are called for.

On the fourth, rendering unnecessary in any indictment the words "with force and arms," *Chitty* said on these words, before this clause: "The words 'with force and arms,' anciently *vi et armis*, were, by the common law, necessary in indictment for offences which amount to an actual disturbance of the peace, or consist, in any way, of acts of violence; but it seems to be the better opinion that they were never necessary where the offence consisted of a cheat or non-feasance, or a mere consequential injury. . . . . But the Statute 37 Hen. VIII., ch. 8, reciting that several indictments had been deemed void for want of these words, when in fact no such weapon had been employed, enacted that, 'that the words *vi et armis, videlicet, cum baculis, cultellis, arcubus et sagittis,*' shall not of necessity be put in any indictment or inquisition. Upon the construction of this statute, there seems to have been en-

tertained very grave doubts whether the whole of the terms were intended to be abolished in all indictments, or whether the words following the *videlicet* were alone excluded. Many indictments for trespass, and other wrongs, accompanied with violence, have been deemed insufficient for want of the words 'with force and arms'; and, on the other hand, the court has frequently refused to quash the proceedings where they have been omitted, and the last seems the better opinion, for otherwise the terms of the statute appear to be destitute of meaning. It seems to be generally agreed, that, where there are any other words implying force, as, in an indictment for a rescue, the word 'rescued,' the omission of *vi et armis* is sufficiently supplied. But it is at all times safe and proper to insert them, whenever the offence is attended with an actual or constructive force, or affects the interest of the public."

The words "with force and arms," though not absolutely an essential allegation of the indictment, would, in certain cases, not be easily replaced, as in indictments for forcible entry or forcible detainer. This clause would not apply, if a statute created an offence in the following words: Whosoever, with force and arms, destroys, &c., &c., &c.;" then, the words *vi et armis* would be a necessary ingredient of the offence, and should be found in an indictment under such a clause.

As to the words "against the peace," at common law, they were necessary, where the offence charged was not one created by statute, and *contra pacem*

Domini Regis were the words required; and this in the conclusion of each of the counts; *contra pacem* alone was insufficient, though *contra coronam et* dignatem ejus was not necessary: 2 *Hale*, 188. So, formerly, great care was necessary in ascertaining whether the expression "against the form of the statute" or "against the form of the statutes" should be used; but one or the other was necessary when the indictment charged a statutory crime. In England, though a contrary opinion is given in *Archbold*, p. 67, it seems, according to *Broom's* Commentaries, p. 991, that, even now, the conclusion of the indictment must be *contra formam statuti*, where the offence charged in it is founded upon the statute law, as the 14, 15 Vic., ch. 100, sec. 29, does not dispense with the conclusion; but whatever doubts may arise there are in Canada removed by the enactment, stated as the seventh, *ante*, of our corresponding clause, as to the omission of these words.

It will be seen that another enactment in the Canadian clause, not to be found in the English Act, is the eighth, *ante*, declaring immaterial the want of addition or imperfect addition of *any* person mentioned in the indictment. This covers all persons who are named as owners of the property, regarding which the offence has been committed, and appears to be the rule even without this clause: 3 *Burn's* Justice, 23.

But what is meant by the word "addition?" *Addition* is the title, or mystery (art, trade or occupa-

tion), and place of abode of a person besides his names: *Wharton*, Law Lexicon, verbo *addition*.

By the ninth enactment of the clause in question, it is declared that no indictment shall be insufficient "for that any person mentioned in it is designated by a name of office or other descriptive appellation instead of his proper name."

This part of the clause applies only to the names of the prosecutor or of the party injured, or of any third parties mentioned in the indictment: it does not extend to the names of the defendant. Under it, an indictment alleging the goods stolen to be the property of the "Duke of Cambridge" without giving him any other names, would be held sufficient. *Reg.* vs. *Frost*, Dears. 474. But it must be remembered that, if at the trial, it appear in evidence that the party injured is misnamed, or that the owner of the goods or house, &c., is another and different person from him named as such in the indictment, the variance, unless amended, is fatal, and the defendant must be acquitted: 2 East, P. C. 651, 781; *Archbold*, 46. But, now, under sec. 71 of the Procedure Act of 1869, see *post*, such an amendment, asked for before verdict, would hardly ever be refused.

The enactments tenthly, eleventhly, and twelfthly, contained in the said sec. 23 of the Procedure Act of 1869, refer to omitting in any indictment to state the time at which the offence was committed, in any case where time is not of the essence of the offence, or to stating the time imperfectly, or to stating the offence

to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, the clause enacting in the same terms as the English Act, that no objection to any indictment on these grounds will be available to the defendant.

At Common Law, where the date was not a necessary ingredient of the offence, a variance between the indictment and evidence in the time, when the offence was committed, was never considered material, and in *Sir Henry Vane's* case, for high-treason, the jury, under instructions of the Court, found the prisoner guilty, though the offence was proved to have been committed ten years anterior to the time laid in the indictment: Kelyng's C. C.; 19 *Stevens & Haynes* reprint. And the doctrine that the time laid in the indictment is not material, when not essential to the offence, was confirmed by all the judges in *Lord Balmerino's* case: note in *Townley's* case, Foster, 9.

So, Lord Hale, says: "But though the day or year be mistaken in the indictment of felony or treason, yet if the offence be committed in the same county at another time, the offender ought to be found guilty:" 2 *Hale*, P. C. 179. But it was, nevertheless, necessary, though only a formal averment, except in particular cases, to state in the indictment the time at which the offence charged had been committed, that is to say the year and day, and any uncertainty or incongruity in the description of time was fatal to the indictment: 1 *Starkie*, C. P., 54, 60. The rule

required a day to be specified, but did not require that day to be proved.

But, now, by the above enactment, time need not even be averred, and, if averred, it is no objection that the date stated is an impossible or an incongruous one. The averment is a surplusage, except when time is of the essence of the offence, as, for instance in an indictment for a subsequent offence.

"Averments of time in criminal proceedings," says *Taylor* on Evid., 229, "are now even of less importance than those of place; for, excepting in the very few cases where time is of the essence of the offence, the indictment need not contain any allegation respecting it. Indeed, independent of the new law, 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, the judges held that no objection could be taken to the indictment in arrest of judgment, for alleging that the act was done before that day, the jury having expressly found that this was not correct: *R.* vs. *Treharne*, 1 Mood. 298, (in 1831)"

It is said in *Archbold*, page 50: "There are, however, some exceptions to this rule:—1. The dates of bills of exchange, and other 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 precise date of a fact be a necessary ingredient in the offence, it must be truly stated."

See post, sec. 70, as to amendment of variances between the proof and the indictment, in documents in writing.

The *want of a proper or perfect venue* is the omission thirteenthly provided for by the above clause, as not affecting the validity of the indictment.

It seems that an entire omission of venue is not provided for by this clause, and that such an omission might still be taken advantage of; but no venue need now be stated in the body of the indictment, except where local description is required, but the name of the district, county, or place in the margin shall be taken to be the venue: sec. 15 of the Procedure Act of 1869, *ante*. But an entire omission of venue in the cases where it is yet necessary, though it may be taken advantage of under sec. 32 of the Procedure Act of 1869, by way of demurrer or motion to quash the indictment, would probably be rectified by amendment under that section: and, if not taken advantage of by demurrer or motion to quash, the omission could not be taken advantage of by motion in arrest of judgment: see 3 *Burn's* Justice, 22.

The above clause declares, as its fourteenth enactment, that no indictment shall be held insufficient *for want of a proper or formal conclusion.*

These words were introduced to render any conclusion, perfectly unnecessary and immaterial: 2 *Russell*, 326, *note W. by Greaves.*

So that the words "to the great damage of the said ....." "to the evil example of all others," "to the great displeasure of Almighty God," &c., &c., &c., probably never necessary, are now not to be used. And

an indictment for a public nuisance need not now conclude, "*ad commune nocumentum.*" By all the Judges: *Reg.* vs. *Holmes*, Dears. 207.

And before these statutes, it was held that the conclusion "against the form of the Statute" in an indictment for a common law offence, instead of "against the peace," did not invalidate the indictment, the conclusion may then be treated as a surplusage: *Rex.* vs. *Mathews*, 2 Leach, 585.

Of course, in such a case this ruling would now be followed with no doubts whatever, under the above clause.

The want of or imperfection in the addition of any defendant, is the next defect declared immaterial by the above clause, or rather declared to be no defect at all.

See, *ante*, what has been said under the enactment in this same clause, concerning the want of addition or imperfect addition of *any person* mentioned in the indictment.

Sec. 31, *post*, enacts, *inter alia*, that no indictment shall be abated by reason of any want of addition of any party offering such plea.

Before these enactments, the 1 Hen. V., c. 5, required, in indictments, to be given to defendants the additions of "their estate, or degree, or mystery," and also the "towns, or hamlets, or places, and counties of which they were or be, or in which they be or were conversant."

Lastly, this clause enacts that no indictment shall be held insufficient for want of the statement of the value or price of any matter or thing, or the amount

of damage, injury or spoil in any case where the value or price, or the amount of damage, injury or spoil, is not of the essence of the offence.

The rule is, that if a statute makes, for instance, the stealing of a particular thing a felony, without reference to its value, then the value need not be alleged in the indictment. But wherever the value is an element to be considered by the Court in determining the punishment, it must be alleged in the indictment and duly proved on the trial: *Bishop*, 1 Cr. Proc. 541. So suppose an indictment charges the defendant with the larceny of a diamond ring, without alleging the value of the ring, the defendant cannot be sentenced to more than three years in the penitentiary, under sec. 4 of the Larceny Act, though, at the trial, the ring were proved to be worth one thousand pounds; and the Court cannot sentence him to a greater punishment, as allowed by sec. 110 of the said Larceny Act, in cases where the property stolen is of a value of over two hundred dollars, because this value was not alleged in the indictment.

The value is of the essence of the offence, where, by the statute, it is said, for instance: "Whosoever steals in any dwelling-house any chattel, &c., to the value in the whole of *twenty-five dollars or more*:" sec. 61 of the Larceny Act. To bring an indictment under this section, the value of twenty-five dollars or more must necessarily be alleged in the indictment and proved. But suppose it is alleged to be of fifty dollars, and proved to be only of thirty, this will be sufficient, be-

cause the value proved constitutes the offence created by statute.

If there are more than one article mentioned in the indictment, it is better to state and prove the value of each, so as to form, in the whole, the amount necessary to bring the case under the statute: *Reg.* vs. *Forsyth*, R. & R. 274; 1 *Taylor*, Evid. par. 230. However, in *Reg.* vs. *Thoman*, 12 Cox 54, it has been held by the Court of Criminal Appeal that in an indictment, under 24–5 Vic., ch. 97, sec. 51, Imp., (32–33 Vic., ch. 22, sec. 59 of Canadian Acts), for maliciously damaging personal property, the damage exceeding five pounds, it is not necessary to allege the value of each article injured, or the value of the damage done to each article, but only that the amount of damage done to the several articles exceeded five pounds in the aggregate.

DESCRIPTION OF INSTRUMENTS GENERALLY, AND OF MONEY AND BANK-NOTES.

Sec. 24.—Whenever it is necessary to make an averment in an indictment, as to any instrument, whether the same consists wholly or in part of writing, print or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or *fac-simile* of the whole or of any part thereof.

Sec. 25.—Whenever in any indictment it is necessary

to make an averment as to any money, or to any note of any bank, or Dominion or Provincial note, it shall be sufficient to describe such money or note simply as money, without any allegation (so far as regards the description of the property) specifying any particular coin or note, and such averment shall be sustained by proof of any amount of coin or of any such note, although the particular species of coin of which such amount was composed, or the particular nature of the note be not proved.

The 24th sec. is taken from the 14-15 Vic., ch. 100, sec. 7, of the Imperial Statutes upon which *Greaves* remarks: "This section renders it sufficient to describe any instrument to which it applies by any name or designation by which it is usually known, or by its purport. It is to be observed also that this section applies not merely to instruments in respect of which any offence is alleged to have been committed, but to every instrument as to which any averment may be made in any indictment:" Lord Campbell's Acts, by *Greaves*, 12.

The 25th sec. is taken from the 14–15 Vic., ch. 100, sec. 18, of the Imperial Statutes, upon which *Greaves* says: "This section was framed upon the 7-8 Geo. IV., ch. 29, sec. 48, and was intended to meet the case of *Reg.* v. *Bond*, 1 Den. 517. It originally applied to money and valuable securities, the same as the section from which it was taken; but it was thought better that it should only extend to coin and the notes of the Bank of England and other banks. In these cases it is

sufficient in any indictment whatever, where it is necessary to make any averment as to any coin or bank note, to describe such coin or note simply as money, without specifying any particular coin or note; and such an allegation will be supported by proof of any amount, although the species of coin or the nature of the note be not proved."

As to sec. 24 it is only necessary to remark that, at common law, written instruments, wherever they formed a part of the gist of the offence charged must have been set out verbatim: *Archbold*, 55. But even, before this statute, it was held that if the defendant is charged with fraudulently offering a spurious bank-note, and obtaining goods by the false pretence that it is a good bank-note, it is not necessary to set out the bank-note, because it is not in this case material for the Court to see that the instrument falls within a particular description: *Reg.* v. *Coulson*, 1 Den. 592.

As to sec. 25, it is said in *Archbold*, 59, that, before this enactment, *money* was described in an indictment as so many "pieces of the current gold," or "silver," or "copper coin of the realm, called———," and the particular species of coin must have been specified; so, though *Lord Hale*, 1 P. C. 534, and *Starkie*, 1 Cr. Pl. 187, seem to be of a contrary opinion, an indictment charging the stealing of ten pounds in moneys numbered was held bad; *R.* vs. *Fry*, *R.* & *R.*, 482. And in *Bond's* case, cited, *supra*, by *Greaves*, it was held that an indictment charging a stealing of seventy pieces of the current coin of the realm called sovereigns,

of the value of seventy pounds, 140 pieces, &c., called half-sovereigns, &c., 500 pieces, &c., called crowns, &c., is not supported by proof of a stealing of a sum of money consisting of some or other of the coins mentioned in the indictment, without proof of some one or more of the specific coins there charged to have been stolen. Of course these decisions could not now be followed.

The English Act has, in the corresponding clause, an additional enactment as to the embezzling or obtaining by false pretences any piece of coin or any bank-note; but 2 *Russell*, 626, *Greaves*, note t, is of opinion that the necessity of this part of this clause is partly got rid of by sec. 89 of the English Larceny Act, (sec. 94 of the Canadian Larceny Act.)

INDICTMENTS FOR SUBSEQUENT OFFENCES, AVERMENTS PROCEDURE IN, ETC.

Sec. 26.—In any indictment for any indictable offence committed after a previous conviction or convictions for any felony, misdemeanour, or offence or offences punishable upon summary conviction, and for which a greater punishment may be inflicted on that account, it shall be sufficient, after charging the subsequent offence, to state that the offender was at a certain time and place, or at certain times and places, convicted of felony or of an indictable misdemeanour, or of an offence or offences punishable upon summary conviction (as the case may be), *and to state the substance and effect only, omitting the formal part, of the indictment and conviction, or of the summary conviction* (*as*

the case may be) *for the previous offence*, without otherwise describing the previous offence or offences, and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanor, or a copy of any such summary conviction, purporting to be signed by the Clerk of the Court, or other officer having the custody of the records of the Court where the offender was first convicted, or to which such summary conviction has been returned, or by the deputy of such clerk or officer, shall upon proof of the identity of the person of the offender, be sufficient evidence of such conviction, without proof of the signature or official character of the person appearing to have signed the same; and the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows (that is to say),—the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he pleads not guilty, or if the Court orders a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance to inquire concerning such subsequent offence only, and if they find him guilty, or if on arraignment he pleads guilty, he shall then, and not before, be asked whether he was so previously convicted as alleged in the indictment, and if he answers that he was so previously convicted, the Court may proceed to sentence him accordingly, but if he denies that he was so previously convicted, or stands mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning

such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again but the oath already taken by them shall for all purposes be deemed to extend to such last mentioned inquiry: Provided that if upon the trial of any person for any such subsequent offence, such person gives evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty is returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.

This clause is taken from section 116 of the English Larceny Act, 24-25 Vic., ch. 96, and section 37 of the English Coin Act, 24-25 Vic., ch. 99. The words in *italics* are not in section 116 of the English Larceny Act; but are in section 37 of the Coin Act. They clearly take away the necessity, before existing, of setting out at length the previous indictment, &c., and of giving in evidence a copy of that indictment, &c.: see *Greaves'* Cr. Acts, 344.

Greaves remarks on section 116 of the English Larceny Act apply to section 26 of our Procedure Act of 1869, with, of course, the exception of the passage discussing whether this clause of the English Act applies only to the Larceny Act, or to any indictment for any offence. Of course, with us, sec. 26 of the Procedure Act, applies without doubt, to all indictments for any subsequent offence whatever.

Greaves says: "The words 'after charging a subsequent offence' were inserted in order to render it absolutely necessary always to charge the subsequent offence or offences first in the indictment, and after so doing to allege the previous conviction or convictions. This was the invariable practice on the Oxford Circuit, and the Select Committee of the Commons were clear that it ought to be universally followed, so that the previous conviction should not be mentioned, even by accident, before a verdict of guilty of the subsequent offence had been delivered."

"Mr. *Davis* Cr. L. 113, however, says, 'It seems to be immaterial whether the prior conviction be alleged before or after the substantive charge,' for which he cites *Reg.* vs. *Hilton*, Bell, C. C. 20. Now, that case was decided on the 7 & 8 Geo. IV., ch. 28, sec. 11, which had not in it the words, 'after charging the subsequent offence,' and is therefore, no authority on the present clause in which those words are inserted to render the course held sufficient in *Reg.* vs. *Hilton* unlawful. Whenever a statute increases the punishment of an offender on a subsequent conviction, and gives no mode of stating the former conviction, the former indictment, &c., must be set out at length, as was the case in Mint prosecutions before the present Coin Act; but where a statute gives a new form of stating the former conviction, that form must be strictly pursued; for no rule is more thoroughly settled than that in the execution of any power created by any Act of Parliament, any circumstance required by the Act, however un-essential and

unimportant otherwise, must be observed, and can only be satisfied by a strictly literal and precise performance: *Rex* vs. *Austrey*, 6 M. & S. 319; and to suppose that this clause, which makes it sufficient to allege the former conviction '*after* charging the subsequent offence' can be satisfied by alleging it *before* charging the subsequent offence, is manifestly erroneous.

"Mr. *Davis* Cr. L. 24, speaking of the similar clause in the Coin Act, says: 'There is a difficulty under this section in charging the subsequent offence as a *felony* without previously showing that which makes it a felony—namely, the previous conviction for misdemeanor. Moreover, arraigning the prisoner for the subsequent offence as for a felony, is equivalent to saying that the prisoner has been before convicted. The Legislature, perhaps, relies upon the ignorance of the jury as to this distinction.'

"It should seem that this difficulty may easily be surmounted. In the beginning of the indictment the subsequent offence may be alleged in exactly the same terms as if it were a first offence, omitting the word 'feloniously;' then the previous conviction may be stated in the ordinary way; and then the indictment may conclude, 'and so the jurors aforesaid, upon their oath aforesaid, do say that the defendant on, &c., in manner and form aforesaid, *feloniously* did' (stating the subsequent offence again). There not only appears to be no objection to such an indictment, but it would rather seem to be the more accurate form of pleading; for the clauses, which make a subsequent offence after a conviction of a misdemeanor, or of an

offence punishable on summary conviction, a felony, are in this form, 'whosoever, having been convicted of any such misdemeanor, shall afterwards commit any of the *misdemeanors* aforesaid, shall be guilty of felony:' Coin Act, sec. 12 (sec. 12 of Canadian Coin Act) or, 'whosoever having been convicted of any *such offence* (stealing fruit) shall afterwards commit any of *the offences* in this section mentioned, shall be guilty of felony:' sec. 36 of this Act, (sec. 26 of Canadian Larceny Act.) An indictment, therefore, in the form suggested would be strictly in accordance with these clauses; and in principle it is supported by the forms of indictment for perjury, and for murder where several are charged as principals in the first and second degree, and *Rex* vs. *Crighton*, R. & R. 62, appears fully to warrant such an indictment; for there the indictment alleged that the prisoner received a sum of money on account of his masters, and 'did *fraudulently* embezzle' part of it, 'and *so* the jurors aforesaid, upon their oath aforesaid, do say' that the prisoner on, &c., 'in manner and form aforesaid the said sum' from his said masters '*feloniously* did steal,' &c. It was objected that the indictment did not charge that the prisoner '*feloniously* embezzled;' it was answered that this was unnecessary; as the indictment in charging the embezzlement pursued the words of the statute, and that it was sufficient in having drawn the conclusion that *so* the prisoner feloniously stole the money; and, on a case reserved, the conviction was held right. It is obvious that the clauses in these Acts are precisely similar to the clause on which that case was decided.

"It must not be supposed that in what I have said

I mean to raise a doubt as to the validity of an indictment which follows the ordinary form; all I suggest is, that an indictment in the form I have pointed out would be good.

"Mr. *Saunders*, Cr. L. 94, complains that this clause does not provide against the clerk of assize or the clerk of the peace announcing 'a true bill for felony after a previous conviction.' This practice was clearly irregular even before this Act passed, and the reason why no provision was made against it was that no one on the Select Committee of the Commons had ever heard of such a practice. After the trouble the legislature has taken to prevent the previous conviction being mentioned till after the prisoner has been convicted of the subsequent offence, it is to be hoped that any court where such a practice may have prevailed will forbid it in future.

"The proceedings on the arraignment and trial are now to be as follows:

"The defendant is first to be arraigned on that part only of the indictment which charges the subsequent offence; that is to say, he is to be asked whether he be guilty or not guilty of that offence. If he plead not guilty, or if the Court order a plea of not guilty be entered for him under the 7-8 Geo. IV., ch. 28, sec. 2, or 9 Geo. IV., ch. 54, sec. 8 (section 34 Procedure Act of 1869), where he stands mute or will not answer directly to the charge, then the jury are to be charged in the first instance to try the subsequent offence only. If they acquit of that offence, the case is at an end; but if they find him guilty of the subsequent offence, or if he plead guilty to it on arraignment, then

the defendant is to be asked whether he has been previously convicted as alleged, and if he admit that he has, he may be sentenced accordingly; but if he deny it, or stand mute of malice, or will not answer directly to such question, then the jury are to be charged to try whether he has been so previously convicted, and this may be done without swearing them again, and then the previous conviction is to be proved in the same manner as before this Act passed.

"The proviso as to giving evidence of the previous conviction, if the prisoner give evidence of his good character remains unaltered.

"Mr. *Davis* in several places asserts that this clause applies to the proceedings on the trial of every subsequent offence under other Acts, because the words in the middle of the clause are 'the proceedings on any indictment,' &c. This sentence, however general its terms may be, is found in the middle of a clause which is limited in the beginning to subsequent offences against this Act, and this Act relates only to 'larceny and other similar offences,' and there is a precisely similar clause in the Coin Act sec. 37, which would be surplusage, if this clause extended to every subsequent offence. In addition to which the clause in the 6-7 Will. IV., ch. 111, which relates to the like procedure in other cases under other Acts, is not repealed. This being the state of things the more reasonable construction would be, that these clauses in the Larceny and Coin Acts are confined to subsequent offences against those Acts. There can be no doubt that that was the intention of the Select Committee of the Commons, and that the little word 'such' was accidently omitted.

"In a case tried at Gloucester since this Act came into operation, the proof of the identity of the prisoner failed, and Willes, J., directed the jury to be discharged as to the previous conviction, entertaining a doubt whether, if the jury gave a verdict, it might not be pleaded to a future indictment which alleged that previous conviction, and therefore it may be well to say a few words on this point. There is no authority bearing directly on the question, and the pleas of autrefois acquit and convict afford no support to such a plea; for the former rests on the ground that no one ought to be put in peril a second time for the same offence, and the latter on the ground that no one ought to be punished twice for the same offence; now the clauses giving a higher punishment for having been previously convicted, clearly take away the grounds on which both these pleas rest; and all that a finding in favour of a prisoner on the allegation of a previous conviction necessarily amounts to is that the jury are not satisfied that he was previously convicted. It by no means amounts to a determination that he had not been previously convicted. It may, therefore, well be doubted whether any such plea would be good; but, supposing that this difficulty were surmounted, another obstacle presents itself. In order to plead such a plea, the prisoner must set out the indictment in the case where his identity was not proved and his conviction for the felony charged in it, and aver that he was the same person that was so convicted; for until he had been so convicted the

jury could have no jurisdiction to inquire as to his previous conviction, and then it would appear, by his own showing, that he had been convicted of felony before the commission of the offence charged in the indictment to which that plea was pleaded, and thus the question would arise whether the court might not sentence him accordingly. The clauses which apply to subsequent offences merely state that if a person be convicted of any such offence after a previous conviction he shall be more severely punished, but never say in what manner the former conviction *must* be shown. In some instances no form of indictment or proof is given; in others it is stated what form of indictment and what evidence *shall be sufficient.* But it is plain that such provisions are merely for the purpose of facilitating the statement in the indictment and the evidence in support of it, and they leave the question as to the sufficiency of any other statement or proof wholly unaffected; and, therefore, where a defendant has by his plea alleged that he has been previously convicted, it seems open to contend that judgment might well be given for a subsequent offence on such a record; for the judgment ought to be according to the merits as appearing on the whole record.

"But even if this were not held to be so, such a plea would disclose the previous conviction, and the Court would, no doubt, consider it as far as it could in awarding the punishment for the subsequent offence; even if the Court could not award any greater punishment than that which was assigned to the subsequent offence alone. It may, therefore, well be doubted

whether any counsel would think it *prudent* to plead such a plea.

"It is obvious, also, that in any case the prosecutor may allege the previous conviction for felony in the case where the proof of the previous conviction failed, and then the prisoner can have no answer to it."

In *Archbold*, page 363, are found the following remarks and form of conviction under sec. 33 of the English Larceny Act, (sec. 22 of the Canadian Larceny Act.) As observed before, section 26 of our Procedure Act of 1869, is the reproduction of section 116 of the English Larceny Act, under which, the said form of indictment and remarks, in *Archbold*, are given, so that they may be usefully inserted here, as entirely applicable to our own law on the subject, and to be followed with safety:—

"INDICTMENT.

, to wit: The jurors for our Lady the Queen, upon their oath present, that J. S., on the day of A.D. 1866, one oak sapling, of the value of two shillings, the property of J. N., then growing in certain land situate in the parish of , in the County of , unlawfully did steal, take and carry away, thereby then doing injury to the said J. N., to an amount exceeding the sum of one shilling, to wit, to the amount of two shillings, against the form of the statute in such case made and provided: and the jurors aforesaid, upon their oath aforesaid, do say, that heretofore and before the committing of the offence

hereinbefore mentioned, to wit, on the day of , A.D. 1865, at , in the County of , the said J. S. was duly convicted before J. P., one of her said Majesty's justices of the peace for the said county of , for that he the said J. S., on [*etc., as in the first conviction to the words*], against the form of the statute in such case made and provided; and the said J. S. was thereupon then and there adjudged for his said offence, to forfeit and pay the sum of five pounds, over and above the value of the said tree so stolen as aforesaid, and the further sum of two shillings, being the value of the said tree, and also to pay the sum of shillings for costs; and, in default of immediate payment of the said sums, to be imprisoned in the , and there kept to hard labour for the space of calendar months, unless the said sums should be sooner paid; and the jurors aforesaid, upon their oath aforesaid, do further say, that heretofore and before the committing of the offence first hereinbefore mentioned, to wit, on the day of A.D. 1866, at , in the county of the said J. S., was duly convicted before L. S., one of Her Majesty's Justices of the Peace for the said county of , for that he [*etc., setting out the second conviction in the same manner as the first and proceed thus*]: and so the jurors aforesaid, upon their oath aforesaid, do say that the said J. S., on the day and year first aforesaid, the said oak sapling, of the value of two shillings, the property of the said J. N. then growing in the said land, situate in the parish of , in the said county of , feloniously did steal, take and carry away,

&c., against the form of the statute in such a case made and provided.

"Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day of A.D. 1866, one oak sapling of the value of two shillings, the property of the said J. N., then growing in certain land, situate in the said parish of , in the said county of , feloniously did steal, take and carry away, thereby then doing injury to the said J. N., to an amount exceeding the sum of one shilling, to wit, to the amount of two shillings, against the form of the statute in such case made and provided: And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore and before the committing of the offence in this count hereinbefore mentioned, to wit, on the day of , A.D., 1865 [*here set out the first conviction as in the first count*]: and the jurors aforesaid, upon their oath aforesaid, do further say that heretofore, and before the committing of the offence in this count first hereinbefore mentioned, to wit, on the day of A.D. 1866 [*here set out the second conviction as directed in the first count.*]

"A first and second offence against the 24 & 25 Vic., ch. 96, sec. 33, (sec. 22 of our Larceny Act), are both punishable on summary conviction, but a subsequent offence against that section is a felony. The 24 & 25 Vic., ch. 96, sec. 116 (sec. 26 of Procedure Act of 1869), enacts, that 'in any indictment for any offence punishable under this Act, and committed after a previous conviction or convictions for any

felony, misdemeanor, *or offence, or offences punishable under summary conviction*, it shall be sufficient, *after charging the subsequent offence*, to state that the offender was at a certain time and place, or at certain times and places convicted of felony, or of an indictable misdemeanor, or of an offence or offences punishable upon summary conviction (as the case may be) without otherwise describing the previous felony, misdemeanor, offence, or offences,' etc. It appears clear from this enactment that it was intended that the subsequent offence should first be charged, and in both counts of the above form of indictment that course has accordingly been adopted.

"It will be seen that the first count consists of three parts:—1. The charge of the subsequent offence which is charged as an offence, *not as a felony*. 2. The charge of the two previous summary convictions. 3. An averment, commencing, 'and so the jurors aforesaid,' &c. The reason for charging the subsequent offence first has been already given. The reason for charging it it in the first instance as an offence only is as follows:—Sec. 116, above referred to, goes on to enact that 'the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows (that is to say)—the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the Court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall

then, and not before, be asked whether he had been previously convicted, as alleged in the indictment, and if he answer that he had been so previously convicted, the Court may proceed to sentence him accordingly; but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry.'

"In pursuance of this enactment, therefore, the prisoner must be first arraigned for the subsequent offence, and if he plead not guilty, the jury must first inquire and give their verdict concerning that subsequent offence. They cannot find the prisoner guilty of *felonious* stealing at that stage of the proceedings, for they are then ignorant of the previous conviction, and, therefore, at that stage they can only find him guilty of the offence of unlawfully stealing. If they find him guilty of the unlawful stealing, they are then to inquire of the previous convictions. If they find him guilty of the previous convictions, or if he pleads guilty to them, the ingredients are complete which make the felony, which, however, up to that time they have not expressly found. But then follows the third part of the indictment, 'and so the jurors aforesaid,' &c. This last part of the indictment, perhaps, need not be put to the jury in so many words, as the verdict of guilty of the subsequent offence, together with the verdict of guilty of

the previous convictions, amount to a verdict of guilty of the felony, and would, as it should seem, authorize the entry of such a verdict on the record.

"That the omission of the word 'feloniously' in the first part of the indictment does not vitiate it, see *Reg.* vs. *Crighton*, R. & R. 62, in which case an indictment for embezzlement was held good, in which the word 'feloniously' was omitted before the word 'embezzled,' in the first part of the indictment, which, however, concluded,—and so the jurors say that the prisoner did 'feloniously embezzle, steal, take and carry away,' &c.

"Sec. 116 of 24–25 Vic., ch. 96, is analogous to sec. 37 of 24–25 Vic., ch. 99 (The Coinage Act) [*these two clauses are combined in sec.* 26 *of our Procedure Act of* 1869], and the mode of proceeding at the trial above suggested was approved by the Court of Criminal Appeal in *Reg.* vs. *Martin*, 11 Cox, 343, where the prisoner was indicted under sec. 12 of 24–25 Vic., ch. 99 (sec. 12 of our Coin Act), for being unlawfully in possession of counterfeit coin, after having been convicted of unlawfully uttering counterfeit coin. The Court held that, as sec. 37 of 24–25 Vic., c. 99 (sec. 26 Procedure Act of 1869) regulated the mode of proceeding at the trial, the prisoner must be first arraigned upon the subsequent offence, and evidence respecting the subsequent offence must first be submitted to the jury, and the charge of the previous conviction must not be inquired into until after the verdict on the charge of the subsequent offence.

"The second count varies from the first in charging the subsequent offence in the first instance as a felony:" *Archbold*, 363.

In the case hereinbefore cited in *Archbold*, *Reg.* vs. *Martin*, 11 Cox. 343, Lush, J., said that when he decided the unreported case mentioned in *Archbold* as a different ruling on the question, (p. 757, of the 17th edit.) his attention had not been called to the clause under consideration, and he concurred with the Court in the judgment. *Reg.* vs. *Goodwin*, 10 Cox, 534, then stands overruled. Nor can *Reg.* vs. *Hilton*, Bell 20, be followed in Canada, since the enactment of the said section of the Procedure Act.

In *Reg.* vs. *Clarke*, Dears. 198, it was held that any number of previous convictions may be alleged in the same indictment, and, if necessary, proved against the prisoner; by the aforesaid section this is undoubtedly also allowed here.

In *Reg.* vs. *Fox*, 10 Cox, 502, upon a writ of error by the Crown to increase the sentence, the Irish Court of Criminal Appeal perceived that it appeared from the record that the provisions of sec. 116 of the Larceny Act, under which the indictment had been tried, as to the arraigning of the prisoner, &c., had been neglected, and, thereupon, *ex proprio motu*, quashed the conviction.

In *Reg.* vs. *Spencer*, 1 Car. & K. 159, it was held that the indictment need not state the judgment, but the introduction of the words given in *italics*, *supra*, in

clause 26 of the Procedure Act, seem to require with us the statement of the judgment. It will be at all events, more prudent to allege it.

The certificate must state that judgment was given for the previous offence and not merely that the prisoner is convicted: *Reg.* vs. *Ackroyd*, 1 C. & K., 158; *R.* vs *Stonnell*, 1 Cox, 142; for the judgment might have been arrested, and the statute says that the certificate is to contain the substance and *effect* of the indictment and conviction for the previous offence; until the sentence, there is no perfect conviction.

See *post*, sec. 83 of the Procedure Act of 1869, as to punishment in the case of a second conviction for felony.

At common law, a subsequent offence is not punishable more severely than a first offence; it is only when a statute declares that a punishment may be greater after a previous conviction that this clause 26 of the Procedure Act of 1869 applies. So in an indictment for a misdemeanor, as for obtaining money by false pretences, a previous conviction for felony cannot be charged: *Reg.* vs. *Garland*, 11 Cox, 224. And then this clause does not prevent the prosecution from disregarding, if it chooses, the fact of a previous conviction and from proceeding as for a first offence. But the Court cannot take any notice of a previous conviction, unless it were alleged in the indictment and duly proved on the trial, for giving a greater punishment than allowed by law for the first offence: *Reg.* vs. *Summers*, 11 Cox, 248; *Reg.* vs. *Willis*, 12 Cox, 192.

To complete the proof required on a previous conviction charged in the indictment, when the prisoner does not admit it, it must be proved that he is the same person that is mentioned in the certificate produced, but it is not necessary for this, to call any witness that was present at the former trial; it is sufficient to prove that the defendant is the person who underwent the sentence *mentioned in the certificate*: *Reg.* vs. *Crofts*, 9 C. & P. 219; 2 *Russell*, 352.

By the proviso of the said section of the Procedure Act of 1869, it is enacted that, if upon such a trial for a subsequent offence, the defendant gives evidence of his good character, it shall be lawful for the prosecutor to give in reply evidence of the previous conviction, before the verdict on the subsequent offence is returned, and then the previous conviction forms part of the case for the jury on the subsequent offence.

It has been held on this proviso, that if the prisoner cross-examines the prosecution's witnesses, to show that he has a good character, the previous conviction may be proved in reply: *Reg.* v. *Gadbury*, 8 C. & P. 676.

This doctrine was confirmed in *Reg.* v. *Shrimpton*, 2 Den. 319, where Lord Campbell, C. J., delivering the judgment of the Court, said: "It seems to me to be the natural and necessary interpretation to be put upon the words of the proviso in the statute, that if, whether by himself or by his counsel, the prisoner *attempts* to prove a good character, either directly, by calling witnesses, or indirectly, by cross-examining the

witnesses for the Crown, it is lawful for the prosecution to give the previous conviction in evidence for the consideration of the jury." In the course of the argument Lord Campbell said that, however, he would not admit evidence of a previous conviction, if a witness for the prosecution, being asked by the prisoner's counsel some question which has no reference to character, should happen to say something favourable to the prisoner's character.

It is said in 2 *Russell*, 354: "It is obvious, that where the prisoner gives evidence of his good character, the proper course is for the prosecutor to require the officer of the Court to charge the jury with the previous conviction, and then to put in the certificate and prove the identity of the prisoner in the usual way. If the prisoner gives such evidence during the course of the case for the prosecution, then this should be done before the case for the prosecution closes; but if the evidence of character is given after the case for the prosecution closes, then the previous conviction must be proved in reply."

In connection with this clause of the Procedure Act may be mentioned the last part of sec. 72 of ch. 31 of 32-33 Vic.: "*An Act respecting the duties of Justices out of Sessions, in relation to summary convictions and orders*," which is in the following words: ". . . . . and upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the Court, or proved to be a true copy, shall be

sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against, until the contrary be shown."

It will undoubtedly be more prudent, with this clause, and with the phraseology of sec. 26 of the Procedure Act, in the case of a summary conviction, to have an authentic copy of the conviction; the certificate allowed by sec. 26 seems to be allowed only where a previous conviction was upon an indictment. The conviction should be certified, in case of a summary conviction, by the clerk or officer of the Court, where, according to the said chapter 31, the Justice of the Peace, has returned the conviction: it is doubtful if a copy certified by the Justice who pronounced the conviction, or by his clerk, would be legal evidence of the conviction, under these clauses.

CLAUSE CONCERNING THE FORMS GIVEN IN THE SCHEDULE, AND FORMS OF INDICTMENT GENERALLY.

Sec. 27.—The forms of indictment contained in the Schedule A to this Act may be used, and shall be sufficient as respects the several offences to which they respectively relate; and as respects offences not mentioned in the Schedule, the said forms shall serve as a guide to shew the manner in which the offences are to be charged, so as to avoid surplusage and verbiage, and the averment of matters not necessary to be proved, and the indictment shall be good if, in the opinion of the Court, the prisoner will sustain no injury from

its being held to be so, and the offence or offences intended to be charged by it can be understood from it.

Very few English cases applicable to this clause can be cited. In England, no statute has ever given forms of indictment, though forms of summons, convictions, &c., accompany the Jervis Acts on summary conviction.

In *Labalmondière* vs. *Frost*, 1 E. & E., 527; 5 Jur., N. S. 789; and *Egginton* vs. *Lichfield Mayor*, 24 L. J. Q. B. 360, proceedings were held bad, though exactly drawn according to the forms given with the Jervis Acts. But in *Barnes* vs. *White*, 1 C. B. 192; *In re Allison*, 10 Ex., 561; and *Reg.* vs. *Johnson*, 8 Q. B., 102, it was held that where a statute gives a form of conviction, it is sufficient to follow the form so given.

In *Re Allison*, 10 Ex., 561, Park, B., said: "I entirely agree that if the justices substantially adopt the forms given by the statute, they do all that is required of them; if this were not so, the act itself would prove only *a snare to entrap persons.*"

But this doctrine must be taken with some limitation, and in the case of *Reg.* vs. *Johnston*, above cited, it was held that where a form given by a statute does not fully describe the offence, the conviction must nevertheless fully describe it. And, to use the words of Parke, B., the forms given in Schedule A of the Procedure Act are, many of them, *snares to entrap persons.*

Section 27 says that these forms shall serve as a guide, so as to avoid surplusage and verbiage, and the averment of matters not necessary to be proved. Is

it to avoid surplusage and verbiage that the forms for murder, rape, larceny, &c., aver a special venue, notwithstanding sec. 15 of the Procedure Act says it is not necessary? Is it to avoid verbiage that the form for rape avers that the woman was above twelve years of age? Has the word *burglariously* in an indictment for burglary, been considered a surplusage before 1869? &c.

We give here this schedule, with the remarks on each form:

Murder.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath present, that A. B., on the day of , in the year of Our Lord, one thousand eight hundred and , at , in the County (*or* District) of , did feloniously, wilfully, and of his malice aforethought, kill and murder one C. D.

Remarks.—It is not necessary to state where the offence was committed: the district or county in the margin is the venue for all the facts stated in the indictment: Sec. 15, Procedure Act of 1869.

Manslaughter.

County (*or* District) of , to wit: } *Same as last form, omitting* "wilfully and of his malice aforethought," *and substituting the word* "slay" *for the word* "murder."

Remarks.—See under preceding form.

Bodily Harm.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath present, that J. B., on the day of , at did feloniously administer to (*or cause to be taken by*) one A. B., poison (or other destructive thing), and did thereby cause bodily harm to the said A. B., with intent to kill the said A. B. (*or* C. D.)

Remarks.—This is a stupendous form. The heading "Bodily harm" means wounding or poisoning with intent to murder, under sec. 10 of the Offences against the Person Act. The averment "and did thereby cause bodily harm" is altogether a surplusage; but if entered at all it should say "grievous" bodily harm, in the words of the statute. Then the special venue, as in the two last forms, is unnecessary. And last, though not least, the words "with intent to kill" describe no offence whatsoever. "With intent feloniously, wilfully and of his malice aforethought to kill *and murder*," or, in the words of the statute, "with intent to commit murder," are the correct averments in such cases—in fact, the only ones used in practice. And it is certain that nowhere can be seen an indictment for wounding with intent to murder drawn in the above form.

The Court of Queen's Bench (Quebec, March, 1872, 2 Revue Critique, 238), in *Reg.* vs. *Carr*, quashed, after verdict, an indictment for wounding with intent to murder, which was drawn on the above form, and did not contain the words "wilfully and of his malice

aforethought." See, *ante*, vol 1, pp. 227 and 229, for precedents of indictments under sec. 10 of 32–33 Vic., ch. 20.

Rape.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present, that A. B., on the day of , at , by force and against her will, feloniously ravished and carnally knew C. D., a woman above the age of *twelve* years.

Remarks.—As under the three last forms, the special venue is unnecessarily alleged here. Then, where is there a form of indictment for rape in *Chitty*, *Starkie*, *Burn's* Justice, *Archbold*, *Bishop*, &c., alleging that the woman was above twelve? Why not allege, also, that the prisoner was above fourteen?

See a form, *ante*, vol. 1, p. 308.

Simple Larceny.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath present, that A. B., on the day of , at , did feloniously steal a *gold watch*, the property of C. D.

Remarks.—Why not say, as in all the precedents to be found since hundreds of years, *feloniously steal, take and carry away?*

See form, *ante*, vol. 1, p. 394.

Robbery.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath present, that A. B., on the day of , at , did feloniously rob C. D., and at the time of, or immediately before or after such robbery (*if the case be so*), did cause grievous bodily harm to the said C. D., (*or to any person, naming him*).

Remarks.—This form is bad, either before or after verdict.

See a form for robbery, *ante*, vol. 1, p. 460, and for robbery with aggravating circumstances, p. 474.

The above form does not aver what was stolen, neither that the taking was effected with violence from the person and against the will of the party robbed. "Did feloniously rob" cannot replace all these averments, which are necessary ingredients of the offence, any more than "did feloniously murder" could be held sufficient upon an indictment for murder, without the words "wilfully and of his malice aforethought." Then as to the last part of this form, supposed to apply to an indictment for robbery with aggravating circumstances, it is also defective, first in not having the word "feloniously," and then for charging "did cause grievous bodily harm," with a robbery. There is no such offence in law. By sec. 42 of the Larceny Act, it is provided for a robbery with wounding, beating, striking, or using any other personal violence, but there is no mention of a robbery with causing grievous bodily harm. This being a statutory offence,

if the words of the statute are not followed, the indictment charges no legal offence whatever, and is not aided by verdict.

In *Rex.* vs. *Pelfryman*, 2 Leach, 563, an indictment for robbery was held bad, after verdict, for stating an assault, without saying that such assault was made *feloniously*, though the indictment alleged that the defendant, *the said K. O. in corporeal fear and danger of his life did then and there, in the King's highway aforesaid, feloniously did put*—

In *Lennox's case*, 2 Lewin, 268, an indictment for robbery merely alleging that the prisoner with force and arms assaulted and robbed the prosecutor, was good after verdict, and that the omission of a more particular description of the offence was cured by 7 Geo. IV, ch. 64, sec. 21 (sec. 79 of the Procedure Act), as the indictment was in the words of the statute. But the indictment was, in that case, though not perfect, certainly better than the above form; yet, it would undoubtedly have been quashed on demurrer.

Burglary.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath present, that A. B. on the day of , at , did feloniously break into and enter the dwelling house of C. D., in the night time, with intent to commit a felony therein (*or as the case may be*).

Remarks.—It would be difficult to find anywhere an indictment for burglary without the word "burg-

lariously." This word has always been held as essential, in such cases, as the word feloniously, in all felonies. This form is also defective, in not stating, against all known principles on the matter, what felony the prisoner intended to commit. See *ante*, vol. 1, pages 509, 510; also *Archbold*, 60.

Stealing Money.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath present, that A. B. on the day of , at , did feloniously steal a certain sum of money, to wit, to the amount of dollars, the property of one C. D. (*or as the case may be.*)

Remarks.—It is not clear what difference there is between this form and the form given *ante*, in the same schedule, for simple larceny. The framers of the Act might, perhaps, also have told what is this offence of *stealing money*, as distinguished from *simple larceny*. Perhaps they had in mind the offence of *stealing from the person*. Then it would have been better to insert these words in the indictment.

See *ante*, vol. 1, p. 458, for a form of indictment for stealing from the person.

Embezzlement.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath present, that A. B., on the day of , at , being a servant (*or* clerk)

then employed in that capacity by one C. D., did then and there, in virtue thereof, receive a certain sum of money—to wit, to the amount of , for and on account of the said C. D., and the said money did feloniously embezzle.

Remarks.—This form is also defective. See *ante*, vol. 1, pp. 544 to 549, for the new clause on embezzlement, *Greaves'* remarks thereon, and a form of indictment.

False Pretences.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, on their oath present, that A. B., on the day of , at , unlawfully, fraudulently and knowingly by false pretences, did obtain from one C. D., *six yards of muslin*, of the goods and chattels of the said C. D., with intent to defraud.

Remarks.—It has been seen, *ante*, vol. 1, p. 588, that, in such indictments, the false pretences must be set out at full length, and, after verdict, an indictment was quashed for not stating what the false pretences were: *Reg.* vs. *Mason*, 2 T. R. 581. This decision was before the statute which enacts that, *after verdict*, an indictment in the words of the statute is sufficient.

In *Reg.* vs. *Goldsmith*, 12 Cox, 483, it is said that the question whether such an indictment, not stating what are the false pretences, would be sufficient now, after verdict, has not been raised.

In Ontario and Quebec, before the Consolidation Act, sec. 35 of ch. 99 Con. Stat. Can. expressly dispensed with the necessity of setting out the false pretences in all indictments for obtaining by false pretences; but this clause has been repealed by the General Repeal Act of 1869, and the careful practitioner will not follow the form given above.

See form, *ante*, vol 1, p. 586; also remarks under sec. 79, *post*.

Offences against the Habitation.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath present, that A. B., on the day of , at , did feloniously and maliciously set fire to the dwelling-house of C. D., the said C. D. (*or some other person by name, or if the name be unknown*, some person) being therein.

Remarks.—The offence for which this form is intended is created by sec. 2 of 32–33 Vic., ch. 22 (*ante*, vol. 1, p. 645), which says: Whoever unlawfully and maliciously sets fire, &c., so that the above form, not having the word *unlawfully*, is deficient. Local description of the house, &c., is also considered necessary in indictments for this class of offences.

In *Reg.* vs. *Davis*, 1 Leach, 493, the indictment averred that the defendant *unlawfully*, *maliciously* and *feloniously* did shoot, &c. The words of the statute creating the offence charged were, "That if any

person shall *wilfully* and *maliciously* shoot . . . he shall be guilty of felony." As the word "wilfully" was not in the indictment, it was held bad.

So in *Reg.* vs. *Cox*, 1 Leach, 71, it was held that the term "wilful" in a statute is a material description of the offence, and that an indictment for such an offence must necessarily aver that the act was "wilful" or done "wilfully." *Quod voluit dixit*, said Patteson, J., in *Reg.* vs. *Bent.*, 1 Den. 157: if the Legislature has said that the doing such an act *wilfully* shall be an offence, the indictment must charge the defendant to have done it *wilfully*. That the words of the statute must be pursued is a safe and certain rule; an inquiry whether other words have the same meaning, must be precarious and uncertain.

So in *Rex* vs. *Turner*, 1 Mood. 239, it was held that if a statute makes it criminal to do an act *unlawfully* and *maliciously*, an indictment must state that it was done unlawfully: stating that it was done feloniously, voluntarily and maliciously is not enough. So an indictment charging the prisoner with "feloniously, wilfully and maliciously" cutting, is defective, and judgment will be arrested upon a verdict thereon, if the statute creating the offence uses the word "unlawfully:" *Rex* vs. *Ryan*, 2 Mood. 15; *Rex* vs. *Lewis*, 2 *Russell*, 1067.

Malicious Injuries to Property.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath present, that A. B., on the

day of , at , did feloniously and maliciously set fire, or attempt to set fire to a certain building or erection—that is to say (a house *or* barn, *or* bridge, *or as the case may be*) the property of one C. D., (*or as the case may be*).

Remarks.—The word "unlawfully" is here also erroneously left out. See remarks under last form. Any indictment under sec. 3 of ch. 22, 32–33 Vic. (*ante*, vol. 1, p. 646), must aver "with intent thereby to injure" (*or* defraud).

See forms, *ante*, vol. 1., pp. 647 and 657.

Forgery.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath present, that A. B. on the day of , at , did feloniously forge (*or* utter, knowing the same to be forged), a certain *promissory note, &c.*, (*or* clandestinely) and without the consent of the owner did make an *alteration* in a certain written instrument with intent to defraud, (*or as the case may be*).

Remarks.—The venue is unnecessarily alleged in the body of this indictment. It is otherwise altogether defective. A count for uttering is always added, in practice, to a count for forgery. In law, every fraudulent alteration of an instrument amounts to a forgery of the whole, and sec. 45 of the Forgery Act (*ante.*, vol. 1, page 144) has, besides, a special enactment to

that effect. It would be sufficient then to charge a forgery as in the first count; but, at all events, if thought better to add a count charging the fraudulent alteration, the word "clandestinely" in the above form should be replaced by "feloniously," and the alteration, in a second count, should be set out at full length.

See, *ante.*, vol. 1, pages 54, 62, 100 and 144.

Coining.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, on their oath present, that A. B., on the day of , at , did feloniously counterfeit a gold coin of the United Kingdom, called a *sovereign*, current by law in Canada, with intent to defraud, *or*

had in his possession a counterfeit of a gold coin of the United Kingdom, called a *sovereign*, current by law in Canada, knowing the same to be counterfeit, and with intent to defraud by uttering the same.

Remarks.—The words "with intent to defraud" are a surplusage in the count for counterfeiting. The last part of this form is for having in possession a counterfeit gold coin, with intent to utter it. This offence is a misdemeanor.

See *ante.*, vol. 1, pages 4 and 17.

Perjury.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath present, that, heretofore, to wit, at the (*Assizes*) holden for the County (*or* District) of , on the day of , in the year of our Lord one thousand eight hundred and , before , (*one of the Judges of our Lady the Queen*), a certain issue between one E. F. and one J. H., in a certain action of *covenant* was tried, upon which trial A. B. appeared as a witness for and on behalf of the said E. F., and was then and there duly *sworn* before the said , and did then and there, upon his *oath* aforesaid, falsely, wilfully and corruptly depose and *swear* in substance and to the effect following, "*that he saw the said G. H. duly execute the deed on which the said action was brought,*" whereas, in truth, the said A. B. did not see the said G. H. execute the said deed, and the said deed was not executed by the said G. H., and the said A. B. did thereby commit wilful and corrupt perjury.

Subornation of Perjury.

County (*or* District of ; to wit: } *Same as the last form to the end and then proceed:*—And the Jurors further present that, before the committing of the said offence by the said A. B., to wit, on the day of , at , C. D. unlawfully, wilfully and corruptly

did cause and procure the said A. B. to do and commit the said offence in manner and form aforesaid.

Remarks.—These two last forms seem good, although in the last one, the words "aforesaid upon their oath aforesaid" ought to be inserted after the words "and the Jurors." Each count is a separate presentment, and every presentment must appear to be upon oath; 1 *Chitty*, Cr. L. 249; 1 *Bishop*, Cr. Proced. 429.

Offences Against the Public Peace.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath present, that, A.B., on the day of , at , with *two* or more persons, did riotously and tumultuously assemble together to the disturbance of the public peace, and with force did demolish, pull down or destroy, (*or* attempt, or begin to demolish, &c.,)a certain building or erection of C. D.

Remarks.—This form is very defective. It is intended for the offence created by sec. 15, of 32-33 Vic. ch. 22 (*ante*, vol. 1, page 661), but does not describe the offence in the words of the statute, the word "unlawfully" being omitted. Then the word "feloniously" is left out, though the offence is a felony.

See, *ante*., remarks under form for "offences against the habitation:" see a form, *ante*, vol. 1, page 662.

Offences against the Administration of Justice.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath present, that, A.B., on the day of , at , did corruptly take or receive money under pretence of helping C. D. to a chattel, (*or* money, &c.,) that is to say, a horse, (*or* five dollars, *or* a note, *or* a carriage), which had been stolen, (*or as the case may be*).

Remarks,—The offence charged or intended to be charged in this form is created by sec. 115 of the Larceny Act of 1869 (*ante*, vol. 1, page 633), and thereby is made a felony. Yet the above form has not the word "feloniously." Then, by this same section, the taking a reward is a felony, "unless he (the person who has taken the reward) has used all due diligence to cause the offender to be brought to trial." This is an exception, and a well established rule of pleading directs that if there be an exception contained in the same clause of an Act creating an offence, the indictment must show, negatively, that the defendant does not come within the exception: *Archbold*, 62.

See, *ante*, vol. 1, page 633 for a form.

Bigamy or Offences against the Law for the Celebration of Marriage.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath present, that, A.B., on the

day of , at , being then married, did feloniously marry C.D. during the lifetime of the wife of the said A. B.—(*or* not being duly authorized, did celebrate [*or* assist in the celebration of] a marriage between C. D. and E.F.,—*or*, being duly authorized to marry, did celebrate marriage between C. D. and E. F. before proclamation of banns according to law, (*or* without a license for such marriage under the hand and seal of the Governor).

Remarks.—See *ante*, vol. 1, page 327, a form of indictment for bigamy. The other offences to which the above form of this schedule applies, are created in Ontario, by ch. 102, Con. Stat. U. C.; in New Brunswick, by ch. 146 of the Revised Statutes; in Nova Scotia, by ch. 161, sec. 3, of the Revised Statutes; and in the Province of Quebec, by articles 157 and 158 of the Civil Code; but in Quebec these offences are not indictable: sec. 16 of the Civil Code. Being specially provided for, they do not fall under sec. 6, par. 15, of of ch. 5, Con. Stat. C., nor under sec. 7, par. 20, of 31 Vic., ch. 1 D.

Offences relating to the Army.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath present, that A. B., on the day of , at , did solicit (*or* procure) a soldier to desert the Queen's service, (*or as the case may be*).

Remarks.—This indictment is very defective. It is based on 32-33 Vic., ch. 25 : see *ante*, vol. 1, page 754 ; but this statute has nowhere the words "*solicit* a soldier to desert." Then, the clause creating the offence charged in the said indictment contains an exception. "Whosoever, *not being an enlisted soldier*," &c. So, the indictment must specially allege that the defendant was not himself an enlisted soldier, in the terms of the statute. See *ante*, remarks under form of indictment for "offences against the Administration of Justice." Then *procuring a soldier to desert* is too general. The name, &c., must be given.

This offence is also punishable on summary conviction.

Offences against Public Morals and Decency.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath present, that A. B., on the day of , at , did keep a common gaming, bawdy *or* disorderly house (*or* room).

Remarks.—The offence of keeping a common gaming, bawdy or other disorderly house is provided for, in New Brunswick by chap. 145 of the Revised Statutes, and in Nova Scotia by chap. 160 of the Revised Statutes.

The 32-33 Vict. ch 32, "*An Act respecting the prompt and summary administration of Criminal Justice in certain cases*," of 1869, contains also special provisions for the trial of these offences. This Act, as to New

Brunswick and Nova Scotia, is amended by 37 Vic., ch. 40. Its provisions are extended to Manitoba, by 37 Vic. ch. 39, and to British Columbia, with certain variances, by 37 Vic. ch. 42.

The form of indictment above given is defective. See forms in *Archbold*, 894, 895.

General Form.

County (*or* District) of , to wit: } The Jurors for our Lady the Queen, upon their oath present that A. B., on the day of , at , did (*here describe the offence in the terms in which it is described in the law, or state such facts as constitute the offence intended to be charged, and if the offence be felony state the act to have been done feloniously*).

Remarks.—These are certainly very wise recommendations. But this form ought to have been the first in the schedule, so that probably the other forms therein given would then have practically benefited by the said recommendations.

As to alleging a special venue in an indictment, in the cases where local description is not required, see *ante*, sec. 15 of the Procedure Act, and remarks thereon.

PRELIMINARY REQUIREMENTS AS TO CERTAIN INDICTMENTS.

Sec. 28.—No bill of indictment for any of the offences following, viz. : perjury, subornation of perjury, con-

spiracy, obtaining money or other property by false pretences, keeping a gambling-house, keeping a disorderly house, or any indecent assault, shall be presented to, or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless the indictment for such offence is preferred by the direction of the Attorney-General, or Solicitor-General for the Province, or of a Judge of a Court having jurisdiction to give such direction or to try the offence.

Sec. 29.—Where any charge or complaint is made before any one or more Justices of the Peace, that any person has committed any of the offences in the next preceding section mentioned, within the jurisdiction of such justice or justices, and such justice or justices refuses or refuse to commit or to bail the person charged with such offence, to be tried for the same, then, in case the prosecutor desires to prefer an indictment, respecting the said offence, it shall be lawful for the said justice or justices, and he or they is or are hereby required to take the recognizance of such prosecutor to prosecute the said charge or complaint, and to transmit the recognizance, information, and depositions, if any, to the proper officer, in the same manner as such justice or justices would have done,

in case he or they had committed the person charged to be tried for such offence.

These two clauses form, in England, the Act known as the "Vexatious Indictments Act," 22-23 Vic., ch. 17 (1859).

The following offences fall under this enactment:

Perjury,
Subornation of Perjury,
Conspiracy,
Obtaining money or other property by false pretences,
Keeping a gambling-house,
Keeping a disorderly house, and
Any indecent assault.

The reasons for this legislation are thus given in *Archbold*, page 5:—

"Formerly any person was at liberty to prefer a bill of indictment against another before a grand jury for any crime, without any previous inquiry before a justice into the truth of the accusation. This right was often much abused, because, as the grand jury only hear the evidence for the prosecution, and the accused is totally unrepresented before them, it frequently happened that a person wholly innocent of the charge made against him, and who had no notice that any proceedings were about to be instituted, found that a grand jury had been induced to find a true bill against him, and so to injure his character and put him to great expense and inconvenience in defending himself against a groundless accusation." And,

it is added, "the above provisions have been introduced, in order in some degree to remedy this state of the law."

The Imperial statute requires that the indictment, when authorized by a Judge, or by the Attorney-General or Solicitor-General, should be preferred by the direction, *or with the consent in writing*, of such Judge, or Attorney-General or Solicitor-General Though the words "in writing" are omitted in our statute, there is no doubt that no verbal proof of such a direction would be sufficient for the grand jury, and that this direction must be in writing. By the terms of the clause itself, any Judge of any court having jurisdiction to try the offence may give this direction, as well as any Judge authorized under sec. 6 of 32–33 Vic., ch. 23, "An Act respecting Perjury," to direct that a person guilty of perjury before him be prosecuted.

It is not necessary that the performance of any of the conditions mentioned in this statute should be averred in the indictment or proved before the petty jury: *Knowlden* vs. *Reg.* (in error), 5 B. & S., 532; 9 Cox, 483.

When the indictment is preferred by the direction in writing of a Judge of one of the Superior Courts, it is for the Judge to whom the application is made for such direction to decide what materials ought to be before him, and it is not necessary to summon the party accused, or to bring him before the Judge: the

Court will not interfere with the exercise of the discretion of the Judge under this clause: *Reg.* vs. *Bray*, 3 B. & S., 255; 9 Cox, 215.

The provisions of the above statute must be complied with in respect to every count of an indictment to which they are applicable, and any count in which they have not been complied with must be quashed: *Reg.* vs. *Fuidge*, L. & C. 390; 9 Cox. 430. So if an indictment contains one count for obtaining money by false pretences on the 26th of September, 1873, and another count for obtaining money by false pretences on the 29th of September, 1873, though the false pretences charged be the same in both cases, the second count must be quashed, if the defendant appears to have been committed only for the offence of the 26th September.

Where three persons were committed for conspiracy, and afterwards the Solicitor-General, acting under this clause, directed a bill to be preferred against a fourth person, who had not been committed, and all four were indicted together for the same conspiracy, such a course was held unobjectionable: *Knowlden* vs. *Reg.* (in error), 5 B. & S., 532; 9 Cox, 483.

Where 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 of the defendant, even after he has pleaded; but in a doubtful case, they will leave him to his writ of error: *Reg.* vs. *Heane*, 4 B. & S. 947; 9 Cox, 433.

It is probable that the mere fact of an indictment being signed "B. W., Attorney-General, by J. O. duly authorized," would be held not to be a sufficient direction, under this clause; this power must be exercised by the Attorney-General or Solicitor-General in person, and cannot be delegated. It is, in this respect, on the same footing as a *nolle prosequi* or the *fiat* for a writ of error: see *Reg.* vs. *Dunlop*, 11 L. C. Jur. 271, and *Archbold*, 105, 106.

A prosecutor who has required the magistrates to take his recognizances to prosecute, under section 29, *ante*, of the Procedure Act of 1869, when the magistrates have refused to commit or to bail for trial the person charged, must either go on with the prosecution or have his recognizances forfeited, as it would defeat the object of the statute if he was allowed to move to have his recognizances discharged: *Reg.* vs. *Hargreaves*, 2 F. &. F. 790.

And under this section 29, a magistrate, if he refuses to commit or bails the person charged, is bound to take the recognizance of the prosecutor, if the information discloses any of the offences mentioned in the statute; but he has a discretion to refuse, if no indictable offence is disclosed: where, therefore, the offence charged is that of conspiracy, by three persons, two of whom are members of the House of Lords to deceive the House and so to prevent the due course of justice and injure and prejudice a third person by making statements in the House which they knew to be false, the magistrate is right in refusing to

take any proceedings as members of either House of Parliament are not civilly or criminally liable for any statements made in the House, nor for a conspiracy to make such statements: *Ex parte Wason*, 38 L. J. Q. B. 302.

In England, the corresponding statute 22–23 Vic., is amended by secs. 1 and 2 of 30-31 Vic., ch. 35, which provide for the payment of the costs of the accused by the prosecutor, in certain cases where the accused is acquitted by the grand jury, and extend the provisions of the first Act by enacting that it will be sufficient, for the purposes of the act, if the offence charged in the indictment is substantially the same as the one gone into before the magistrates, though not in the same form. Of course, this amendment is not law in Canada; but, it is as well not to lose sight of it in reference to the cases decided in England on the "Vexatious Indictments Act" since 1867. See *Reg.* v. *Bell*, 12 Cox, 37.

ON TRAVERSE AND POSTPONEMENT OF TRIAL.

Sec. 30.—No person prosecuted shall be entitled as of right to traverse or postpone the trial of any indictment preferred against him in any court, or to imparl or to have time allowed him to plead or demur to any such indictment: provided always that if the court, before which any person is so indicted, upon the application of such person, or otherwise, is of opinion that he ought to be allowed a further time to plead or demur or to prepare for his defence, or otherwise, such court

may grant such further time to plead or demur, or may adjourn the receiving or taking of the plea or demurrer, and the trial or (as the case may be) the trial of such person to some future time of the sittings of the court, or to the next or any subsequent session or sittings of the court, and upon such terms as to bail or otherwise, as to the court seems meet, and may, in the case of adjournment to another session or sitting, respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session or sittings, without entering into any fresh recognizances for that purpose.

Formerly, it was always the practice in felonies to try the defendant at the same assizes: 1 *Chitty*, C. L. 483, but it was not customary nor agreeable to the general course of proceedings, unless by consent of the parties, or where the defendant was in gaol, to try persons indicted for misdemeanors during the same term in which they had pleaded not guilty or traversed the indictment: 4 *Blackstone*, 351.

Traverse took its name from the French *de travers*, which is no other than *de transverso* in Latin signifying *on the other side;* because as the indictment on the one side chargeth the party, so he, on the other side, cometh in to discharge himself: *Lambard*, 540.

The word *traverse* is only applied to an issue taken upon an indictment for a misdemeanor; and it

should rather seem applicable to the fact of putting off the trial till a following sessions or assizes, than to the joining of the issue; and, therefore, perhaps, the derivation is from the meaning of the word *transverto*, which, in barbarous Latin, is to go over, *i.e.*, to go from one sessions, &c., to another, and thus it is that the officer of the court asks the party whether he be ready to try then, or will traverse over to the next sessions, &c., but the issue is joined immediately by pleading not guilty: 5 *Burn's* Justice, 1019.

To *traverse* properly signifies the general issue or plea of *not guilty*: 4 *Stephen's* Comm., 419.

To *imparl* is to have licence to settle a litigation amicably, to obtain delay for adjustment: *Wharton's* Law Lexicon, *verb.* "*imparl.*"

The above section of our Procedure Act is taken from the 60 Geo. III. & 1 Geo. IV., ch. 4, secs. 1 and 2, and the 14–15 Vic., ch, 100, sec. 27, and abolishes all these distinctions in the practice between felonies and misdemeanors.

On the 14–15 Vic., ch. 100, sec. 27, *Greaves* says:—

"This section is intended wholly to do away with traverses, which were found to occasion much injustice. A malicious prosecutor could formerly get a bill for any frivolous assault found by the grand jury, and cause the defendant to be apprehended during the sitting of the Court; and then he was obliged to traverse till the next session or assizes, as he could not

compel the prosecutor to try the case at the sessions or assizes at which the bill was found. This led to the expense of the traverse-book and sundry fees, which operated as a great hardship on the defendant, not unfrequently an innocent person. Again, the defendant, in many instances, has been able to turn his right to traverse into a means of improperly putting the prosecutor to expense and inconvenience. The intention of the section is to abolish traverses altogether, and to put misdemeanors precisely on the same footing in this respect as felonies. In felonies, the prisoner has no *right* to postpone his trial, but the Court, on proper grounds, will always postpone the trial. Under this section, therefore, no defendant in a case of misdemeanor can insist on postponing his trial; but the Court in any case, upon proper grounds being adduced, not only may, but ought to, order the trial to be postponed. If, therefore, a witness be absent, or ill, or there has not been reasonably sufficient time for the defendant to prepare for his defence, or there exist any other ground for believing that the ends of justice will be better answered by the trial taking place at a future period, the Court would exercise a very sound discretion in postponing the trial accordingly."

There are several cases in which, upon a proper application, the Court will put off the trial. And it has been laid down that no crime is so great, and no proceedings so instantaneous, but the trial may be put off, if sufficient reasons are adduced to support the application; but to grant a postponement of a trial on the

ground of the absence of witnesses, three conditions are necessary: 1st, the Court must be satisfied that the absent witnesses are material witnesses in the case; 2nd, it must be shown that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses; and, 3rd, the Court must be satisfied that there is a reasonable expectation that the attendance of the witnesses can be procured *at* the future time to which it is prayed to put off the trial: *Rex* vs. *D'Eon*, 3 Burr., 1514.

But if an affidavit is given that, on cross-examination, one of the absent witnesses for the prosecution who has been bound over to appear, can give material evidence for the prisoner, this is sufficient ground for postponing the trial, without showing that the defence has made any endeavour to procure this witness's attendance, as the prisoner was justified in believing, that, being bound over, the witness would be present: per Cresswell, J., *Reg.* vs. *McCarthy*, Car. & M. 625.

In *Reg.* vs. *Savage*, 1 C. & K. 75, the Court required an affidavit stating what points the absent witness was expected to prove, so as to form an opinion as to the witness being material or not.

The party making an application to postpone a trial, on the ground of the absence of a witness, is not bound in his affidavit to disclose all that the absent witness can testify to, but he must show that the absent witness is likely to prove some fact which may

be allowed to go to the jury; he must also show the probability of having the witness at a later term: per Ramsay, J., *Reg.* vs. *Dougall*, 18 L. C. Jur. 85.

The Court will postpone until the next assizes the trial of a prisoner charged with murder, on an affidavit by his mother that she would be enabled to prove by several witnesses that he was of unsound mind, and that she and her family were in extreme proverty, and had been unable to procure the means to produce such witnesses, and that she had reason to believe that if time were given to her, the requisite funds would be provided: *Reg.* vs. *Langhurst*, 10 Cox, 353.

But the affidavit of the prisoner's attorney, setting forth the information he had received from the mother is insufficient: *Idem.*

Upon an indictment for a murder recently committed, the Court will postpone the trial, upon the affidavit of the prisoner's attorney that he had not had sufficient time to prepare for the defence, the affidavit suggesting the possibility of a good ground of defence: *Reg.* vs. *Taylor*, 11 Cox, 340.

If the application is made by the defendant, he shall be remanded and detained in custody until the next assizes or sessions; but where the application is made by the prosecutor it is in the discretion of the Court either, on consideration of the circumstances of each particular case, to detain the defendant in custody, or admit him to bail, or to discharge him on his own

recognizance: *R.* vs. *Beardmore*, 7 C. & P. 497; *R.* vs. *Parish*, 7 C. & P. 782; *R.* vs. *Osborn*, 7 C. & P. 799; *Reg.* vs. *Bridgman*, 1 C & Mar. 271. But, as a general rule, after a bill has been found, if the offence be of a serious nature, the Court will not admit the prisoner to bail: *Reg.* vs. *Chapman*, 8 C. & P. 558; *Reg.* vs. *Guttridge*, 9 C. & P. 228; *Reg.* vs. *Owen*, 9 C. & P. 83; *Reg.* vs. *Bowen*, 9 C. & P. 509; 5 *Burn's* Justice, 1032.

NO DILATORY PLEAS OF MISNOMER, ETC., ALLOWED.

Sec. 31. No indictment shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition of any party offering such plea; but if the Court be satisfied, by affidavit or otherwise, of the truth of such plea, the Court shall forthwith cause the indictment to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded.

This clause is textually taken from the 7th Geo. IV., ch. 64, sec. 19, of the Imperial Statutes.

See *post*, sec. 71, where, *inter alia*, a variance in names may be amended.

The name of the prisoner, says *Taylor* on Evid., note c, 236, is not a matter of essential description, because on this subject the prosecutor may have no means of obtaining correct information. If, therefore,

the prisoner's name or addition be wrongly described, or if the addition be omitted, the Court may correct the error, and call upon the prisoner to plead to the amended indictment.

And now, the total omission of any addition to the name of the defendant is of no consequence, as has been seen *ante*, under sec. 23.

In *Reg.* vs. *Orchard*, 8 C. & P. 565, a woman charged with the murder of her husband, being described as "A., the wife of B. C.," the record was amended by inserting the word "widow" instead of "wife," per Lord Abinger.

The plea in abatement is now very little used, as well in consequence of this section as of the next sec. 32, see *post*. However, if pleaded, it must be remembered that it is always required to be framed with the greatest accuracy and precision, and must point out the objection, so that it may be readily amended or avoided in another prosecution: *O'Connell* vs. *Reg.*, in error, 11 Cl. & Fin. 155; so in a plea of misnomer, the defendant must disclose his real name. But now, by sec. 1 of the Procedure Act of 1869, see *ante*, the word "indictment" includes "any plea," so that a plea in abatement may be amended in the same cases where an indictment would be amendable.

By the 4 Anne, ch. 16, sec. 17, it is enacted that no dilatory plea shall be received, unless the party offering such plea do by affidavit prove the truth thereof;

so a plea in abatement to an indictment will be set aside, if not sworn to or accompanied by an affidavit: *Rex* vs. *Grainger*, 3 Burr, 1617; *Reg.* vs. *Duffy*, 9 Ir. L. R. 163.

If the name of the defendant be unknown, and he refuse to disclose it, an indictment against him as "a person whose name is to the jurors unknown, but who was personally brought before the said jurors by ——— the keeper of ——— prison," will be sufficient: *R.* vs. —, R. & R. 489.

Whatever mistake may exist in the indictment, in respect of the name of the defendant, if he appears and pleads not guilty, he cannot afterwards take advantage of the error: 1 *Chitty* C. L. 202; 1 *Bishop*, Cr. Proced. 677.

As a rule, the plea in abatement must be pleaded before any plea in bar when the prisoner is arraigned: 2 *Hale*, 175. But the court may, in its discretion, allow the withdrawal of the plea of not guilty, so as to allow the prisoner to plead in abatement or to the jurisdiction or to demur: *Kinlock's* case, Foster, 16; *R.* vs. *Purchase*, C. & Mar. 617. And this is entirely in the discretion of the judge, who should allow it for the purpose of substantial justice, but not to enable the prisoner to take advantage of a mere technicality: *R.* vs. *Turner*, 2 M. & Rob. 214; *Reg.* vs. *Brown*, 1 Den. 293; *R.* vs. *Odgers*, 2 M. & Rob. 479.

Bishop, 1 Cr. Proced. 884, says, that by a plea in abatement, the defendant can avail himself of the ob-

jection that the grand jury finding the indictment consisted of more than twenty-three members.

WHEN OBJECTION TO INDICTMENT TAKEN—AMENDMENT, ETC.

Sec. 32.—Every objection to any indictment for any defect apparent in the face thereof, must be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded, and not afterwards; and every court, before which any such objection is taken, may, if it be thought necessary, cause the indictment to be forthwith amended in such particulars, by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared; and no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act.

The Imperial Statute, from which this clause is taken, reads as follows:

"Every objection to any indictment for any FORMAL defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictment *before the jury shall be sworn*, and not afterwards; and every court before which any such objection shall be taken *for any formal defect* may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared:" 14-15 Vic., ch. 100, sec. 25.

Greaves says on this clause: "Under this section all formal objections *must* be taken before the jury are sworn. They are no longer open upon a motion in arrest of judgment or on error. By the common law, many formal defects were amendable: see 1 *Chitty*, Cr. Law, 297, and the cases there cited; and it has been the common practice for the grand jury to consent, at the time they were sworn, that the Court should amend matters of form: 2 *Hawk.* P. C., ch. 25, s. 98. The power of amendment, therefore given in express terms by this section, seems to be no additional power, but rather the revival of a power that had rarely, if ever, been exercised of late years."

As will be seen by comparing them, there is a very great difference between the Imperial and the Canadian sections on this subject, consisting principally in the omission, in the Canadian clause, of the words "formal" and "for any formal defect." Is it to be presumed that the framers of our Act had the intention to extend the provisions of this clause to *any* defect apparent on the face of the indictment, and not only to formal defects, as in the English Act?

Is it to be inferred, from this clause, for instance, that if a man is indicted for having shot at the moon, he must either demur or move to quash; and that, if he fails so to do, he will be refused leave to move in arrest of judgment, or bring error?

It is hardly to be believed that such was the intention of the framers of the Act. However, it is satisfactory to see that another and more reasonable interpretation can be given to this clause. And in this, as in all other cases, a wise and safe rule exists, that, if

between two possible interpretations of a statutory enactment, one leads to incongruous and repugnant conclusions, whilst the other is conformable to sound reason and the fundamental principles of the law, the latter must be followed.

Then, if the French version of the statute is referred to, it will be seen that *formal* defects, only, are provided for thereby in this section 32: "Toute objection à un acte d'accusation pour défaut *de forme* apparent" . . . . . says this version. The French version is as much law as the English one: sec. 133 of the *British North America Act*; and, in the cases, as in this one, where there is a variance between the two versions, should not the one similar to the pre-existing law be held the right one. And the pre-existing enactments on the subject, in all the Provinces, applied only to *formal* defects.

A motion for arrest of judgment will always avail to the defendant for defects apparent on the face of the indictment, when these defects are such that thereby no offence in law appears charged against the defendant. Such an indictment cannot be aided by verdict, and such defects are not cured by verdict. As said in *Reg*, vs. *Waters*, 1 Den. 356, "There is a difference between an indictment which is bad for charging an act which, as laid, is no crime, and an indictment which is bad for charging a crime defectively: the latter may be aided by verdict, the former cannot."

Defects in matters of substance are not amendable, so if a material averment is omitted the Court cannot allow to amend the indictment by inserting it, for the very good reason that if there is an omission of a material averment, of an averment without which there is no offence, known to the law, charged against the defendant, then strictly speaking, there is no indictment; there is nothing to amend by.

In a criminal charge *there is no latitude of intention* to include anything more than is charged; the charge must be explicit enough to support itself: per Lord Mansfield, 2 *Burr.*, 1127.

The Court cannot look to what the prosecutor intended to charge the defendant with; it can only look to what he has charged him with. And this charge, fully and clearly defined, of a crime or offence known to the law, the indictment as returned by the grand jury must contain. If the indictment as found by the grand jury does not contain such a charge, the defect is fatal; if the grand jury has not charged the defendant with a crime, surely it will not be allowed at a later period of the case, to amend the indictment so as to make it charge one.

It must not be forgotten that when the Clerk of the Court on the grand jury returning the bill, asked them to agree that the Court should amend matters of form in the indictment, the grand jury gave their assent, but on the express condition that no matter of substance should be altered: and this is right. Who are the accusers on an indictment?—The grand jury, and

to their accusation only has the prisoner to answer. This accusation cannot be changed into another one, at any time, without the consent of the accuser : 1 *Chitty*, Cr. L., 298, 324. And it is hard to conceive how, if they have brought against the prisoner an accusation of an offence not known in law, the Court can feel justified in turning it into an offence known in law, by *adding* to the indictment in their absence.

This section must be interpreted as obliging the defendant to demur or move to quash before joining issue for defects apparent on the face of the indictment, *which the Court has the power to amend.* In cases where the Court has not the power to amend the defect or omission, the motion for arrest of judgment will avail to the defendant as heretofore. And this clause itself supposes cases where the Court has not the power to amend, when it says that "No motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority *of this Act*," giving certainly to understand that "a motion for arrest of judgment shall be allowed for any defect in the indictment which could not have been taken advantage of by demurrer or amended under the authority *of this Act*," leaving the question reduced to *what are the amendments allowed under the authority of this Act?* Which can be, it seems, very easily answered. Of course this clause has no reference to the amendments allowed *on the trial*, by sections 70 and 71, see *post.* These do not relate to defects *apparent on the face of the indictment*, and cannot, in

consequence, be the subject of a motion in arrest of judgment. Then the only other clause in the Act relating to amendments is this section 32. And it does not authorize amendments in matters of substance or material to the issue. For instance, if the word "feloniously" in an indictment for felony has been omitted, the Court cannot allow its insertion. This would be *adding* to the offence charged by the grand jury; it would be a change of its nature and gravity : note *a*, by *Greaves*, 1 *Russ.* 935 ; *Reg.* vs. *Gray*, L. & C., 365.

And in an indictment intended to be for burglary, the word "burglariously," if omitted, cannot be inserted by amendment. It would be charging the defendant with burglary when the grand jury have not charged him with that offence. And in an indictment intended to be for murder, if it is barely alleged that the mortal stroke was given feloniously, or that the defendant *murdered*, &c., without adding *of malice aforethought*, or if it only charge that he *killed* or *slew* without averring that he *murdered* the deceased, the defendant can only be convicted of manslaughter : 1 *East*, P. C. 345 ; 1 *Chitty*, Cr. L. 243 ; 3 *Chitty*, Cr. L. 737, 751. And why ?— Undoubtedly because the offence charged is manslaughter, not murder. And surely it will not be pretended that the Court has the power by any amendment to try for *murder* a defendant which the grand jury has charged with *manslaughter.*

And even, in the case of a misdemeanor, on an indictment for obtaining money by false pretences, if the words "*with intent to defraud*" are omitted in the indictment, there is no offence charged, and the Court

cannot allow their insertion by amendment: *Reg.* vs. *James*, 12 Cox, 127, per Lush, J.; see *Archbold*, 60. So if a statute makes it an offence to do an act "wilfully" or "maliciously," the indictment is bad if it does not contain these words: *Reg.* vs. *Bent*, 1 Den. 157; *Reg.* vs. *Ryan*, 2 Mood, 15; *Reg.* vs. *Turner*, 1 Mood, 239, it does not charge the defendant with a crime.

And whether the defendant takes advantage of an objection of this nature, or not, makes no difference. Nay, even after verdict, even without a motion in arrest of judgment, the Court is obliged to arrest the judgment, if the indictment is insufficient: *Rex.* vs. *Wheatly*, 2 Burr. 1127; per Lord Mansfield, and Denison and Wilmot, J. J., 1 East, 146; 1 *Chitty*, Cr. L. 303; *R.* vs. *Turner*, 1 Mood. 239; *Reg.* vs. *Webb*, 1 Den. 339: see also *Reg.* vs. *Sills*, Dears. 138.

And these omissions are not *defects* in the sense of this word as used in this section: they make the indictment no indictment at all, or, at least, charge the defendant with no crime or offence.

On these principles, the Court of Queen's Bench, in Quebec, (March, 1872,) by Duval, C. J., Badgley and Monk, J. J. (Caron and Drummond, J. J. *dissentientibus*), decided the case of *Reg.* vs. *Kerr*, 2 *Revue Critique*, 238.

In this case the indictment was under sec. 10, of ch. 20, 32-33 Vic., for an attempt to murder. A verdict of guilty was given, but the Court being of opinion that the indictment was defective on its face, and that words material to the constitution of the offence charged were omitted therein, granted a motion to arrest the judgment and quash the indictment, though

the prosecutor invoked section 32 of the Procedure Act, and contended that the prisoner was too late to take the objection. Undoubtedly, if this indictment had been at first demurred to, the Court of Queen's Bench would have quashed it, and would not have allowed it to be amended. Sections 23 and 78 by enacting that, even after verdict, an indictment shall not be held insufficient for want of the averment of *any matter necessary to be proved*, certainly cannot be made to say that an indictment not averring a matter *necessary to be proved* is sufficient, or that a verdict on such indictment will not be quashed.

Section 32 leaves the law of amendments what it is at common law. It leaves to the judge the discretion of allowing or refusing the amendment, and in matter of substance, no such amendment can be allowed. An irregularity may be amendable, but a nullity is incurable, and it has been held, that, the Court itself, *ex proprio motu*, will refuse to try an indictment on which plainly no good judgment can be rendered: *R.* vs. *Tremearne*, 5 D. & R. 413.

The ruling in the case of *Reg.* vs. *Mason*, 22 U. C. C. P. 246, is not a contrary decision. The concluding remarks of Gwynne, J., in this case, show that the Ontario Court never went so far as to hold that no arrest of judgment or reversal on error should, *in any case*, be granted for *any* defect *whatever* in the indictment, apparent on the face thereof. What can be gathered from these remarks, taken together with those of Hagarty, C. J., is, that it was there held that the objections taken would even not have been good

grounds of demurrer, or that if they had been raised by demurrer, the Court would have had the power to amend the indictment in such particulars, and that, therefore, the defendant was too late to raise these objections after verdict. And this ruling is perfectly right.

As remarked *ante*, if the defect is one which the Court could amend, the objection must be taken *in limine litis*: a plea of not guilty may then be a waiver of the right to take advantage of such a defect. But if the indictment is defective in a matter of substance, a plea of not guilty is no such waiver. Nay, more, a plea of guilty is no such waiver, and does not prevent the defendant from taking exceptions in arrest of judgment to faults apparent on the record: 1 *Chitty*, 431; 2 *Hawkins*, 466. The Court, as said before, cannot allow an amendment adding, for instance, to the offence charged, or having the effect to make the indictment charge an offence where none, in law, was charged, or to change the nature of the offence charged by the grand jury, and the statute obliges to demur or move to quash before plea, only for objections based on *amendable* defects.

It is true, as remarked by the learned Judge in *Reg.* vs. *Mason*, that the last part of this clause of our statute, taking away, in express words, the motion in arrest of judgment, is not in the Imperial statute; but it will be seen *ante*, that Mr. Greaves, Q. C., who framed the English clause, is of opinion that even without these words, it has the same effect: the words *and not afterwards*, it must be admitted, cannot be interpreted otherwise.

Another difference between the two Acts consists in the words *before the defendant has pleaded* in the Canadian Act, instead of *before the jury shall be sworn* in the English one. This is not an important change, however. In all cases, a demurrer must be pleaded before the plea of "not guilty," though the same may not strictly be said of the motion to quash: *Reg.* vs. *Heane*, 9 Cox, 433. But though, perhaps, in a technical sense, a demurrer is not a plea, still, in practice, it is certainly considered as such, and to say that the defendant must demur, before the plea pleaded, does not sound well; of course the legislator meant to oblige the defendant to demur, if he wishes to do so, "before he has pleaded to the matter of the indictment," or, in plainer words, before he has pleaded not guilty: but it would have been better to say so, than to revive in a legislative enactment, even by inference only, the exploded notion that a demurrer is not a plea.

EFFECT OF PLEA OF "NOT GUILTY."

Sec. 33.—If any person being arraigned upon any indictment for any indictable offence pleads thereto a plea of "not guilty," he shall by such plea, without any further form, be deemed to have put himself upon the country for trial, and the Court may, in the usual manner, order a jury for the trial of such person accordingly.

This clause is taken from the Imperial Act, 7-8 Geo. IV., ch. 28, sec. 1.

Formerly, after the prisoner had pleaded "not guilty," he was asked by the clerk "*How wilt thou be tried?*" To have his trial, he had to answer, if a commoner "*By God and the country,*" if a peer "*By God and my peers.*" If he refused to answer, the indictment was taken *pro confesso*, and he stood convicted: 4 *Blackstone*, 341.

REFUSAL TO PLEAD.

Sec. 34.—If any person, being arraigned upon any indictment for any indictable offence, stands mute of malice, or will not answer directly to the indictment, in every such case it shall be lawful for the Court, if it thinks fit, to order the proper officer to enter a plea of "not guilty" on behalf of such person, and the plea so entered shall have the same force and effect as if such person had actually pleaded the same.

This clause is taken from the 7-8 Geo. IV, ch. 28, sec. 2 of the Imperial Statutes.

Formerly, to stand mute was to confess, and, if the defendant stood mute of malice, he was immediately sentenced: 4 *Blackstone*, 324, 329. In the case of *R.* vs. *Mercier*, 1 Leach, 183, the prisoner being arraigned, stood mute. The Court ordered the sheriff to return a jury instanter, to try whether the prisoner stood mute obstinately, or by the visitation of God. A jury being accordingly returned, the following oath was administered to them: "You shall diligently enquire and true presentment make for and on behalf of Our

Sovereign Lord the King, whether Francis Mercier, the now prisoner at the bar, being now here indicted for the wilful murder of David Samuel Mondrey, stands mute fraudulently, wilfully and obstinately, or by the providence and act of God, according to your evidence and knowledge." The jury examined the witness in open Court, and returned as their verdict that the prisoner stood mute of malice, and not by the visitation of God. Whereupon the Court immediately passed sentence of death upon the prisoner, who was accordingly executed on the Monday following.

A prisoner who had been previously tried and convicted, but whose trial was deemed a nullity on account of some informality in swearing the witnesses, was again arraigned upon an indictment for the same offence, and refused to plead, alleging that he had been already tried: *Littledale*, J., and *Vaughan*, B., ordered a plea of not guilty to be entered for him under this section: *R.* vs. *Bitton*. 6 C. & P., 92.

A person deaf and dumb was to be tried for a felony: the judge ordered a jury to be empannelled to try whether he was mute by the visitation of God: the jury found that he was so: they were then sworn to try whether he was able to plead, which they found in the affirmative, and the defendant by a sign pleaded not guilty: the judge then ordered the jury to be empannelled to try whether the defendant was now sane or not, and, on this question, directed them to say whether the defendant had sufficient intellect to understand the course of the proceedings to make a

proper defence, to challenge the jurors and comprehend the details of the evidence, and that, if they thought he had not, they should find him of non-sane mind: *R.* vs. *Pritchard*, 7 C. & P. 303.

It seems that where a prisoner who is called on to plead remains mute, the Court cannot hear evidence to prove that he does so through malice, and then enter a plea of not guilty under this section; but a jury must be empannelled to try the question of malice and it is upon their finding that the Court is authorized to enter the plea: *Reg.* vs. *Israel*, 2 Cox, 263.

A prisoner, when called upon to plead to an indictment, stood mute. A jury was empannelled and sworn to try whether he was mute of malice or by the visitation of God. A verdict of mute of malice having been returned, the Court ordered a plea of not guilty to be entered on the record: *Reg.* vs. *Schelter*, 10 Cox, 409.

A collateral issue of this kind is always tried *instanter* by a jury empanelled for that purpose. In fact, there is properly speaking no issue upon it: it is an inquest of office. No peremptory challenges are allowed: *R.* vs. *Radcliffe*, Foster, 36, 40. The jury may be chosen amongst the jurors in attendance for the term of court, but must be returned by the sheriff, on the spot, as a special panel: *Dickenson's* Quarter Sessions, 431. If the jury return a verdict of "mute by the visitation of God," as where the prisoner is deaf or dumb, or both, a plea of not guilty is to be entered,

and the trial is to proceed in the usual way, but in so critical a case, great diligence and circumspection ought to be exercised by the Court; all the proceedings against the prisoner must be examined with a critical eye, and every possible assistance consistent with the rules of law, given to him by the Court: *R.* vs. *Steel*, 1 Leach, 451. In the case of *R.* vs. *Jones*, note, 1 Leach, 452, Blackstone, J., the jury returned that the prisoner was "mute by the visitation of God." It appearing that the prisoner, who was deaf and dumb, could receive and communicate information by certain signs, a person skilled in those signs was sworn to act as interpreter and the trial then proceeded.

It would seem that now, as whether the prisoner stands mute of malice or by visitation of God, a plea of not guilty is to be entered, the only reason why a jury must be sworn to enquire whether the prisoner stands mute of malice or not, is to put the Court in a position to know how to act during the trial, as above stated in *Steel's* and *Jones'* cases.

By section 102 of the Procedure Act of 1869, see *post*, it is enacted that: "If any person indicted for any offence be insane, and upon arraignment be so found by a jury empanelled for that purpose, so that such person cannot be tried upon such indictment, or if, upon the trial of any person so indicted such person appears to the jury charged with the indictment to be insane, the Court before whom such person is brought to be arraigned, or is tried as aforesaid, may direct such finding to be recorded, and thereupon may order such person

to be kept in strict custody, until the pleasure of the Lieutenant-Governor be known."

AUTREFOIS ACQUIT, AUTREFOIS CONVICT, HOW PLEADED.

Sec. 35.—In any plea of *autrefois convict* or *autrefois acquit*, it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted (as the case may be) of the offence charged in the indictment.

This clause is taken from the 14-15 Vic. ch. 100, sec. 28, of the Imperial Statutes.

It is a sacred maxim of our law that "*nemo bis vexari debet pro eadem causa*," no man ought to be twice tried, or brought into jeopardy of his life or liberty more than once, for the same offence.

"This section very properly," says *Greaves*, Lord Campbell's Acts, 31, "abbreviates the form of pleas of *autrefois acquit* and *autrefois convict*,' and renders it unnecessary to set forth the previous indictment, and to make the many averments of identity, and so forth, which were requisite before the passing of this statute."

These pleas are of the class called special pleas in bar.

The following is the form of a plea of *autrefois acquit*, in answer to the whole of the indictment:—

And the said J. S., in his own proper person cometh into Court here, and having heard the said indictment read, saith, that our said Lady the Queen ought not further to prosecute the said indictment against the said J. S., because he saith that heretofore, to wit at (describe the Court correctly) he, the said J. S., was lawfully acquitted of the said offence charged in the said indictment and this, he, the said J. S. is ready to verify. Wherefore he prays judgment, and that by the Court here he may be dismissed and discharged from the said premises in the present indictment specified: Archbold, 132.

It is not necessary that the plea should be written on parchment: sec. 13 of the Procedure Act of 1869, *ante*.

If there is more than one count in the indictment it is better to plead to each: *Reg.* vs. *Westley*, 11 Cox, 139. The defendant may, at the same time, plead over to the indictment, in felonies, by adding "*and as to the felony and larceny* (as the case may be) *of which the said J. S. now stands indicted, he, the said J. S., saith that he is not guilty thereof;* and of this, he, the said J. S., puts himself upon the country." If, however, the defendant pleads *autrefois acquit*, without, at the same time, pleading over to the felony, after his special plea is found against him, he may still plead over to the felony: *Archbold*, 133. But it seems that in misdemeanors, if the defendant pleads *autrefois acquit* or *autrefois convict*, and the jury find against him on this issue, the verdict operates as a conviction of the offence, and nothing remains to be done but to

sentence the prisoner: *Archbold*, 134; 1 *Chitty*, Cr. L. 461, 463; *Bishop*, I Crim. Proced, 755, 809, 811, 812; *Reg.* vs. *Bird*, 2 Den. 94. As a consequence of this, it has been held, in England, that, in misdemeanors, the defendant cannot, even by separate pleas, at the same time plead *autrefois acquit* or *autrefois convict*, and *not guilty*: *Reg.* vs. *Charlesworth*, 9 Cox, 40. See also *Rex.* vs. *Taylor*, 3 B. & C. 502. Though in a recent case of misdemeanor a plea of not guilty seems to have been put in with a plea of *autrefois acquit*: *Reg.* vs. *Westley*, 11 Cox, 139.

In felonies, the jury cannot be charged at the same time with both issues, but must first determine the plea of former acquittal: 1 *Chitty*, Cr. L. 460; *R.* vs. *Roche*, 1 Leach, 134. The prisoner has the right of challenge in the usual way: 2 *Hale*, P. C. 267*d*; *R.* vs. *Scott*, 1 Leach, 404. If the verdict is in favour of the prisoner, and finds the plea proved, the prisoner is discharged, and the trial is at an end. If, on the contrary, the jury find the plea "not proved," they are charged again, this time to inquire of the second issue, *i.e.*, on the plea of not guilty, and the trial proceeds as if no plea in bar had been pleaded: 1 *Chitty*, Cr. L. 461; 2 *Hale*, P. C. 255; *Reg.* vs. *Knight*, L. & C. 378. They need not be sworn *de novo*, to try the second issue: *Reg* vs. *Key*, 2 Den. 347. Formerly, when such pleas contained the first indictment, with the judgment, &c., detailed at full length, the prosecutor could demur to it, and then the Court pronounced on that demurrer, without the intervention of a jury; but now, with the general form allowed by the statute, the prosecutor

meets the plea with a general replication, entered only, when the record is made up, after trial, though not necessarily actually pleaded, and the issue must be determined by a jury: *Archbold*, 133; *Note by Greaves*, 2 *Russell*, 62.

This replication, and the *similiter* (as to which see sec. 79 *post*), when so entered upon the record, may be as follows:

And hereupon A. B. who prosecutes for our said Lady the Queen in this behalf, says, that by reason of any thing in the said plea of the said J. S. above pleaded in bar to the present indictment, our said Lady the Queen ought not to be precluded from prosecuting the said indictment against the said J. S., because he says that the said J. S. was not lawfully acquitted of the said offence charged in the said indictment, in manner and form as the said J. S. hath above in his said plea alleged; and this he the said A. B. prays, may be inquired of by the country. And the said J. S. doth the like.

For a form of plea of *autrefois acquit* or *autrefois convict* to one count only of the indictment: see Lord Campbell's Acts, by *Greaves*, 88.

When a man is indicted for an offence and acquitted he cannot afterwards be indicted for the same offence, provided the first indictment were such that he could have been lawfully convicted on it; and if he be thus indicted a second time, he may plead *autrefois acquit*, and it will be a good bar to the indictment. The true test by which the question whether such a plea is a

sufficient bar in any particular case may be tried, is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first: *R.* vs. *Sheen*, 2 C. & P. 634; *R.* vs. *Bird*, 2 Den. 94; *R.* vs. *Drury*, 3 C. & K. 193. Thus an acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for a larceny of the same goods, because upon the former indictment the defendant might have been convicted of the larceny. But if the first indictment were for a burglary, with intent to commit a larceny, and did not charge an actual larceny, an acquittal on it would not be a bar to a subsequent indictment for the larceny; 2 *Hale*, P. C., 245; *R.* vs. *Vandercomb*, 2 Leach, 716; because the defendant could not have been convicted of the larceny on the first indictment. An acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter, because the defendant could be convicted of the manslaughter on the first indictment. So, an acquittal upon an indictment for manslaughter is, it seems, a bar to an indictment for murder, for they differ only in degree: 2 *Hale*, P. C. 246; 1 *Chitty*, Cr. L. 455.

Now, also, a person cannot, after being acquitted on an indictment for felony or misdemeanor, be indicted for an attempt to commit it, for he might have been convicted of the attempt on the previous indictment: secs. 49 & 52, Procedure Act of 1869. But this applies only to the common law misdemeanor of attempting to commit a crime, for which section 49 of the said Act allows a verdict, and not when the attempt to commit the offence charged is by

a special statutory enactment made an indictable offence. So, upon an indictment for the statutory felony of administering poison with intent to murder, a previous acquittal on an indictment for murder, founded on the same facts, cannot be pleaded in bar: *Reg.* vs. *Connell*, 6 Cox, 178, per Williams and Talfourd, J.J. An acquittal for the murder of a child is a bar to an indictment for concealing the birth of the same child, because by sec. 61 of ch. 20, 32-33 Vic., the defendant upon the first indictment, might have been found guilty of concealing the birth: *Reg.* vs. *Ryland*, note by *Greaves*, 2 *Russell*, 55.

So, a person acquitted of a felony including an assault, and for which assault the defendant might have been convicted upon the trial for the felony, under sec 51 of the Procedure Act, cannot be subsequently indicted for this assault.

So, also, a person indicted and acquitted on an indictment for a robbery, cannot afterwards be indicted for an assault with intent to committ it: 32–33 Vic., ch. 21, sec. 40. A person indicted and tried for a misdemeanor, which upon the trial appears to amount in law to a felony, cannot afterwards be indicted for the felony: the statute has the words "*if convicted*," but, by the common law, this rule would extend to a prisoner acquitted on trial: Sec. 50, Procedure Act of 1869. A person indicted and acquitted for embezzlement cannot afterwards be indicted as for a larceny, or if tried and acquitted for a larceny, cannot afterwards be indicted as for embezzlement upon

evidence of the same facts: 32–33 Vic., ch. 21, sec. 74. A person indicted for larceny and duly acquitted, cannot afterwards be indicted for the same facts for obtaining by false pretences, and a person indicted for obtaining by false pretences and acquitted, cannot afterwards be prosecuted for larceny on the same facts: 32–33 Vic., ch. 21, secs. 93 and 99.

And the ruling *R.* vs. *Henderson*, 2 Mood. 192; C. & Mar. 328, as cited in *Archbold*, p. 132, is not law here; but, a reference to the report shows that there was no such ruling in that case, as given in *Archbold*, and even admitting there had been, it would not have been free from doubt, even in England, where they have not the enactment contained in sec. 99 of our Larceny Act: 2 *Taylor*, on Evid. par. 1516; though see *Reg.* vs. *Adams*, 1 Den. 38.

If a man be indicted in any manner for receiving stolen goods, he cannot afterwards be prosecuted again for the same facts: 32–33 Vic., ch. 21, secs. 100, 101, 102, 103. This rule is equally applicable, though the first indictment be against the defendant jointly with others, and the second against him alone; and upon the first indictment the prisoner has been acquitted, and the others found guilty, because he might have been convicted on the first: *R.* vs. *Dann*, 1 Mood. 429.

But the prisoner must have been put in jeopardy on the first indictment. If by reason of some defect in the record, either in the indictment, the place of trial, the process, or the like, the defendant was not lawfully liable to suffer judgment for the offences charged

against him in the first indictment, as it stood at the time of the verdict, 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: *R.* vs. *Drury*, 3 C. & K. 190; *Reg.* vs. *Green*, Dears & B. 113.

"In general," says *Starkie*, Cr. Pl. 320, "where the original indictment is insufficient, no acquittal founded upon that insufficiency can be available, because the defendant's life was never really placed in jeopardy, and therefore, the reason for allowing the plea entirely fails."

And in almost the same terms, *Chitty*, 1 Cr. L. 454, says: "And hence we may observe that the great general rule upon this part of the subject is, that the previous indictment must have been one upon which the defendant could legally have been convicted, upon which his life or liberty was not merely in imaginary, but in actual danger, and consequently in which there was no material error. . . . . Upon the same principle, where the defendant was acquitted merely on some error of indictment, or variance in the recitals, he may be indicted again upon the same charge, for the first proceedings were merely nugatory. Thus, if an indictment for larceny lay the property in the goods in the wrong person, the party may be acquitted, and afterwards tried on another, stating it to be the property of the legal owner."

And even now, that an amendment is allowed in such a case, and that the Court, on the first indictment, might have substituted the name of the legal owner

for the wrong one first alleged, if the indictment was not, in fact, so amended, the plea of *autrefois acquit* cannot be sustained; the indictment must be considered as it was, not as it might have been made; the Court was not bound to amend, and the indictment to be considered is the indictment upon which the jury in the first case gave their verdict: *Reg.* vs. *Green*, Dears. & B. 113.

An abortive trial without verdict cannot be pleaded as an acquittal; the acquittal, in order to be a bar, must be by verdict on a trial. Thus, if after the jury are sworn, and the prisoner given in charge to them, the Judge, in order to prevent a failure of justice by a refusal of a witness to give his evidence, or by reason of the non-agreement of the jury to a verdict, or by reason of the death or such illness of a juryman as to necessitate the discharge of a jury before verdict, does so discharge them without coming to a verdict: *Reg.* vs. *Winsor*, 10 Cox, 276; 7 B. & S. 490; *Reg.* vs. *Charlesworth*, 1 B. & S., 460; 1 *Burn's* Justice, 348; 2 *Russell*, 62, *note* by *Greaves*; *Reg.* vs. *Ward*, 10 Cox, 573.

A previous summary conviction for an assault is not a bar to an indictment for manslaughter of the party assaulted, dead since, founded upon the same facts: *Reg.* vs. *Morris*, 10 Cox, 480.

A person was acquitted of an assault with intent to murder, but was convicted of an assault with intent to do grievous bodily harm, and the prosecutor having

subsequently died, he was indicted for murder, and it was held right: *Reg.* vs. *Salvi*, 10 Cox, 481.

And these two cases seem based on a very just principle. There can never be the crime of murder till the party assaulted dies: the crime has no existence, in fact or law, till the death of the party assaulted. Therefore it cannot be said that one is tried for the same crime when he is tried for assault during the life, and tried for murder after the death, of the injured party. That new element of the injured person's death is not merely a supervening aggravation, but it creates a new crime: per Lord Ardmillan, in *Stewart's* case (Scotland), cited in 1 *Bishop*, Cr. L. 1059.

A man steals twenty pigs at the same time, can he be charged with twenty larcenies of one pig, in twenty different indictments? After verdict on the first indictment, can he maintain a plea of *autrefois acquit* or *autrefois convict* in answer to the subsequent indictments?

It can be said that, in principle, a man who steals twenty pigs, at the same time, commits but one larceny, but one criminal act. Suppose a man steals a bag containing three bushels of potatoes, could he be charged with three larcenies of one bushel each, in three different indictments, or with two larcenies in two indictments, one of the bag, and one of the potatoes? Or if a man steals ten pounds in ten one-pound notes, can he be charged in ten different indict-

ments with ten different larcenies of one pound? If that could be done, then why should it not be allowed to reduce the ten pounds into dollars, and have forty crimes and forty indictments?

Then A., at one shot, murders B. and C., though the shot was directed at B. only; has he committed one murder or two murders? If he is tried for the murder of B. and acquitted, can he plead *autrefois acquit* to an indictment charging him with the murder of C? Of course not. He is guilty of two murders.

In all these cases there has been only one criminal act, only one actual execution of a criminal design, only one guilty impulse of the mind; yet it appears to be settled that where *several chattels* are stolen at the same time, an acquittal on an indictment for stealing one of them is no bar to an indictment for stealing another of them, although it appear that both were taken by the same act: Cr. L. Commrs'. 8th Rep., 5th July, 1845.

"And thus it hath happened," says 2 *Hale*, P. C. 245, "that a man acquitted for stealing the horse hath yet been arraigned and convict for stealing the saddle, though both were done at the same time." And in *Reg.* vs. *Brettel*, C. & M. 609; 2 *Russell*, 60, it was held that where the prisoner had been convicted of stealing one pig, he might be tried for stealing another pig at the same time and place; but, as the prisoner was undergoing his sentence upon the conviction already given against him, the Judge (Cresswell, J.) thought that the second indictment should be abandoned, and this was done.

Erle, J. in *Reg.* vs. *Bond*, 1 Den., 517, seemed to be of opinion that *one* act of taking could not be *two* distinct crimes: he said: "I do not think it necessary in a plea of *autrefois convict*, to allege the identity of the specific chattel charged to be taken (under the old form of such pleas). Suppose the first charge to be taking a coat; the second, to be taking a pocket-book; *autrefois convict* pleaded; parol evidence showing that the pocket-book was in the pocket of the coat. I think that I would support the plea, because it would show a previous conviction for the *same act of taking*."

But a note by *Greaves*, 2 *Russell*, 60, thinks this dictum erroneous, and the reporter, in Denison, in a foot note to the case says: "*Quære*, whether a plea of *autrefois acquit or convict* would be supported by mere proof of the *same act of taking?* Suppose a purse stolen containing ten sovereigns: five belonging to A.; five to B. Two indictments preferred; one charging prisoner with a theft from A., the other with a theft from B.; a conviction of the theft from A. If the same act of taking were the gist of the crime, he could plead *autrefois convict* to the indictment of stealing from B. It seems that, to support a plea of *autrefois convict or acquit*, there must be proof of '*a taking of the same thing from the same party at the same time.*'"

Then, if, according to this note, in the case where ten sovereigns are stolen at one and the same time, in the same purse, five belonging to A., five to B., two crimes have been committed by one act, in the case of the stealing of a bag containing three bushels of potatoes if the bag belongs to A., and the potatoes to B., two lar-

cenies may be charged, one for the bag and one for the potatoes.

The proof, on a plea of this nature, lies on the defendant, and he is to begin: *Archbold*, 133; 2 *Russell*, 62, *note* by *Greaves*.

In order to prove a former acquittal or conviction, if it took place at a previous Assizes or in a different court, the prisoner must produce the record regularly drawn up: *Rex.* vs. *Bowman*, 6 C. & P. 101, 337. But if it took place at the same assizes, the original indictment, with the notes of the clerk of the court upon it, are sufficient evidence: *Rex.* vs. *Lea*, 2 Mood. 9, (called *R.* vs. *Parry*, in 7 C. & P. 836.)

In England, now, by 14-15 Vic., ch. 99, sec. 13, it is enacted that, "Whenever, in any proceeding whatever it may be, it shall be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce therecord of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction and judgment, or acquittal, as the case may be, omitting the formal parts thereof."

But we have no such enactments in the Statutory Law of the Dominion, secs. 26 and 65 of the Procedure Act applying only to special cases, and sec. 73 of

chapter 99 of the Consolidated Statutes of Canada being repealed. Sec. 77 of the Procedure Act of 1869, see *post*, provides how the record shall be made up in any criminal case, but does not refer to the proof of the acquittal or conviction; the record must, therefore, be made up, according to that clause, to prove *autrefois acquit* or *autrefois convict*, and the proof of it must be made according to the common law rules: as to which see 2 *Taylor* on Evid. p. 1378; 2 *Burn's* Justice, 54. When the verdict is quashed for informalities, or any other grounds than the real merits of the case, the entry on the records should state it in these words, "and because it appears that the said indictment is not sufficient (*or as the case may be*), therefore it is considered and adjudged that the defendant go thereof without day," so as to prevent a plea of "*autrefois acquit*": 1 *Chitty*, 719.

ATTAINDER OF ANOTHER CRIME NOT PLEADABLE.

Sec. 36.—No plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment. 7-8 Geo. IV., ch. 28, sec. 4, Imp.

Attainder, is the stain or corruption of the blood of a criminal capitally condemned: it is the immediate, inseparable consequence, by the common law, of the sentence of death, or of outlawry for a capital offence. Upon the sentence of death or the judgment of outlawry being pronounced, the prisoner is attaint, *attinctus*, stained or blackened. He is no longer of any

credit or reputation; he cannot be a witness in any court (but see now, sec. 62 of the Procedure Act of 1869, *post*), neither is he capable of performing the functions of any other man, for, by anticipation of his punishment, he is already dead in law, *civiliter mortuus*. The consequences of attainder are forfeiture and corruption of blood: 4 *Blackstone*, 380. And at common law, if a man is *attainted*, he may plead such attainder in bar to any subsequent indictment for the same or any other felony. And this because such proceeding on a second indictment cannot be to any purpose, for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he has forfeited what he had; so that it is absurd and superfluous to endeavour to attaint him a second time: 4 *Blackstone*, 336. But, now, by the above clause, attainder is no bar, unless for the same offence as that charged in the indictment, and in effect the plea of *autrefois attaint* is at an end. See *Archbold*, 137.

See *post* secs. 55 & 56 of the Procedure Act of 1869, limiting the effects of attainder.

In England, now, by the 33–34 Vic., ch. 23, all attainders, corruption of blood, or forfeiture of property are abolished.

CHALLENGES BY THE DEFENCE, TO WHAT EXTENT ALLOWED.

Sec. 37.—If any person arraigned for treason or felony challenges peremptorily a greater number

of men returned to be of the jury than twenty in a case of indictment for treason or felony punishable with death, or twelve in case of indictment for any other felony, or four in case of indictment for misdemeanor, every peremptory challenge beyond the number so allowed in the said cases respectively shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made, but nothing herein contained shall be construed to prevent the challenge of any number of jurors for cause.

The Imperial Act, 7–8 Geo. IV., ch. 28, sec. 3, also enacts that every peremptory challenge beyond the number allowed by law is void.

There is in the General Repeal Act of 1869, a special clause (sec. 3) for New Brunswick, on peremptory challenges, but it is *effete*.

In England, thirty-five peremptory challenges are allowed in cases of high treason, twenty in all felonies and frauds, and none in misdemeanors: *Archbold*, 152.

Section 33 of ch. 84 of the Con. Stat. for Lower Canada, relating to challenges of jurors, is repealed by the General Repeal Act of 1869; but it was repealed five years before, with the whole of the said chapter 84, by section 13 of the 27-28 Vic., ch. 41. It would have been better to repeal par. 8 of sec. 7 of this last mentioned Act.

Why allow peremptory challenges in misdemeanors in Canada? It is a great mistake.

By the common law, if the prisoner challenged peremptorily more of the jury than he was allowed, this was deemed a refusal to be tried, and, therefore, the prisoner, if he would not retract his illegal challenge, stood convicted, as in cases where he refused to plead. And, even after the 22 Hen. VIII., ch. 14, had enacted that "no person arraigned for felony can be admitted to make any more than twenty peremptory challenges," it was doubtful whether, if the prisoner challenged twenty-one, he was to stand convicted without trial, or if the trial was to proceed, the illegal challenge being disregarded and overruled: 4 *Blackstone*, 354. This explains the phraseology of the above clause, which, to remove all doubts, had to, and does, provide for the consequences of a peremptory challenge over the number allowed, at the same time as it enacts what is the number allowed in all cases.

There are two kinds of challenges, the one to the array and the other to the polls.

A challenge to the array is an exception to the whole panel of jurors returned, and must be made before the swearing of any of the jury is commenced: a challenge to the array must be made in writing.

A challenge to the polls is an exception to some one or more individual juror or jurors. It may be made orally. After issue joined between the Crown and the prisoner, when the jury is called and before they are sworn, is the only time when the right of challenge can be exercised: *Reg.* vs. *Key*, 2 Den. 347; *Reg.*

vs. *Shuttleworth*, 2 Den. 351. In *Reg.* vs. *Giorgetti*, 4 F. & F. 546, it was held that the challenge must be made before the book is given into the hands of the juror, and before the officer has recited the oath, and it comes too late afterwards, though made before the juror has kissed the book. In *Reg.* vs. *Frost*, 9 C. & P. 136, it was held that the challenge of a juror, either by the Crown or by the prisoner, must be before the oath is commenced. The moment the oath has begun it is too late. The oath is begun by the juror taking the book, having been directed by the officer of the Court to do so. But if the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby. But a juror may be challenged even after being sworn if the prosecutor consents: *Bacon's* Abr. *Verb.* juries, 11; 1 *Chitty*, 545; *Reg.* vs. *Mellor*, Dears. & B. 494, per Wightman, J.

It is obvious that each juror must be sworn separately, in misdemeanors as well as in felonies. The practice to swear the jurors four at a time in misdemeanors ought to be put a stop to, now that peremptory challenges are allowed in misdemeanors as in felonies.

The accused is to be informed before the swearing of the jurors, that if he will challenge them or any of them, he must challenge them as they come to the book to be sworn, and before they are sworn; the following is the usual form: "Prisoner, these good men whose names you shall now hear called are the jurors who are to pass between our Sovereign Lady the

Queen and you upon your trial (*in a capital case*, upon your life and death); if, therefore, you would challenge them or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard": 1 *Chitty*, 531.

The accused must make all his challenges in person even in cases where he has counsel: 1 *Chitty*, 546; 2 *Hawkins*, 570.

"This distinction," justly remarks *Bishop*, 1 Cr. Proced. 944, "it would be well should be more strictly attended to in practice." But, it is said in 3 *Wharton*, Cr. L., par. 3133: "This, however, is a mere arbitrary and forced extension of the fiction of the jurymen and prisoner looking on each other, to see if there is any personal reminiscence which would touch the question of indifference. The usual practice is for this kind of challenge, as is the case with all others, to be made by counsel."

To enable the accused to make his challenges, he is entitled to have the whole panel read over, in order that he may see who they are that appear: 2 *Hawkins*, 570; *Townley's* case, Foster, 7.

A challenge to the polls is either peremptory or for cause: a peremptory challenge is such as a person arraigned upon an indictment is allowed to make to a juror without assigning any cause: the number of these challenges allowed in each particular case is settled by secs. 37 and 38 of the Procedure Act of 1869, *ante*.

Peremptory challenges are not allowed upon any collateral issue: *R.* vs. *Ratcliffe*, Foster, 42; *Barkstead's* case, Kelyng's C. C.; *Stevens & Haynes*, reprint, 16; *Johnson's* case, Foster, 46; *Reg.* vs. *Paxton*, 10. L. C. Jurist, 213.

Hale, 2 P. C., 267*d*, says that no peremptory challenges are allowed to the defendant "if he had pleaded any foreign plea in bar or in abatement, which went not to the trial of the felony, but of some collateral matter only." And it is added, in *Bacon's* Abr. *Verb.* juries, 9, that "this peremptory challenge seems by the better opinion to be only allowable when the prisoner pleads the general issue." This would seem to take away the right of peremptorily challenging on the trial of pleas of "*autrefois acquit*," or "*autrefois convict*." But it is not so; the issue on a plea of this kind is not a collateral issue, And it is said in 2 *Hale*, P. C. *loc. cit.* that if a man plead not guilty, or *plead any other matter of fact triable by the same jury*, and plead over to the felony, he has his peremptory challenges. By collateral issues, must be understood, for instance, where a criminal *convict* pleads any matter allowed by law in bar of execution, as pregnancy, pardon, an act of grace, or, as in *Ratcliffe's* case, above cited, when a person brought to the bar to receive his sentence says that he is not the same person that was convicted; the issues in these cases being always tried by a jury *instanter*.

Where several persons are tried by the same jury, each of such persons has a right to his full number of peremptory challenges in all cases where the right of

peremptory challenge exists; and if twenty men were indicted for the same offence by one indictment, yet every prisoner should be allowed his full number of peremptory challenges. They may join in their challenges, if they wish to be tried together, and then they can only challenge amongst them to the number allowed to one. But if they refuse to do so, the Crown has the right of trying each, or any number of them less than the whole, separately from the others, in order to prevent the delay which might arise from the whole panel being exhausted by the challenges: 1 *Chitty*, 535.

So, in *Charnock's* case, 3 Salk., 80 (in many books erroneously called *Charwick*), three being indicted together, Holt, Ch. J., told them "that each of them had liberty to challenge thirty-five of those who were returned upon the panel to try them, without showing any cause, but that if they intended to take this liberty, then they must be tried separately and singly, as not joining in the challenges; but, if they intended to join in the challenges, then they could challenge but thirty-five in the whole, and might be tried jointly upon the same indictment;" accordingly, they all three joined in their challenge, and were tried together and found guilty.

A challenge to the polls for cause is either *principal* or *for favour*: it is allowed to both the prosecutor and the defendant: *Archbold*, 152.

It is said in *Archbold*, 156: "The defendant in treason or felony may, for cause shown, object to all or any of the jurors called, *after* exhausting his peremptory

challenges of thirty-five or twenty." If this means that the prisoner must first exhaust all his peremptory challenges, before being allowed to challenge for cause, it is an error, and was so held by the full Court of Queen's Bench, in Ontario, in *Reg. vs. Whelan*, 28 U. C. Q. B., 2, confirmed by the Court of Appeal, 28 U. C. Q. B., 108; in which case, it was unanimously held that the prisoner is entitled to challenge for cause before exhausting his peremptory challenges, Richards, C. J., concurring, though he had at first at the trial, on *Archbold's* passage above cited, ruled that the prisoner, before being allowed to challenge for cause, must first have exhausted his peremptory challenges.

If the prosecutor or the defendant have several causes of challenge against a juror, he must take them all at the same time: *Bacon's* Abr. *Verb.* juries, 11; 1 *Chitty*, 545.

If a juror be challenged for cause and found to be indifferent he may afterwards be challenged peremptomarily, if, the number of his peremptory challenges is not exhausted, 1 *Chitty*, 545; *R.* vs. *Geach*, 9 C. & P. 499.

The most important causes of a *principal* challenge to the polls are: 1. *Propter defectum*, on account of some personal objection, as alienage, minority, old age, insanity, present state of drunkenness, deafness, or a want of the property qualifications required by law: See, as to Province of Quebec, sec. 4, par. 1 of 32 Vic. ch. 22, Q. 2. *Propter affectum*, on the ground of some pre-

sumed or actual partiality in the juror, who is objected to; as if he be of affinity to either party, or in his employment, or is interested in the event, or if he has eaten or drank at the expense of one of the parties, if the juror has expressed his wishes as to the result of the trial, or his opinion of the guilt or innocence of the defendant, also if he was one of the grand jurors who found the indictment upon which the prisoner is then arraigned, or any other indictment against him on the same facts. 3. *Propter delictum*, on the ground of infamy as where the juror has been convicted of treason, felony, perjury, conspiracy, or any other famous offence. In the Province of Quebec, by sec. 4, par. 4, 32 Vic. ch. 22, persons are disqualified who are arrested or under bail upon a charge of treason or felony, or who have been convicted thereof.

A challenge to the polls for favour is founded on the allegation of facts not sufficient in themselves to warrant the Court in inferring undue influence or prejudice, but sufficient to raise suspicion thereof, and to warrant inquiry whether such influence or prejudice in fact exists. The cases of such a challenge are manifestly numerous, and dependant on a variety of circumstances, for the question to be tried is whether the juryman is altogether indifferent as he stands unsworn. If a juror has been entertained in the party's house, or if they are fellow-servants, are cited as instances of facts upon which a challenge for favour may be taken: 1 *Chitty*, 544.

In the case of a *principal* challenge to the polls, the

Court, without triers, examines either the juror challenged, or any witness or evidence then offered, to ascertain the truth of the fact alleged as a ground of challenge, if this fact is not admitted by the adverse party; and if the ground is made out to the satisfaction of the Court, the challenge is at once allowed, and the juror set aside: 5th Cr. Law Comm. Report, 1849, p. 122. In these cases, the necessary conclusion in law of the fact alleged against the juror is that he is not indifferent, and this, as a matter of law, must be decided by the Court.

But in the case of a challenge for favour, the matter of challenge is left to the discretion of triers. In this case, the grounds of such challenge are not such that the law necessarily infers partiality therefrom, as, for instance, relationship; but are reasonable grounds to suspect that the juror will act under some undue influence or prejudice.

The oath taken by the triers is as follows: "*You shall well and truly try whether A,B., one of the jurors, stands indifferently to try the prisoner at the bar, and a true verdict give according to the evidence. So help you God.*"

No challenge of triers is admissible: 1 *Chitty*, 549.

The oath to be administered to the witnesses brought before the triers is as follows:

"*The evidence which you shall give to the court and triers upon this inquest shall be the truth, the whole truth and nothing but the truth. So help you God.*"

If this challenge is made to the first juror, and, of course, before any one has been sworn, then the Court will direct two indifferent persons, not returned of the jury, to act as triers; if they find against the challenge, the juror will be sworn, and be joined with the triers in determining the next challenges.

But as soon as two jurors have been found indifferent and have been sworn, then the office of the first two triers ceases, and every subsequent challenge is referred to the decision of the two first jurors sworn: 3 *Blackstone*, 363. If the first challenge is made after more than two of the jurors are sworn, then the Court may assign any two of the jurors sworn to try the challenges. If the challenge is made when there is yet only one juror sworn, one trier is chosen by each party, and added to the juryman sworn, and the three, together, try the challenges, till a second juror is sworn: 1 *Chitty*, 549; *Bacon's* Abr. *Verb.* juries, E. 12 2 *Hale*, 274.

The trial then proceeds by witnesses before the triers, in open Court: the juror objected to may also be examined, having first been sworn as follows:

"*You shall true answer make to all such questions as the Court shall demand of you. So help you God.*"

The challenging party first addresses the triers, and calls his witnesses; then the opposite party addresses them, and calls witnesses if he sees fit, in which case the challenger has a reply; or, perhaps, with us the addresses would be in the order provided by sec. 45

of the Procedure Act of 1869, see *post*. But in practice there are no addresses in such cases. The Judge sums up to the triers, who then say if the juror challenged stands indifferent or not: this verdict is final: *Roscoe*, 197, 198. But a juror challenged on one side and found to be indifferent, may still be challenged by the other: 1 *Chitty*, 545.

Bishop truly says, 1 Cr. Proced. 905: "It is plain that the line which separates the challenge for principal cause, and the challenge to the favour must be either very artificial, or very uncertain."

And *Wharton*, 3 Cr. L. 3125, says: "The distinction, however, between challenges for favour and those for principal cause is so fine, that it is practically disregarded."

The following case was brought before the Court of Criminal Appeal, in England, in 1858:—*Reg.* vs. *Mellor*, Dears. & B. 468—On a trial for murder, the panel of petit jurors returned by the Sheriff contained the names of two persons—*Joseph Henry Thorne* and *William Thorniley*. The name of *Joseph Henry Thorne* was called from the panel as one of the jury to try the case of Aaron Mellor; and *Joseph Henry Thorne*, as was supposed, went into the box and was duly sworn as *Joseph Henry Thorne* without challenge or objection. It was, however, discovered the next day, and after the prisoner had been convicted, that *William Thorniley* had, by mistake, answered to the name of *Joseph Henry Thorne*, when this one was called, and had gone

into the box and been sworn as *Joseph Henry Thorne*, the prisoner having been offered his challenge when the person called *Joseph Henry Thorne*, but who was really *William Thorniley*, came to the book to be sworn. Upon being informed of these facts, the Judge who had presided at the trial respited the execution of the the sentence, and reserved the case for the consideration of the Court of Criminal Appeal. It was held in this Court, by Lord Campbell, C. J., Cockburn, C. J., Coleridge, J., Wightman, J., Martin, B., and Watson, B. (six), that there had been a mis-trial; by Erle, Crompton, Crowder, Willes and Byles, JJ. and Channell, B (six), that this was not a mis-trial, but only ground of challenge; and by Pollock, C. B., and Williams, J., that this was not a question of law arising at the trial, which could have been reserved for the Court of Criminal Appeal. The conviction was therefore affirmed by eight against six. But the report shows clearly that upon a writ of error the conviction would have been quashed. And it was undoubtedly illegal, the challenge is to the person called, not to the person who appears. When addressed by the clerk of the court, as the jurors were to be called, the prisoner has been told, "These good men that *you shall now hear called* are the jurors who are to pass between our Sovereign Lady the Queen and you upon your trial; if, therefore, you would challenge *them*, or any of *them* (*i.e.*, that are called), you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard." Of course, this address supposes that the person who comes to be sworn is the person called. But that very sup-

position demonstrates clearly that if the contrary takes place it is a cause of absolute nullity. When *Joseph Henry Thorne* was called, the prisoner could shut his eyes, and feel confident that *Joseph Henry Thorne* would be sworn as one of the jurors who were to try him. Why should he have challenged? He did not desire to challenge *Joseph Henry Thorne*. And supposing he desired to challenge him for cause, surely it is clear that it is causes of challenge against *Joseph Henry Thorne* that he would have brought forward, not those against *William Thorniley*. And then, suppose again, he had challenged when *Joseph Henry Thorne* was called, would not the entry on the record have been that *Joseph Henry Thorne* had been challenged. Who would think of an entry that "*Joseph Henry Thorne*, &c., *being called*, &c., *William Thorniley* was challenged?" Upon this challenge to *Joseph Henry Thorne's name*, *William Thorniley* would have withdrawn; then, if *William Thorniley's* name had been later called, would not the prisoner have had to challenge him, if he objected to him? Would he not then have had to challenge *twice* to get rid of *one* man? Would he not, then, have been deprived of one of the peremptory challenges he was entitled to?

CHALLENGES BY THE CROWN.

Sec. 38.—In all criminal trials, whether for treason, felony or misdemeanor, four jurors may be peremptorily challenged on the part of the Crown; but this shall not be construed to affect the right of the Crown to cause any juror to stand aside until the panel has

been *gone through*, or to challenge any number of jurors for cause.

By 37 Vic., ch. 38, "*An Act respecting the crime of libel*," sec. 11, it is enacted that:—The right of the Crown to cause any juror to stand aside until the panel has been gone through, shall not be exercised on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel.

At common law, the Crown might, it seems, have challenged peremptorily any number of jurors, without alleging any other reason than "*quod non boni sunt pro rege*." But this power was taken away, in the year 1305, by 33 Edw. I. (re-enacted *for England* by 6 Geo. IV., ch. 50). An abuse had arisen in the administration of justice by the Crown assuming an unlimited right of challenging jurors without assigning cause, whereby "inquests remained untaken." In this way, the Crown could in an arbitrary manner, on every criminal trial, challenge so many of the jurors returned on the panel by the Sheriff that twelve did not remain to form a jury, and the trial might be indefinitely postponed *pro defectu juratorum*. To prevent the trial going off for want of jurors by the peremptory challenges of the Crown, this statute enacts that no peremptory challenge by the Crown can be allowed, so that the "inquest remains untaken." The Crown, however, is not bound to show any cause of challenge, or for the order to "stand aside," until the panel has been *gone through*, and it appears that

there will not be jurors enough to try the defendant, if the peremptory challenges are allowed to prevail. And the panel is not to be considered as being gone through for this purpose, until it has been, not only once called over, but *exhausted* (*épuisée* is the word used in the French version of the Procedure Act of 1869, for *gone through*); that is, until according to the usual practice of the Court, and what may reasonably be expected, the fact is ascertained that there are no more jurors in the panel whose attendance may be procured, and so that unless the Crown be put to show its cause of challenge, "the inquest would remain untaken:" *Mansell* vs. *Reg.* (in error), Dears. & B. C. C. 375.

In that case, the panel contained fifty-four names: eighteen when called were peremptorily challenged by the prisoner; fifteen were, on the prayer of the counsel for the Crown, the prisoner's counsel objecting and praying that cause of challenge should be shown, ordered to "stand by;" and nine were elected and tried to be sworn. This left twelve other persons only on the panel, and they were at that time absent deliberating upon their verdict in another case. The name of William Ironmonger, the first person, who, upon the prayer of the counsel for the Crown, had been ordered to stand by, was then again called, and the counsel for the Crown again prayed that he might be ordered to stand by, upon which the counsel for the prisoner prayed that cause of challenge should be shown forthwith. At that moment, and before any judgment was given on this application, the twelve persons who sat as a jury in the

other case came into court and gave their verdict; and the counsel for the Crown then prayed that William Ironmonger should be ordered to stand by until such twelve persons should be called, but the counsel for the prisoner demanded that William Ironmonger should be sworn unless cause of challenge to him were shown. The Court ordered that William Ironmonger should stand by, and three persons, the number required to complete the jury, were taken from the said twelve jurors, and elected and tried to be sworn, although the prisoner's counsel objected that such persons ought to be called in their proper order, with other persons on the panel, and that Jacob Jacobs, the person whose name stood in the panel immediately after that of William Ironmonger ought to be next called. Upon a writ of error, it was held that, under the circumstances, the panel was not *gone through*, so as to put the Crown to assign cause of challenge, until the twelve persons who came into Court before the complete formation of the jury had been called, and that William Ironmonger was properly ordered to stand by the second time: also, that the three persons required to complete the jury were properly called and taken from the said twelve, without again calling the whole panel through in its order: also, that "stand by" merely means that the juror being challenged by the Crown, the consideration of the challenge shall be postponed till it be seen whether a full jury can be made without him.

The case of *Reg.* vs. *Lacombie*, 13 L. C. Jur. 259, was decided on the same principles, in Montreal, in

1869, by the full Court of Queen's Bench upon a case reserved by Mr. Justice Mackay, as follows:

"The prisoner was tried before me on the 3rd July, 1869. . . . . At the commencement of the trial, while the petty jury were being formed, and the jurors called for this trial, numbers of jurors were ordered to 'stand aside,' on the prayer of the Crown prosecutor. So many jurors had been so made 'stand aside,' and so many had been challenged peremptorily by the prisoner, that before a complete jury was formed the whole list was gone through once: resort had then to be had to those who, just before, had been made 'stand aside.' I ordered them to be called in order. On the first of these, namely Adolphe Masson, being called, he answered, and was advancing to the jury-box, when he was ordered to 'stand aside' by the Crown prosecutor; the prisoner's counsel objected, insisting that Masson should be sworn, unless the Crown had cause for challenging him, and did then state sufficient cause. This the Crown refused to do. I ruled in favour of the Crown, and Masson was ordered to 'stand aside,' and he was not sworn. Others were called afterwards, sworn, and the trial proceeded . . . . . ." The prisoner was convicted, and the Court of Queen's Bench, Drummond, J., *dissentiente*, maintained the conviction.

It is most remarkable, in this last case, that the learned Judges have completely ignored sec. 7, par. 8, of the 27-28 Vic., ch. 41 (1864), then in full force, and even now not expressly repealed. It is in the following terms:

"No person arraigned and about to be tried for any felony shall be permitted peremptorily to challenge more than twenty of the jurors appearing, *when called in court*, to serve as jurors upon such trial; and no challenge on behalf of the Crown, shall be *finally* maintained by the Court, except for cause, unless there remains a sufficient number of qualified jurors *in attendance* on the Court, without the persons challenged, *after the right of challenge on behalf of the person prosecuted has been exhausted.*"

Now this clause has never been expressly repealed though it seems, as in *Lacombie's* case, not even to have been mentioned in the late case of *Rex.* vs. *Dougall*, 18 L. C. Jur. 242, where the question of the Crown challenges was raised (see *post*, under sec. 40). Of course, though not expressly mentioned in the General Repeal Act of 1869, it stands by sec. 1 thereof, repealed in so far as it is contrary or inconsistent with the Procedure Act of 1869. And this clearly destroys the first part of this clause of the Act of 1864, which gives twenty peremptory challenges in *all* felonies. But the second part of this clause remains law. In fact, it contains nothing but a re-enactment of the Statute of Edward I., and says exactly the same thing in other words.

And so, besides the granting of four peremptory challenges to the Crown, section 38 of the Procedure Act is not new law, and contains nothing but the rule on this question as it has always been since the 33 Edward I, which is interpreted by *Blackstone* as follows: "However it is held that the King need not assign his cause of challenge till all the panel is gone through, *and unless* there cannot be a full jury without the persons so challenged. And then, *and not sooner*, the King's counsel must shew his cause, otherwise the juror shall be sworn:" 4 *Blackstone*, 353.

And it is said in 2 *Hawkins*, 569:

"However, if the King challenge a juror before a panel is perused, it is agreed that he need not show any cause of his challenge till the whole panel be gone through, *and* it appear that there will not be a full jury without the person so challenged." See also *Bacon's* Abr. *Verb.* "juries," E. 10.

In 1 *Chitty*, 547, it is said: "The King need not show the cause until the whole panel is exhausted, and if one of the jurors was not present, but appear before his default is recorded, the King's counsel, if he has previously challenged another juror, need not assign his cause of challenge till after such defaulter has been sworn."

In the case of *Reg.* vs. *Geach*, 9 C. & P. 499, Parke, B., is reported to have held that: "if on the trial of a case of felony, the prisoner peremptorily challenges some of the jurors, and the counsel for the prosecution also challenges so many that a full jury cannot be had the proper course is to call over the whole of the panel in the same order as before, only omitting those who have been peremptorily challenged by the prisoner, and, as each juror then appears, for the counsel for the

prosecution to state their cause of challenge; and if they have not sufficient cause, and the prisoner does not challenge, for such juror to challenge.

Upon this case, Lord Campbell, C. J., in *Mansell's* case, *supra*, remarks: "There can be no doubt that the course pointed out by the learned Judge was, under the circumstances, the proper course; but is there any reason to suppose that if, after the panel had been once called over, and before any further step had been taken for the formation of the jury, jurors on the panel who had been called and did not at first answer had come into court in sufficient number to make a full jury, they would have been rejected, and the Crown would have been put to assign cause for its challenges?.....No doubt it may be assumed, *prima facie*, that all the jurors in the panel are in Court when the panel is called over, and if, when it has been once called over, there is not a full jury made, the usual course would be immediately to call the names over again, and to put the Crown upon assigning cause of challenge..... but there is no decision nor *dictum* to the effect that the panel may not be called over again, with a view to see whether there may not be some of the jurors in the panel who may have come into court, and who may make up a full jury, without putting the Crown to assign cause of challenge."

JURIES DE MEDIETATE LINGUÆ.

Sec. 39.—*Juries de medietate linguæ* shall not hereafter be allowed in the case of aliens.

Ever since the 28 Edw. III. ch. 13, aliens, under our Criminal Law, have been entitled to be tried by a jury composed of one half of citizens and one-half of aliens or foreigners, if so many of these could be had. It seems to have been thought necessary, in *Reg. vs. Vonhoff*, 10 L. C. Jur. 292, that these six aliens should be natives of the country to which the defendant alleged himself to belong, but the better opinion seemed to be that six aliens were required, without regard to what nationality they were of. Sec. 2 of 28 Ed. III. ch. 13 says "the other half of aliens."

However, this is now of historical interest only, and the above clause has put aliens, all through the Dominion, on the same footing as British subjects, as to the composition of the jury, so that aliens can never now be jurors. As to the Province of Quebec: see sec. 4, par. 5, 32 Vic. ch. 22.

In England also now, an alien is not entitled to a jury *de medietate linguæ*: 33 Vic. ch. 14, Imp. (1870).

MANITOBA AND PROVINCE OF QUEBEC.—JURIES HALF ENGLISH AND HALF FRENCH.

Sec. 40—In those districts in the Province of Quebec in which the Sheriff is required by law to return a panel of petit jurors composed one half of persons speaking the English language, and one half of persons speaking the French language, he shall in his return specify separately those jurors whom he returns as speaking the English language, and those whom he returns as speaking the French language respectively;

and the names of the jurors so summoned, shall be called alternately from the said lists;

2.—Whenever a person accused of treason or felony elects to be tried by a jury composed one half of persons skilled in the language of the defence, the number of peremptory challenges to which he is entitled shall be divided, so that he shall only have the right to challenge one half of such number from the English-speaking jurors and one half from the French-speaking jurors;

3.—This section applies only to the Province of Quebec.

By 34 Vic. ch. 14, "*an Act to extend to the Province of Manitoba certain of the Criminal Laws now in force in the other Provinces of the Dominion*" it is enacted that:

Sec. 3.—Whenever any prosecuted party upon being arraigned before the said General Court, or before such court as may hereafter be constituted by the Legislature of Manitoba to supersede the said General Court, demands a jury composed for the one half, at least, of persons skilled in the language of the defence, if such language be either English or French, he shall be tried by a jury composed for the one half, at least, of the persons whose names stand first in succession upon the general panel, and who, on appearing and not being lawfully challenged, are found, in the judgment of the Court, to be skilled in the language of the defence.

Sec. 4.—Whenever, from the number of challenges or any other cause, there is, in any such case, a deficiency of persons skilled in the language of the defence, the Court shall fix another day for the trial of such case, and the Sheriff shall supply the deficiency by summoning for the day so fixed such additional number of jurors skilled in the language of the defence as the Court may order, and as are found inscribed next in succession on the list of petit jurors.

Sec. 5.—Whenever a person accused of treason or felony elects to be tried by a jury composed one half of persons skilled in the language of the defence, the number of peremptory challenges to which he is entitled shall be divided, so that he shall only have the right to challenge one half of such number from among the English-speaking jurors, and one half from among the French-speaking jurors.

The qualifications of the jurors, and the mode of making the jury lists and panels, of summoning the jurors, &c., are regulated in each of the Provinces by local statutes: see remarks under sec. 44, *post*, of the Procedure Act of 1869.

In the Province of Quebec, the law actually in force on such matters is the 32 Vic., ch. 22, (1869, Q.) as amended by 35 Vic., ch. 10 (1871, Q.); sections 7, 8, 9, 10, 11, 12, 13 and 14 of the 27-28 Vic., ch. 41 (1864) are also in force; sections 7, 8, 10 & 11 apply to trials in criminal matters, as follows:

Sec. 7.—Except in the cases hereinafter mentioned, the names of the petit jurors summoned to attend any Court of Criminal Jurisdiction shall be called over in the order in which they stand on the panel, and the first twelve jurors whose names are so called and who

are present in Court, and are not lawfully challenged, or declared disqualified, shall be sworn for the first trial; and the clerk shall, at every trial, begin at the name next after that of the last juror sworn, and so on until he has gone through the panel, when he shall begin at the top thereof again, and go through it, as aforesaid, omitting the names of any jurors who are then engaged in trying any case:

2.—If any prosecuted party upon being arraigned, demands a jury composed, for the one half at least, of persons skilled in the language of his defence, if such language be English or French, he shall be tried by a jury composed, for the one half at least, of the persons whose names stand first in succession upon the panel, and who, on appearing, and not being lawfully challenged, are found in the judgment of the Court to be skilled in the language of the defence:

3.—If upon the trial of a person for any crime not punishable with death, the prosecuting officer and the party prosecuted consent that the trial jury shall be composed exclusively of persons speaking the English language, or of persons speaking the French language, the jury shall be composed of the first twelve persons speaking the language agreed upon, who, being called in succession from the panel, appear and are not lawfully challenged or disqualified from serving:

4.—But if there be not a sufficient number of persons speaking the language agreed upon, remaining unchallenged or qualified, the remainder of the number required shall be taken from the panel without reference to language, in the order in which they appear therein:

5.—If on or subsequent to the arraignment of any person charged with an offence punishable with death, the prosecuting officer and the party prosecuted consent that the trial jury shall be composed exclusively of persons speaking the English language, or of persons speaking the French language, the Sheriff shall forthwith make a supplementary panel of thirty-two jurors, which panel shall be made by taking from the Jury List, in order as they appear therein, the names of thirty-two persons speaking the required language, and resident within five leagues of the place of trial, commencing with the first name of a juror qualified to be on such panel, which appears on the Jury List, after the name of the last juror taken for the ordinary panel, for the term then sitting:

6.—If the party prosecuted is entitled to be tried either in whole or in part by persons skilled in the language of his defence; and if, from the number of challenges, or from any other cause, there is in any such case a deficiency of such persons, the Court shall fix another day for the trial of such case, and the Sheriff shall supply the deficiency by summoning, for the day so fixed, such additional number of jurors skilled in the required language as the Court may order, and as are found inscribed on the List of Petit Jurors next in succession after the jurors already summoned for the term or session at which such trial is to be had (see *post*, sec. 41 of the Procedure Act of 1869).

7.—The additional or supplementary jurors summoned under the foregoing sub-sections shall not be considered as summoned for any particular case; but shall be considered as an addition to the general or ordinary panels of jurors summoned during the same term, and shall be bound to attend so long as the Court shall order; and whilst they are so required to attend, shall be competent to serve, and bound to serve, with the jurors on the general or ordinary panels in all cases in which extra jurors speaking the same language as the jurors upon such supplementary panel are required:

8.—No person arraigned and about to be tried for any felony shall be permitted peremptorily to challenge more than twenty of the jurors, appearing when called in Court to serve as jurors upon such trial; and no challenge on behalf of the Crown shall be finally maintained by the Court except for cause, unless there remains a sufficient number of qualified jurors in attendance on the Court; without the persons challenged after the right of challenge on behalf of the party prosecuted has been exhausted: see *ante*, secs. 37 and 38 of the Procedure Act of 1869:

9.—Judgment after verdict upon any indictment or information for any felony or misdemeanor shall not be arrested, stayed or reversed, because any unqualified person or persons served upon the jury who tried the case.

Sec. 8.—*See ante, under section* 11 *of the Procedure Act of* 1869.

Sec. 10.—*Provides for the payment of jurors.*

Sec. 11.—*Provides for the penalties against absent jurors*

and officers contravening the provisions of this Act. This section is repeated in 32 Vic. ch 22, Q.

The right to have a jury composed of at least one half of persons skilled in the language of the defence, must, undoubtedly, both in Manitoba and Quebec, be exercised *upon arraignment.* Immediately after arraignment, the *venire* is presumed to have issued, and if it issues without this order, the jurors must be summoned in the usual manner, that is to say, without regard to language.

Both in Manitoba and Quebec, this right is given in misdemeanors as well as in felonies. Why are subsection 2 of chap. 40, of the Procedure Act of 1869, for Quebec, and sec. 5, of 34 Vic. ch. 14, for Manitoba, restricted to treason and felonies? It seems to have been forgotten that peremptory challenges were also now allowed in misdemeanors.

In *Reg.* vs. *Dougall*, 18 L. C. Jur., 85, it was held by Mr. Justice Ramsay: 1st. That where the defendant has asked for a jury composed one half of the language of the defence, six jurors speaking that language *may* first be put into the box, before calling any juror of the other language; 2nd. That the right of the Crown to tell jurors "to stand aside," exists for misdemeanors as well as for felonies; 3rd. That when to obtain six jurors speaking the language of the defence, all speaking that language have been called, the Crown is still at liberty to challenge to stand aside, and is not held to show cause until the

whole panel is exhausted. Mr. Justice Ramsay said that the calling the jurors' names alternately from the English and French lists, mentioned in section 40 of the Procedure Act is only directory and applies only to the calling of the jury in ordinary cases, where no order has been given for a jury composed of one half English and one half French. The case was reserved by the learned Judge, for the consideration of the full Court, but only on the one point thirdly above mentioned, which is more intelligibly given in the summary of the report of the decision of the full Court, at page 242 L. C. Jur., as follows: "Where, to obtain six jurors speaking the language of the defence (English), the list of jurors speaking that language was called, and several were ordered by the Crown to stand aside; and the six English-speaking jurors being sworn, the clerk re-commenced to call the panel alternately from the lists of jurors speaking the English and French languages, and one of those (English) previously ordered to "stand aside," was again called: *Held*, that the previous "stand aside" stood good until the panel was exhausted by all the names on both lists being called."

This was the only point reserved and the only one decided, and that could be decided by the full court. As said by Mr. Justice Ramsay, "Be the question reserved difficult or not, the Court has no authority to go beyond it, and any excursion into other matters is totally uncalled for and without jurisdiction." A reference to such "excursions" in *Dougall's* case would lead to the inference that the majority of the judges were of opinion that, in all such cases, the jurors should

be called alternately from the two lists, and that, if by the consent of the parties, six jurors of one language have first been called and sworn from one of the lists, as in this case, then the calling from that list should go on from the sixth juror sworn, and not begin the said list over again. It does not appear by any of the remarks of the learned judges in this case why, when a jury composed of six English and six French has been ordered (the defence, say, being English), the list of the English jurors is not first called, till six English jurors are sworn, and why the list of the French jurors is not then called over till six French jurors are also sworn: see 27-28 Vic. ch. 41, sec. 7, *ante*; the challenges being divided according to sub-section 2 of sec. 40 of the Procedure Act.

PROCEDURE WHEN PANEL EXHAUSTED.

Sec. 41.—Whenever, in any criminal case, the panel has been exhausted by challenge, or by default of jurors by non-attendance or not answering when called, or from any other cause, and a complete jury for the trial of such case cannot be had by reason thereof, then *upon request made on behalf of the Crown*, the Court may in its discretion order the Sheriff or other proper officer forthwith to summon such number of good men of the district, county or place, whether on the roll of jurors or otherwise qualified as jurors or not, as the Court may deem necessary and may direct, in order to make up a full jury; and such Sheriff or officer shall forthwith summon by word of mouth or in writing, the number of persons he is so

required to summon, and add their names to the general panel of jurors returned to serve at that court, and (subject to the right of the Crown and of the accused respectively, as to challenge or direction to stand aside) the persons whose names are so added to the panel shall (whether otherwise qualified or not) be deemed duly qualified as jurors in the case, and so until a complete jury is obtained, and the trial shall then proceed as if such jurors were originally returned duly and regularly on the panel; and if before such order one or more persons have been sworn or admitted unchallenged on the jury, he or they may be retained on the jury, or the jury may be discharged, as the Court may direct; every person so summoned as a juror shall forthwith attend and act in obedience to the summons, and if he makes default shall be punishable in like manner as a juror summoned in the usual way; such jurors so newly summoned shall be added to the panel for such case only.

It is only *upon request made on behalf of the Crown*, that the Court is authorized to give the order mentioned in this section, and even then, whether this order will be given or not is left to the discretion of the Court. It must not be forgotten that this clause specially enacts that such jurors summoned as therein provided for shall be added to the panel only for the case in which such order has been given.

In Quebec and Manitoba, special provisions are in force respecting the procedure to be taken, when a deficiency of persons skilled in the language of the defence occurs in cases where the defence is entitled

to a mixed jury: they are, for Quebec, contained in sec. 7, sub-secs. 6 and 7 of 27–28 Vic. ch. 41, and, for Manitoba, in sec. 4 of ch. 14, 34 Vic. These clauses are very different from sec. 41 of the Procedure Act of 1869, though on the same subject; yet this last one also applies to Quebec and Manitoba. Such a state of things reminds one of Lord Thurlow's emphatical expression: "the damned statute law."

SAVING OF POWERS NOT EXPRESSLY ALTERED.

Sec. 42.—Nothing in this Act shall alter, abridge or affect any power or authority which any Court or Judge hath when this Act takes effect, or any practice or form in regard to trials by jury, jury-process, juries or jurors, except only in cases where such power or authority is expressly altered by or is inconsistent with the provisions of this Act.

This enactment is not very clear. If it is meant to say that all that is not repealed remains in force, it might well have been left out. Yet it is hard to give it any other interpretation. Anything else it may seem to relate to is amply provided for in sec. 1 of the General Repeal Act of 1869, 32–33 Vic. ch. 36.

AFFIRMATION INSTEAD OF OATH IN CERTAIN CASES.

Sec. 43.—Any Quaker or other person allowed by law to affirm instead of swearing in civil cases, or solemnly declaring that the taking of any oath is, according to his religious belief unlawful, who is sum-

moned as a grand or petit juror in any criminal case, shall instead of being sworn in the usual form, be permitted to make a solemn affirmation beginning with the words following: "I, A. B., do solemnly, sincerely and truly affirm," and may then serve as a juror as if he had been sworn, and his declaration or affirmation shall have the same effect as an oath to the like effect; and in any record or proceeding relating to the case, it may be stated that the jurors were sworn or affirmed; and in any indictment the words "upon their oath present" shall be understood to include the affirmation of any juror affirming instead of swearing.

This clause extends to jurors the provisions of sec. 61 (see *post*), allowing to witnesses, in certain cases, to make an affirmation instead of an oath. In England, a similar enactment is contained in 30–31 Vic. ch. 35, sec. 8.

AS TO ACTS OF PROVINCIAL LEGISLATURES RESPECTING JURORS.

Sec. 44.—And for avoiding doubt, it is declared and enacted that every person qualified and summoned as a grand juror or as a petty juror in criminal cases, according to the laws which may be then in force in any Province of Canada, shall be and shall be held to be duly qualified to serve as such juror in that Province, whether such were laws passed before or be passed after the coming into force of the "British North America Act, 1867"—subject always to any provision

in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such Act.

To the Provincial Legislatures, by *The British North America Act*, is given exclusively the power to legislate on matters relating to the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction. On the ground that the jurors are a part of the constitution and organization of the criminal courts, the local legislatures continue to pass whatever laws they think proper on jurors and juries. Yet, it is obvious, by sections 37, 38, 39, 40 and 41 of the Procedure Act of 1869, that the Parliament of Canada claims challenges and the constitution of each jury in each case as within its powers. It seems to be a matter of no easy solution to say where the powers of each begin and end, on this subject. In Quebec, by section 45 of chap. 22, 32 Vic., the local legislature has assumed to legislate upon the penalty to be imposed by the Court on absent jurors, allowing fifteen days' imprisonment in default of payment thereof, and by sec. 48 of the same Act, to enact that the penalties thereby imposed upon officers of the Court, shall be levied on rule or order of the Court, as provided for by sec. 46. If these clauses do not fall within the procedure in criminal matters, they seem, at least to be very near it.

The rights and powers of the local legislatures it must be admitted, cannot have been added to or increased by sec. 44 of the Procedure Act of 1869. Such rights and powers exist as given by the Constitutional Act,

and Parliament has not the power to increase or diminish them in any degree. Neither can Parliament increase or diminish its own legislative powers. This sec. 44 of the Procedure Act seems to say "in case the local legislatures have passed or will pass laws of doubtful constitutional validity, we, the Parliament, legalize those laws;" and at the same time, it adds "provided that we, the Parliament, have not made contrary enactments on the same subjects." Now, this is wild legislation. The Provincial Legislatures and the Parliament have not both jurisdiction on the same subject, and if both do actually legislate on the same subject, one of them necessarily acts *ultra vires*, and its enactment is not worth a mill. Instead of the words *and for avoiding doubts*, at the beginning of this section, ought to be inserted the words "and for continuing the grave doubts," &c.

TRIAL, DEFENCE, VERDICT, ATTAINDER, ETC.

Sec. 45—All persons tried for any indictable offence shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel learned in the law;

2. And upon any trial the addresses to the jury shall be regulated as follows: The counsel for the prosecution, in the event of the defendant or his counsel not announcing at the close of the case for the prosecution, his intention to adduce evidence, shall be allowed to address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the accused, or his counsel, shall then be allowed to open

his case and also to sum up the evidence, if any be adduced for the defence; and the right of reply shall be according to the practice of the Courts in England: Provided always, that the right of reply shall be always to the Attorney or Solicitor-General, or to any Queen's Counsel acting on behalf of the Crown.

The law, as it stood formerly, did not allow a prisoner to be defended by counsel in any felony except high-treason. On this, *Blackstone* says (Vol. IV. 355):

"But it is a settled rule at common law that no counsel shall be allowed a prisoner upon his trial upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated. A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner, that is, shall see that the proceedings against him are legal and strictly regular,) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English Law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecution for every petty trespass?"

In England, the 6 & 7 William IV. ch. 114, was the first statute passed to "enable persons indicted for felony to make their defence by counsel or attorney," and the addresses of counsel to the jury in felonies and misdemeanors are now regulated by the 28 Vic., ch. 18, sec. 2, as follows:

"If any prisoner or prisoners, defendant or defendants shall be defended by counsel, but not otherwise, it shall be the duty of the presiding Judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants, and upon every trial for felony or misdemeanor, whether the prisoners or defendants or any of them shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded, to sum up the evidence respectively; and the right of reply and practice and course of proceedings, save as hereby altered, shall be as at present."

It will be seen that the only difference between the English and the Canadian clause is that in the former, it is only *when the prisoner is defended by counsel* that the counsel for the prosecution is allowed to address the jury a second time, after his evidence is over, when the counsel for the defence does not declare that he

intends to adduce any evidence, *which it is the duty of the presiding Judge to ask him at the close of the case for the prosecution*, whilst in the Canadian clause this right is given, whether the defendant be assisted by counsel or not, and he or his counsel are required to announce at the close of the case for the prosecution, their intention to adduce evidence or not, without the clause making it obligatory on the presiding Judge to ask the question, though in practice it is obvious that the Judge will always ascertain the intention of the defence on that point, before allowing the prosecutor to sum up when he desires to do so.

The addresses of counsel, as regulated by this clause, 45 of the Procedure Act, are therefore to take place as follows:—

First case: When no evidence for the defence.—

Address of counsel for the Crown; opening the case; Crown's evidence; *defendant or his counsel declares that they have no evidence to adduce;* counsel for the Crown sums up; defendant or his counsel addresses jury; reply of counsel for the Crown only if Attorney or Solicitor-general, or Queen's Counsel, acting on behalf of the Crown.

Second Case: Where the defence adduces evidence.—

Crown prosecutor opens the case; evidence of the Crown; defendant or his counsel addresses the jury; defendant's evidence; defendant or his counsel sums up; reply of prosecution in all cases.

Of course, in the first case supposed, the counsel for the prosecution never in practice exercises both the

rights of summing up and replying; if the counsel is not the Attorney-General or Solicitor-General, or a Queen's Counsel acting on behalf of the Crown, it is better then for him, to sum up the evidence, after it is over, as he is not allowed to reply: if he is the Attorney-General or Solicitor-General, or a Queen's Counsel acting on behalf of the Crown, he, in practice, does not sum up, as he is entitled to reply, whether the defendant adduces evidence or not, though in England, this right is very seldom exercised, where no evidence, or evidence as to character only is offered: see *post*.

In the second case supposed, in practice the defence addresses the jury only after its evidence is over: two addresses would generally have no other result but to lengthen the trial, and fatigue court, counsel, and jury.

Opening of the counsel for the prosecution.—A prisoner charged with felony, whether he has been on bail or not, must be at the bar, viz., in the dock during his trial, and cannot take his trial at any other part of the court, even with the consent of the prosecutor: *Reg.* vs. *St. George*, 9 C. & P. 483. A merchant was indicted for an offence against the Act of Parliament prohibiting slave-trading (felony). His counsel applied to the Court to allow him to sit by him, not on the ground of his position in society, but because he was a foreigner, and several of the documents in the case were in a foreign language, and it would, therefore, be convenient for his counsel to have him by his side, that he might consult him during his trial: *Held*, that the application was one which ought

not to be granted: *Reg.* vs. *Zulueta*, 1 C. & K. 215; 1 Cox, 20. A similar application by a captain in the army was also refused in *Reg.* vs. *Douglas*, Car. & M. 193. But in misdemeanors, a defendant who is on bail and surrenders to take his trial, need not stand at the bar to be tried: *Reg.* vs. *Lovett*, 9 C. & P. 462. A prosecutor conducting his case in person, and who is to be examined as a witness in support of the indictment, has no right to address the jury as counsel: *R.* vs. *Brice*, 2 B. & A. 606; *R.* vs. *Stoddart*, *Dickinson's* Quarter Sessions, by *Talfourd*, 152; *Reg.* vs. *Gurney*, 11 Cox, 414, where a note by the reporter says that such is the law, whether or not the prosecutor is to be a witness.

Serjeant *Talfourd*, in *Dickinson's* Quarter Sessions, 495, on the duties of the counsel for the prosecution, says:—"When the counsel for the prosecution addresses the jury in a case of felony, he ought to confine himself to a simple statement of the facts which he expects to prove, but in cases where the prisoner has no counsel, he should particularly refrain from stating any part of the facts, the proof of which from his own brief appears doubtful, except with proper qualification; for he will either produce on the minds of the jurors an impression which the mere failure of the evidence may not remove in instances where the prisoner is unable to comment on it with effect; or may awaken a feeling against the case for the prosecution, which in other respects it may not deserve. The Court, too, if watchful, cannot fail, in the summing up, to notice the dis-

crepancy between the statement and the proof. But in all cases, as well of felony as misdemeanor, where a prisoner has counsel, not only may the facts on which the prosecution rests be stated, but they may be reasoned on, so as to anticipate any line of defence which may probably be adopted. For as counsel for parties charged with felony may now address the jury in their defence, as might always have been done in misdemeanor, the position of parties charged with either degree of offence is thus assimilated in cases where they have counsel, and it is no longer desirable for the prosecutor's counsel to abstain from observing generally on the case he opens, in such manner as to connect its parts in any way he may think advisable to demonstrate the probability of guilt and the difficulty of an opposite conclusion. But even here he should refrain from indulging in invective, and from appealing to the prejudices or passions of the jury; for it is neither in good taste nor right feeling to struggle for a conviction as an advocate in a civil cause contends for a verdict."

On the duties of counsel, in opening the case for the prosecution, it is said in *Archbold*, 159:—"In doing so he ought to state *all* that it is proposed to prove, as well declarations of the prisoners as facts, so that the jury may see if there be a discrepancy between the opening statements of counsel and the evidence afterwards adduced in support of them: per Parke, B., *R.* vs. *Hartel*, 7 C. & P., 773; *R.* vs. *Davis*, 7 C. & P. 785; unless such declarations should amount to a *confession*, where it would be improper for counsel to open them

to the jury: per Bosanquet and Patteson, JJ., 4 C. & P. 548; *R.* vs. *Swatkins*, per Parke, B., 7 C. & P. 786; *R.* vs. *Davis*, per Bolland, B., 7 C. & P. 775. The reason for this rule is that the circumstances under which the confession was made may render it inadmissible in evidence. The general effect only of any confession said to have been made by a prisoner ought, therefore, to be mentioned in the opening address of the prosecutor's counsel."

Summing up by counsel for the prosecution, where the defence brings no evidence.—It has already been remarked that in practice, if the counsel for the prosecution has the right of reply and intends to avail himself of it, it would be waste of time for him to sum up; but if the counsel has not the right of reply (as to which see *post*, under heading "*reply*"), he will perhaps find it useful to review the evidence as it has been adduced, and give some explanations to the jury. But it has been held in *Reg.* vs. *Puddick*, 4 F. & F. 497, that the counsel for the prosecution ought not, in summing up the evidence, to make observations on the prisoner's not calling witnesses, unless at all events it has appeared that he might be fairly expected to be in a position to do so, and that neither ought counsel to press it upon the jury that if they acquit the prisoner they may be considered to convict the prosecutor or prosecutrix of perjury. Nor is it the duty of counsel for the prosecution to sum up in every case in which the prisoner's counsel does not call witnesses. The statute gives him the right to do so, but that right ought only to be exercised in exceptional cases, such as where

erroneous statements have been made and ought to be corrected, or when the evidence differs from the instructions. The counsel for the prosecution is to state his case before he calls the witnesses, then, when the evidence has been given, either to say simply, "I say nothing," or "I have already told you what would be the substance of the evidence, and you see the statement which I made is correct;" or in exceptional cases, as if something different is proved to what he expected, to address to the jury any suitable explanation which may be required: *Reg.* vs. *Holchester*, 10 Cox, 226; *Reg.* vs. *Webb*, 4 F. & F. 862; *Archbold*, 160.

The Defence.—The defendant cannot have the assistance of counsel in examining and cross-examining witnesses, and reserve to himself the right of addressing the jury: *R.* vs. *White*, 3 Camp. 98; *R.* vs. *Parkins*, 1 C. & P. 548. But if the defendant conducts his own case, counsel will be allowed to address the court for him on points of law arising in the case: *R.* vs. *Parkins*, 1 C. & P. 548. Not more than two counsel are entitled to address the Court for a prisoner during the trial upon a point of law: *Reg.* vs. *Bernard*, 1 F. & F. 240. The rule is, that if the prisoner's counsel has addressed the jury, the prisoner himself will not be allowed to address the jury also: *Reg.* vs. *Boucher*, 8 C. & P. 141; *Reg.* vs. *Burrows*, 2 M. & Rob. 124; *Reg.* vs. *Rider*, 8 C. & P. 531. The counsel for the defendant may comment on the case for the prosecution. He may adduce evidence to any extent, and even introduce new facts, provided he can establish them by witnesses. He cannot, however, assume as proved that which is not

proved. Nor will he be allowed to state anything which he is not in a situation to prove, or to state the prisoner's story as the prisoner himself might have done: *Reg.* vs. *Beard*, 8 C. & P. 142; *Reg.* vs. *Butcher*, 2 M. & Rob. 228.

Bishop says, 1 Crim. Proced. 311: "No lawyer ought to undertake to be a witness for his client, except when he testifies under oath, and subjects himself to cross-examination, and speaks of what he personally knows. Therefore, the practice, which seems to be tolerated in many Courts, of counsel for defendants protesting in their addresses to the jury that they believe their clients to be innocent, should be frowned down and put down, and never be permitted to show itself more. If a prisoner is guilty and he communicates the facts fully to counsel, in order to enable the latter properly to conduct the defence, then, if the counsel is an honest man, he cannot say he believes the prisoner innocent; but, if he is a dishonest man, he will as soon say this as anything. Thus a premium is paid for professional lying. Again, if the counsel is a man of high reputation, a rogue will impose upon him by a false story, to make him an "innocent agent" in communicating a falsehood to the jury. Lastly, a decent regard for the orderly administration of justice requires that only legal evidence be produced to the jury, and the unsworn statement of the prisoner's counsel, that he believes the prisoner innocent, is not legal evidence. It is the author's cherished hope, that he may live to see the day when no Judge, sitting where the common law prevails, will ever, in any circumstances, permit such a violation of

fundamental law, of true decorum, and of high policy to take place in his presence, as is involved in the practice of which we are now speaking."

On the same subject, it is said in 3 *Wharton's* Cr. L., 3010: "Nor is it proper for counsel in any stage of the case, to state their personal conviction of their client's innocence. To do so is a breach of professional privilege, well deserving the rebuke of the Court. The defendant is to be tried simply by the legal evidence adduced in the case; and to intrude on the jury statements not legal evidence is an interference with public justice of such a character that, if persisted in, it becomes the duty of the Court, in all cases where this can be done constitutionally, to discharge the jury and continue the case. That which would be considered a high misdemeanor in third parties cannot be permitted to counsel. And where the extreme remedy of discharging the jury is not resorted to, any undue or irregular comment by counsel may be either stopped at the time by the Court, or the mischief corrected by the judge when charging the jury."

Summing up by the defence.—The counsel for the prisoner or the prisoner himself is now entitled, by sec. 45 of the Procedure Act, at the close of the examination of his witnesses, to sum up the evidence. In practice it is the only time when the counsel for the prisoner addresses the jury, and what has just been said on the defence generally, applies to the address to the jury, whether made before or after the examination of witnesses.

The Reply.—If the defendant brings no evidence, the counsel for the prosecution is not allowed to reply, except if he be, according to sec. 45 of the Procedure Act, the Attorney-General or Solicitor-General, or a Queen's Counsel acting on behalf of the Crown. And in the interpretation of this clause these words "acting on behalf of the Crown," must be read as applying to the Attorney-General or Solicitor-General, as well as to a Queen's Counsel, so that, if not acting on behalf of the Crown in a case, the Attorney-General or Solicitor-General would not be entitled to a reply, if no evidence is adduced by the defence: 3 *Russell*, 354, *note*.

On this privilege to reply, in cases instituted by the Crown, it is said in 1 *Taylor* on Evid. par. 362:—"But as this is a privilege, or rather a prerogative which stands opposed to the ordinary practice of the Courts, the true friend of justice will do well to watch with jealousy the parties who are entitled to exercise it. Mr. Horne, so long back as the year 1777, very properly observed that the Attorney-General would be grievously embarrassed to produce a single argument of reason or justice on behalf of his claim, and, as the rule which precludes the counsel for the prosecution from addressing the jury in reply, when the defendant has called no witnesses, has been very long thought to afford the best security against unfairness in ordinary trials, this fact raises a natural suspicion that a contrary rule may have been adopted, and may still be followed in State prosecutions, for a different and less legitimate purpose. It is to be hoped that ere long this question will receive the consideration which its importance demands, and that the

Legislature, by an enlightened interference, will introduce one uniform practice in the trial of political and ordinary offenders."

If the defendant gives any evidence, whether written or parol, the counsel for the prosecution has a right to reply. If witnesses are called merely to give evidence to character, the counsel for the prosecution is strictly entitled to reply, though in England, in such cases, the practice is not to reply.

In *R.* vs. *Bignold*, 4 D. & R. 70, Lord Tenderden revived an important rule, originally promulgated by Lord Kenyon, and by which a reply is allowed to the counsel for the prosecution, if the counsel for the defendant, in his address to the jury, states any fact or any document which is not already in evidence, although he afterwards declines to prove the fact or put it in writing: 5 *Burn's* Justice, 357; *Archbold*, 161; *Broom's* Comm. 997.

Evidence in reply.—Whenever the defendant gives evidence to prove new matter by way of defence, which the Crown could not foresee, the counsel for the prosecution is entitled to give evidence in reply to contradict it, but then he does not address the jury in reply before going into that evidence. The general rule is that the evidence in reply must bear directly or indirectly upon the subject-matter of the defence, and ought not to consist of new matter unconnected with the defence, and not tending to controvert or dispute it. This is the general rule, made for the purpose of preventing confusion, embarrassment and waste of time; but it rests entirely in the discretion of the Judge whether it ought to be strictly enforced or remitted, as he may think best for the discovery of truth and the administration of justice: 2 *Phillips'* Evid. 408; *Reg.* vs. *Briggs*, 2 M. & Rob. 199; *Reg.* vs *Frost*, 9 C. & P. 159. Where the counsel for the Crown has, *per incuriam*, omitted to put in a piece of evidence before commencing his reply, and the course of justice might be interfered with, if the evidence were not given, the Court may permit the evidence to be given: *Reg.* vs. *White*, 2 Cox, 192. If evidence of his good character is given on behalf of a prisoner, evidence of his bad character may be given in reply: *Reg.* vs. *Rowton*, L. & C. 520, overruling *Reg.* vs. *Burt*, 5 Cox, 284.

Defendant's reply on evidence adduced in answer to his own.—When evidence is adduced for the prosecution in reply to the defendant's proof, the defendant's counsel has a right to address the jury on it, confining himself to its bearings and relations, before the general replying address of the prosecution: *Talfourd's Dickinson's* Quart. Sess. 565.

Charge by the Judge to the jury.—It is the duty of the President of the Court, the case on both sides being closed, to sum up the evidence. His address ought to be free from all technical phraseology, the substance of the charge plainly stated, the attention of the jury directed to the precise issue to be tried, and the evidence applied to that issue. It may be necessary, in some cases, to read over the whole evidence, and, when requested by the jury, this will, of course, be done;

but, in general, it is better merely to state its substance: 5. *Burn's* Just. 357; 1 *Chitty* Cr. L. 632.

In 12 Cox, 549, the editors reported a case from the United States, preceding it with the following remarks: "Although an American case, the principles of the criminal law being the same as in England, and the like duties and powers of the judge being recognised, a carefully prepared judgment on an important question that may arise here at some time has been deemed worthy of a place for any future reference."

The case is *Commonwealth* vs. *Magee*, Philadelphia, December, 1873, decided by Pierce, J., who held that a Judge may, where the evidence is clear and uncontradicted, and the character of the witnesses unimpeached and unshaken, tell the jury in a criminal case that it is their duty to convict.

For the same reason which induced the editors of Cox's Reports to insert this case in their columns, the full report thereof is given here.

"This was a motion for a new trial and in arrest of judgment on the ground of misdirection in the charge to the jury.

"Pierce, J., in his judgment, said: The evidence against the defendant was clear and explicit by two witnesses, who testified to having bought and drunk liquors at the defendant's place within this year. The defendant offered no testimony.

"There was nothing in the manner or matter of the

witnesses to call in question their veracity, or in the slightest degree to impugn their evidence, the counsel for the defence did not in any manner question the truth of their evidence, but confined his address to the jury to an attack upon the law the motives of the prosecutors. Were the jury, under these circumstances, at liberty to disregard their oaths and acquit the defendant? They had been solemnly sworn to try the case according to the evidence, and a regard to their oaths would lead them but to one conclusion, the guilt of the defendant. The counsel for the Commonwealth states the charge to have been: 'The Judge declared that he had no hesitation in saying, that, under the evidence, it was the duty of the jury to render a verdict of guilty under the bill of indictment.' But no matter which form of expression was used, it was the evidence to which I had just called their attention that indicated their duty, and in view of which the remark was made. I perceive no error in this. It was not a direction to the jury to convict the defendant. It was simply pointing them to their duty. Jurors are bound to observe their oaths of office, whether it will work a conviction or acquittal of a defendant, and they are not at liberty to disregard uncontradicted and unquestioned testimony at their mere will and pleasure. Where, however, the testimony is contradicted by testimony on the other side, or a witness is impeached in his general character, or by the improbability of his story, or his demeanour, it would be an unquestionable error in a Judge to assume that the facts testified to by him had been proved.

"In *Delany* vs. *Robinson*, 2 Wharton, 507, Chief Justice Gibson says: 'It will not be pretended that a jury may find capriciously and without the semblance of evidence, or that the Court may not set aside their verdict for palpable error of fact, and, if it may subsequently unravel all they have done, why may it not indicate the way to a wholesome conclusion in the first instance. Without this process of judicial review, causes would frequently be determined, not according to their justice, but according to the comparative talents of the counsel. To hold the scales of justice even, a Judge may fairly analyse the evidence, present the questions of fact resulting from it, and express his opinion of its weight, leaving the jury, however, a full and active liberty to decide for themselves. The Judge who does no more than this transcends not the limits of his duty.' This was said in a case in which there was a conflict of testimony. It is the duty of the Court, when it is decidedly of opinion that the evidence given by the plaintiff, supposing it to be all true, does not tend to prove such facts as will in law entitle him to recover, to tell the jury so. And if the jury were, after such direction from the Court, to find a verdict for the plaintiff, it would be the duty of the Court to set it aside and grant a new trial: *Matson* vs. *Fry*, 1 Watts, 435. To submit a fact destitute of evidence as one that may nevertheless be found, is an encouragement to err, which cannot be too closely observed, or unsparingly corrected: *Slooppe* vs. *Latshawe*, 2 Watts, 267. It is error for the Court to submit a fact to the jury of which there is no proof: *Miller* vs. *Cresson*, 5 W. & S.

284. When the evidence on a question is all one way, the Court is justified in not transmitting the question, as one of fact, to the jury: *U. S.* vs. *Still*, 5 Blatch. C. C. 403.

"See also *Davis* vs. *Handy*, 6 B. & C. 154, in which Abbott, J., says: 'where a witness is unimpeached in his general character, and uncontradicted by testimony upon the other side, and there is no want of probability in the facts which he relates, I think a Judge is not bound to leave his credit to the jury, but to consider the facts he states as proved, and to act upon them accordingly.'

"To warrant an unqualified direction to the jury in favour of one party or the other, the evidence must either be undisputed, or the preponderance so decided that a verdict against it would be set aside, and a new trial granted. The rule with regard to the positive instruction of the Court to find facts admits of the qualification, that where the verdict is in strict accordance with the weight of evidence, and justice has consequently been done, a new trial will not be granted, though the direction be positive: *Graham & Waterman*, on New Trials, 751. There are occasions in which it becomes the solemn duty of a Judge, in maintenance of the law and furtherance of public justice, to express his opinion clearly and unmistakably upon the facts submitted in evidence. And this was one of these occasions. The law under which the defendant was prosecuted has been openly derided and defied. Bad men have conspired to defeat it. They openly violated it, and perjured witnesses, and juries disregardful of their oaths, have given impunity to the transgressors.

And all this has occurred in the very tribunals of justice seeking to administer the law, and in the course of its administration. A Judge who would hesitate, under these circumstances, to instruct a jury in their duty, would seem to me to be unworthy of the trust reposed in him. No objection was made to the charge by the counsel for the defendant at the time it was given, and the jury, after deliberate consideration, rendered a verdict of guilty. The motion for a new trial is refused."

In 3 *Wharton's* Cr. L. par. 3280, it is said: "Can a Judge direct a jury peremptorily to acquit or convict if, in his opinion, this is required by the evidence? Unless there is a statutory provision to the contrary, this is within the province of the Court, supposing that there is no disputed fact on which it is essential for the jury to pass." See, also, 1 *Wharton* Cr. L. par. 82*a*; *U. S.* vs. *Susan B. Anthony.*

See Mr. Justice Ramsay's charge to the jury in *Reg.* vs. *Dougall*, 18 L. C. Jur. 90.

When the Judge has summed up the evidence he leaves it to the jury to consider of their verdict. If they cannot agree by consulting in their box they withdraw to a convenient place, appointed for the purpose, an officer being sworn to keep them as follows: "You shall well and truly keep this jury without meat, drink, or fire, candle light excepted; you shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask

them if they are agreed on their verdict. So help you God:" 1 *Chitty*, Cr. L. 632; 2 *Gude's* Cr. Pr. 584; 5 *Burn's* Just. 357.

But this formality need not appear on the face of the record. The precautions taken for the safe keeping of the jury are of course noted by the clerk in the register, but they form no part of what is technically known as the record. Consequently the regularity or sufficiency of this part of the proceedings cannot be questioned upon a writ of error: *Duval dit Barbinas* vs. *Reg.*, 14 L. C. Rep. 75.

In *Reg.* vs. *Winsor*, 10 Cox, 276, Chief Justice Cockburn said that there was no authority for allowing refreshments to the jury after they have retired to deliberate upon their verdict, and that he doubted exceedingly whether a judge would be justified in putting the rule aside by a simple act of his discretionary authority in ordering them refreshment during their deliberation.

In England a statute has lately been passed altering the common law rule on the subject, 33 & 34 Vic. ch. 77, but in Canada, the law is yet as above stated in *Reg.* vs. *Winsor*, except in New Brunswick, where it is provided by sec. 3 of 21 Vic. ch. 22, that "when the judge deems it necessary that the jury shall be confined to the precincts of the Court House during the progress or until the completion of any long trial for a criminal offence, the sheriff shall provide them necessary refreshment, the expense of which shall be

paid by the county treasurer out of the funds of the county, on the order of the presiding Judge."

The jury coming back to the box, the prisoner is brought to the bar. The clerk then calls the jurors over by their names, and asks them whether they agree on their verdict; if they reply in the affirmative, he then demands who shall say for them, to which they answer their foreman. He then addresses them as follows: "Gentlemen, are you agreed on your verdict; how say you, is the prisoner at the bar (*or naming him if the trial is for a misdemeanor, and the defendant bailed*) guilty of the felony (*or as the case may be*) whereof he stands indicted or not guilty." If the foreman says guilty, the Clerk of the Court addresses them as follows: "Hearken to your verdict as the Court recordeth it: you say that the prisoner at the bar (*or as the case may be*) is guilty (*or "not guilty," if such is the verdict received*) of the felony (*or as the case may be*) whereof he stands indicted; that is your verdict and so you say all." The verdict is at the same time recorded. The assent of all the jury to the verdict pronounced by their foreman in their presence is to be conclusively inferred. But the Court may either *proprio motu*, or, on demand of either party, poll the jury, that is to say, demand of each of them successively if they concur in the verdict given by their foreman: 2 *Hale*, P. C. 299; *Bacon's* Abr. *Verb.* juries, p. 768; 1 *Bishop*, Cr. Proced. 1003.

The mere entry, by the clerk, of the verdict, does not necessarily constitute a final recording of it. If it

appear promptly, say after three or four minutes, that it is not recorded according to the intention of the jury, it may be vacated and set right: *Rex* vs. *Parkin*, 1 Mood. 45; even, if the prisoner has been discharged from the dock, he will be immediately brought back, on the jury which had not left the box saying that "not guilty" has been entered by mistake, and that "guilty" is their verdict: *Reg.* vs. *Vodden*, Dears. 229.

A Judge is not bound to receive the first verdict which the jury gives, but may send them to reconsider it. Pollock, C. B., said, in *Reg.* vs. *Meany*, L. & C. 216: "A Judge has a right, and in some cases it is his bounden duty, whether in a civil or 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:" see *Rex* vs. *Smith*, 1 *Russell*, 749; *Archbold*, 166; *Bacon's* Abr. *Verb.* "verdict"; 5 *Burn's* Just., 358.

INSPECTION OF DEPOSITIONS, AT TRIAL, BY PRISONERS.

Sec. 46.—All persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof), taken against them, and returned into the Court before which such trial is had.

This is the 6 & 7 Will. IV., ch. 114, sec. 4 of the Imperial Statutes.

By sec. 58 of the 32–33 Vic. ch. 30, "*An Act respecting the duties of Justices of the Peace, out of Sessions, in relation to persons charged with indictable offences,*" it is enacted that:

"At any time *after all the examinations have been completed*, and before the first sitting of the Court at which any person so committed to prison or admitted to bail is to be tried, such person may require and shall be entitled to have, from the officer or person having the custody of the same, copies of the depositions on which he has been committed or bailed, on payment of a reasonable sum for the same, not exceeding the rate of five cents for each folio of one hundred words."

See *post*, section 48 of the Procedure Act of 1869.

COPY OF INDICTMENT MAY BE GIVEN.

Sec. 47.—Every person indicted for any crime or offence shall, before being arraigned on the indictment, be entitled to a copy thereof, on paying the clerk ten cents per folio for the same, if the Court is of opinion that the same can be made without delay to the trial, but not otherwise.

At common law the prisoner was never entitled to a copy of the indictment in cases of treason or felony: 1 *Chitty*, 403.

It would seem that the words "of one hundred words" have been omitted after the word "folio": see *ante*, sec. 58, of 32-33 Vic. ch. 30. As the clause

stands, for what are the ten cents payable? What is therein meant by a folio?

COPIES OF DEPOSITIONS RETURNED INTO COURT.

Sec. 48.—Every person indicted shall be entitled to a copy of the depositions returned into Court on payment of ten cents per folio for the same, provided, (if the same are not demanded before the opening of the Assizes, Term, Sittings, or Sessions,) the Court is of opinion that the same can be made without delay to the trial, but not otherwise; but the Court may, if it see fit, postpone the trial on account of such copy of the depositions not having been previously had by the person charged.

What has been remarked under the last preceding section as to the meaning of the word "folio" may also apply here.

This clause seems to apply to the case where the copies mentioned are asked for after the opening of the first term of the Court, after the prisoner's arrest, whilst sec. 58, of 32-33 Vic. ch. 30 applies to such demand when made before this sitting of the Court.

VERDICT AND PUNISHMENT IN CASES WHERE OFFENCE NOT COMPLETED.

Sec. 49.—If, on trial of any person charged with any felony or misdemeanor, it appears to the jury upon the evidence, that the defendant did not complete the offence charged, but that he was guilty only

of an attempt to commit the same, such person shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the indictment; and no person tried as lastly mentioned shall be liable to be afterwards prosecuted for *committing or* attempting to commit the felony or misdemeanor for which he was so tried.

This clause is textually taken, with the exception of the words in italics, from sec. 9 of 14-15 Vic. ch. 100, of the English Statutes, upon which *Greaves* has the following remarks:

"As the law existed before the passing of this Act, (except in the case of the trial for murder of a child, and the offences falling within the 1 Vic. ch. 85, s. 11), [Sec. 51 of the Procedure Act of 1869, see *post*] there was no power upon the trial of an indictment for any felony to find a verdict against a prisoner for anything less than a felony, or upon the trial of an indictment for a misdemeanor to find a verdict for an attempt to commit such misdemeanor. At the same time the general principle of the common law was, that upon a charge of felony or misdemeanor composed of several ingredients, the jury might convict of so much of the charge as constituted a felony or misdemeanor: *Rex.* vs. *Hollingbury*, 4 B. & C. 329. The reason why, upon

an indictment for felony, the jury could not convict of a misdemeanor, was said to be that thereby the defendant would be deprived of many advantages; for if he was indicted for the misdemeanor he might have counsel, a copy of his indictment, and a special jury: *Rex.* vs. *Westbeer*, 2 Str. 1133; Leach, 12. The prisoner is now entitled, in cases of felony, to counsel, and to a copy of the depositions, and though not entitled to a copy of the indictment, yet as a matter of courtesy, his counsel is always permitted to inspect it. With regard to a special jury, in the great majority of cases a prisoner would not desire it, and it can in no case be obtained unless the indictment has been removed by *certiorari*. Very little ground, therefore, remained for objecting to the jury being empowered to find a verdict of guilty of an attempt to commit a felony upon an indictment for such felony, and the prisoner obviously gains one advantage by it, as where he is charged with a felony, he may peremptorily challenge jurymen, which he could not do if indicted for a misdemeanor. No prejudice, therefore, being likely to arise to the prisoner, and considerable benefit in the administration of criminal justice being anticipated by the change, the jury are now empowered, upon the trial of any indictment for a felony to convict of an attempt to commit that particular felony, and upon the trial of any indictment for a misdemeanor to convict of an attempt to commit that particular misdemeanor."

It is not easily seen why the framers of our Act have added the words "*committing or*" to this clause as it

stands in the English Act. They certainly seem quite unnecessary.

In *Reg.* vs. *McPherson,* Dears. & B. 197, the prisoner was indicted for breaking and entering a dwelling-house and stealing therein certain goods specified in the indictment, the property of the prosecutor. At the the time of the breaking and entering the goods specified were not in the house, but there were other goods there the property of the prosecutor. The jury acquitted the prisoner of the felony charged, but found him guilty of breaking and entering the dwelling-house of the prosecutor, and *attempting to steal his goods therein. Held,* by the Court of Criminal Appeal, that the conviction was wrong, as there was no attempt to commit the "*felony charged*" within the meaning of the aforesaid section

Cockburn, C. J. said: "The effect of the statute is, that if you charge a man with stealing certain specified goods, he may be convicted of an attempt to commit, 'the felony or misdemeanor charged,' but can you convict him of stealing other goods than those specified? If you indict a man for stealing your watch, you cannot convict him of attempting to steal your umbrella. I am of opinion that this conviction cannot be sustained. The prisoner was indicted for breaking and entering the dwelling-house of the prosecutor, and stealing therein certain specified chattels. The jury found specially that, although he broke and entered the house with the intention of stealing the goods of the prosecutor, before he did so, somebody else had taken away the chattels specified in the indictment;

now, by the recent statute it is provided, that where the proof falls short of the principal offence *charged,* the party may be convicted of an attempt to commit the *same.* The word attempt clearly conveys with it the idea, that if the attempt had succeeded the offence charged would have been committed, and therefore the prisoner might have been convicted if the things mentioned in the indictment or any of them had been there: but attempting to commit a felony is clearly distinguishable from intending to commit it. An attempt must be to do that which, if successful, would amount to the felony charged; but here the attempt never could have succeeded, as the things which the indictment charges the prisoner with stealing had been already removed, stolen by somebody else. The jury have found him guilty of attempting to steal the goods of the prosecutor, but not the goods specified in the indictment."

An attempt to commit a felony can only be made out where, if no interruption had taken place, the felony itself could have been committed. The prisoner was indicted for attempting to commit a felony by putting his hand into A's pocket, with intent to steal the property in the said pocket then being. The evidence was that he was seen to put his hand into a woman's pocket; but there was no proof that there was anything in the pocket. *Held,* that on the assumption that there was nothing in the pocket, the prisoner could not be convicted of the attempt charged: *Reg.* vs. *Collins,* L. & C. 471; 9 Cox, 497.

See *ante*, Vol. I., pages 460 and 521, observations on the two cases lastly above cited: *Reg.* vs. *McPherson*, and *Reg.* vs. *Collins*. It may be added that Greaves says, referring to these cases: "There can be no doubt that this and the preceding decision were right upon the grounds that the indictment in the former alleged the goods to be in the house, which was disproved, and in the latter to be in the pocket, which was not proved:" *Attempts to commit crimes*, by *Greaves, Cox & Saunders'* Consol. Acts, cix.

But in *Reg.* vs. *Goodall*, 1 Den. 187, where it was held that on an indictment for using an instrument with intent to procure the miscarriage of a woman, the fact of the woman not being pregnant is immaterial: see *ante*, Vol. I., p. 338. *Greaves* admits that this case is a direct authority, that a man may be convicted of an intent to do that which it was impossible to do: *Idem*, cxi. And if a person administers any quantity of poison, however small, however impossible that it could have caused death, yet if it were done with the intent to murder, the offence of administering poison with intent to murder is complete: *Reg.* vs. *Chideray*, 1 Den. 514; 1 *Russell*, 901, note by *Greaves*. And this rests on a distinction between an *intent* and an *attempt* to commit a crime; it seems that a man may be convicted of doing an act with *intent* to commit a crime, although it be impossible to commit such crime, but that a man cannot be convicted of an *attempt* to commit a crime unless the attempt might have succeeded: *Greaves*, "Attempts," *Cox & Saunders'* Consol. Acts, cxii.

It was held in *Reg.* vs. *Johnson*, L. & C. 481, that an indictment for an attempt to commit larceny which charges the prisoner with attempting to steal the goods and chattels of A, without further specifying the goods intended to be stolen is sufficiently certain. And in *Reg.* vs. *Collins*, L. & C. 471, cited *ante*, the indictment charged the defendant with attempting to steal "the property of the said woman in the said gown pocket then being," without further specifying the goods attempted to be stolen.

In *Reg.* vs. *Cheeseman*, L. & C. 145, Blackburn, J. said: "If the actual transaction has commenced which would have ended in the crime if not interrupted there is clearly an attempt to commit the crime."

In *Reg.* vs. *Roebuck*, Dears. & B. 24, the prisoner was indicted for obtaining money by false pretences. It appeared that the prisoner offered a chain in pledge to a pawnbroker, falsely and fraudulently stating that it was a silver chain, whereas in fact it was not silver, but was made of a composition worth about a farthing an ounce. The pawnbroker tested the chain, and finding that it withstood the test, he, relying on his own examination and test of the chain, and not placing any reliance upon the prisoner's statement, lent the prisoner ten shillings, the sum he asked, and took the chain as a pledge; the jury found the prisoner guilty of the misdemeanor charged against him. *Held*, that the conviction was right.

It is said in 2 *Russell*, 599, on this right given to con-

vict the defendant of the offence charged: "There are some offences which may be attempted to be committed, whilst there are others which cannot be so attempted. It is obvious that where an offence consists in an act that is done, there may be an attempt to do that act which will be an attempt to commit that offence. But where an offence consists in an omission to do a thing, or in such a state of things as may exist without anything being done, it should seem that there can be no attempt to commit such offence. Thus if an offence consist in omitting or neglecting to turn the points of a railway, it may well be doubted whether there could be an attempt to commit that offence. And a very nice question might perhaps be raised on an indictment on the 9-10 Will. III., ch. 41, sec. 2, for *having possession* of marked stores, where the evidence failed to prove that the stores actually came into the prisoner's possession through an attempt to get them into his possession, as in *Reg.* vs. *Cohen*, 8 Cox, 41, and knowledge of their being marked might be proved; for in order to constitute the offence of having possession of anything, it is not necessary to prove any act done, and, therefore, it would be open to contend that there could not be an attempt to commit such an offence.

It is to be observed, however, that the 27-28 Vic., ch. 91, sec. 7, has the words "receives, possesses;" and on a count charging the receiving of stores, there seems no reason to doubt that there might be a conviction of an attempt to receive; for receiving clearly includes an act done. Thus in *Reg.* vs. *Whiley*, 2 Den. 37, where a prisoner went into a coach office and

endeavoured to get possession of stolen fowls which had come by a coach, there seems no reason why she might not have been convicted of an attempt to receive the fowls."

Can there be an attempt to commit an assault? *Greaves* says: "In principle there seems no satisfactory ground for doubting that there may be such an attempt. Although an assault may be an attempt to inflict a battery on another, as where A. strikes at B. but misses him, yet it may not amount to such an attempt, as where A. holds up his hand in a threatening attitude at B., within reach of him, or points a gun at him without more. Is not the true view this—that every offence must have its beginning and completion? and is not whatever is done which falls short of the completion, an attempt, provided it be sufficiently proximate to the intended offence? Pointing a loaded gun is an assault. Is not raising the gun in order to point it an attempt to assault?"

In *Reg.* vs. *Ryland*, 11 Cox, 101, it was held that under an indictment for unlawfully assaulting and having carnal knowledge of a girl between ten and twelve years of age, the prisoner may be convicted of the attempt to commit that offence, though the child was not unwilling that the attempt should be made.

In *Reg.* vs. *Hapgood & Wyatt*, 11 Cox, 471, H. was indicted for rape, and W. for aiding and abetting. Both were acquitted of felony, but H. was found guilty of attempting to commit the rape, and W. of aiding H.

in the attempt. The conviction was affirmed both as to W. and H.: see *Reg.* vs. *Bain*, ante, vol. 1, p. 523.

It was held in *Reg.* vs. *Connell*, 6 Cox, 178, that upon a trial for felony the jury can only convict of an attempt, which is a misdemeanor under the above clause, and not of an attempt which is made felony by statute. Thus, on an indictment for murder with poison, the prisoner cannot be convicted of feloniously administering poison to the deceased with intent to murder him.

Punishment.—The attempt to commit a felony or a misdemeanor is, at common law, a misdemeanor, punishable by fine or imprisonment, or both: see *ante*, vol. 1, p. 713, remarks under sec. 74, of the Act concerning malicious injuries to property.

PERSONS TRIED FOR MISDEMEANOR AND FOUND GUILTY OF FELONY NOT TO BE ACQUITTED.

Sec. 50.—If, upon the trial of any person for any misdemeanor, it appears that the facts given in evidence, *while they include such misdemeanor*, amount in law to a felony, such person shall not, by reason thereof, be entitled to be acquitted of such misdemeanor, (and the person tried for such misdemeanor, *if convicted*, shall not be liable to be afterwards prosecuted for felony on the same facts), unless the Court before which such trial is had, thinks fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor.

The above clause is taken from the 14-15 Vic. ch. 100, sec. 12 of the Imperial Acts. The words in italics are not in the English Act, but the clause has always been interpreted, in England, as if these words were actually in it.

Greaves says on this clause: "This section was introduced to put an end to all questions as to whether on an indictment for a misdemeanor in case upon the evidence it appeared that a felony had been committed, the defendant was entitled to be acquitted, on the ground that the misdemeanor merged in the felony: *Regina* vs. *Neale*, 1 C. & K. 591, 1 Den. 36; *Reg.* vs. *Button*, 11 Q. B. 929. The discretionary power to discharge the jury is given in order to prevent indictments being collusively or improperly preferred for misdemeanors where they ought to be preferred for felonies, and also to meet those cases where the felony is liable to so much more severe a punishment than the misdemeanor that it is fitting that the prisoner should be tried and punished for the felony. For instance, if on an indictment for attempting to commit a rape, it clearly appeared that the crime of rape was committed, it would be right to discharge the jury. So if any one were to prefer an indictment for any offences respecting a railway under the 3-4 Vic. ch. 97 (31 Vic. ch. 68 of the Dominion Statutes) instead of under the 14-15 Vic. ch. 19, secs. 6 & 7, (sec. 39

32-33 Vic. ch. 22, and sec. 32, 32-33 Vic. ch. 20, of the Dominion Statutes) it would be proper, generally speaking, to discharge the jury, and order an indictment for felony to be preferred."

Formerly, where, upon an indictment for an assault with intent to commit a rape, a rape was actually proved, an acquittal would have been directed, on the ground that the misdemeanor was merged in the felony: *Rex.* vs. *Harnewood*, 1 East P. C.; *Reg.* vs. *Nicholls*, 2 Cox, 182; though in *Reg.* vs. *Neale*, 1 Den. 36, cited *ante*, by *Greaves*, it was before this enactment that where a prisoner was indicted for carnally knowing a girl between ten and twelve years of age, and it was proved that he had committed a rape upon her, he was not thereby entitled to be acquitted. The above section removes all doubt on the matter, but it must not be lost sight of, that by its express terms the facts proved, though amounting in law to a felony, *must also include the misdemeanor charged.* For instance, if upon an indictment for having carnal knowledge of a girl above the age of ten years and under the age of twelve years, it appears that in fact the girl was under the age of ten years, this section does not apply, and the prisoner must be acquitted: the offence charged against him is not proved: quite another and totally different offence is proved, and this offence as proved does not include the misdemeanor charged. *Reg.* vs. *Shott*, 3 C. &. K. 206, is a ruling to the same effect, in England, though there the words "while they include such misdemeanor" are not in the corresponding clause.

But the clause fully applies where, upon an indictment for false pretences, the facts prove that the false pretences have been effected by a forgery; in such a case, though a forgery be proved, the prisoner may nevertheless be convicted of the misdemeanor charged, if such is also proved. See *ante*, vol. 1, p. 602.

VERDICT OF ASSAULT IN CERTAIN CASES OF FELONY.

Sec. 51.—On the trial of any person for any felony whatever, where the crime charged includes an assault against the person, although an assault be not charged in terms, the jury may acquit of the felony, and find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding, and the person so convicted shall be liable to be imprisoned in the penitentiary for any term not exceeding five years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years.

From 1837 to 1851, the statute book in England contained an enactment similar to this one, the 7 Will. IV and 1 Vic. ch. 85, sec. 11; but it was found there, that such great difficulties had arisen in its construction, that it was repealed by the 14–15 Vic. ch. 100, sec. 10.

On this repealing clause, *Greaves* says:—

"This section repeals the 11th sec. of the 1 Vic. ch. 85, which had not only led to difficulties in determining to what cases it applied, but had been applied to cases, which it is extremely questionable whether it

was ever intended to apply. The power to convict of an attempt to commit a felony given by the last section (sec. 49 of the Procedure Act of 1869), and the power to convict of unlawfully cutting, stabbing, or wounding, given by the 14–15 Vic. ch. 19, sec. 5, (section 19, 32-33 Vic. ch. 20 of Dominion Statutes), are much better calculated to prove beneficial than the repealed section."

In the case of *Regina* vs. *Bird*, 2 Den. 94, on the interpretation of the repealed clause, fourteen Judges of the Court of Exchequer were divided eight to six, and the Chief Justice of England, Lord Campbell, who was one of the minority, closed his remarks on the case by saying: "I hope I may, without impropriety, express a wish that the Legislature will speedily repeal or explain the enactment which has caused such confusion. Of course, I am ready to abandon the construction of it for which I have been contending, and most respectfully and submissively to be governed by the opinion of my learned brethren who differ from me; but I have not been able to gather from them any clear and certain rule for my future guidance, and I am afraid that without the interference of Parliament, notwithstanding our best efforts to be unanimous, we ourselves, as well as others, may again find it difficult to anticipate the result of our deliberations."

This was on the 12th February, 1851, and on the 7th August of the same year, Parliament repealed the objectionable clause. *There*, the decisions and recommendations of the Courts of Justice are not ignored by the legislator.

All this has had no influence with our law-givers, and they *will not* be guided by the experience of others. Of course, it cannot, for an instant, be presumed that they were ignorant of the history of this clause in the mother country. No one would have the presumption to doubt for an instant that each and every one of those who voted our criminal statutes of 1869, had read with the deepest attention and most maturely weighed the report of the case and the lengthy and most learned observations of the fourteen Judges in *Regina* vs. *Bird*. This must necessarily all have been done, since they thought themselves competent to pass these laws, without the aid, usually resorted to in such instances, of a special commission. It must then be assumed that, in their opinion, what was found, after trial, impracticable in England, may perhaps be found to work well here, though the principle upon which such a result can be expected, may not be *broadly* known.

At all events, in practice, the clause, though not very long in force, promises not to fare better in Canada than it did in England, and already, in Ontario, it has been held that under it a verdict of assault upon an indictment for murder or manslaughter is not legal: *Reg.* vs. *Ganes*, 22 U. C. C. P. 185 (following *Rey.* vs. *Bird*), whilst in Quebec, in *Reg.* vs. *Carr*, 1872, a verdict of assault in a case of manslaughter has been given, and received by Chief Justice Duval, without

hesitation, and, in fact, this seems admitted as the settled jurisprudence on the subject, in this last named Province. See also *Reg.* vs. *Smith*, 34 U. C. Q. 552.

The following are the most important decisions in England on the interpretation of this clause.

In a joint indictment for felony, one may be found guilty of the felony, and the other of assault under this clause: *R.* vs. *Archer*, 2 Mood. 283. In an indictment for felony, a conviction cannot be given under this clause of an assault, completely independent and distinct, but only of such an assault as was connected with the felony charged: *R.* vs. *Gutteridge*, 9 C. & P. 471, and this interpretation was admitted as undoubtedly right in *Reg.* vs. *Phelps*, 2 Mood. 249 (see *post*), and by the fourteen Judges in *Reg.* vs *Bird*. The case of *Reg.* vs. *Pool*, 9 C. & P. 728, where Baron Gurney held that if a felony was charged and a misdemeanor of an assault proved, the defendant might be convicted of the assault, although that assault should not be connected with the felony stands, therefore, overruled. In *Reg.* vs. *Boden*, 1 C. & K. 395, it was held that on an indictment for assaulting with intent to rob, if that intent is negatived by the jury, the prisoner may be convicted of assault under this enactment. In *Reg.* vs. *Birch*, 1 Den. 185, upon a case reserved, it was held that upon an indictment for robbery, the defendant, under this clause, may be found guilty of a common assault. The Judges thought, upon consulting all the authorities, that this enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor

was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault. See also *Reg.* vs. *Ellis*, 8 C. & P. 654. But they were of opinion that, in order to convict of an assault under this section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the Crown prosecutes as a felony by the indictment. And it was suggested that it would be prudent that all indictments for felony including an assault, should state the assault in the indictment.

This suggestion may be, here, usefully remembered in the framing of such indictments, other than murder or manslaughter, notwithstanding the words inserted in this section "*although an assault be not charged in terms*," which were not in the English Act.

In *Reg.* vs. *Greenwood*, 2 C. & K. 339, it was held by Wightman, J., that if on an indictment for robbery with violence the robbery was not proved, the prisoner could not be found guilty of the assault only, under this clause, unless it appeared that such assault was committed, in the progress of something, which, when completed, would be, and with intent to commit, a felony.

In *Reg.* vs. *Reid*, 2 Den. 88, it was held by five judges that the verdict of assault allowed by this clause must be for an assault, as a misdemeanor, and not for a felonious assault, and this has never since been doubted.

In *Reg.* vs. *St. George*, 9 C. & P. 491, the prisoner was charged with attempting to fire a pistol with intent, &c. The question was whether the prisoner could be convicted of an assault committed with his hand prior to having drawn out the pistol. Baron Parke held that the prisoner could only be found guilty of that assault which was involved in and connected with firing the pistol.

In *Reg.* vs. *Phelps*, 2 Mood. 240, the prisoner with others was indicted for murder. It was proved that Phelps, in a scuffle, struck the deceased once or twice and knocked him down: that after this, Phelps went away to his own home and took no further part in the affray: that, about a quarter of an hour afterwards, the deceased, on the same spot, was again assaulted by other parties, and received then an injury of which he died on the spot. On these facts the jury acquitted Phelps of the felony, and found him guilty of the assault. But the judges were unanimously of opinion that the conviction was wrong, as for a verdict of assault under the clause mentioned, the assault must be such as forms one constituent part of the greater charge of felony, not a distinct and separate assault as this was.

In *Reg.* vs. *Crumpton*, 1 C. & M. 597, Patteson, J., held that, in manslaughter, a jury should not convict a prisoner of an assault unless it conduced to the death of the deceased, even though the death itself was not manslaughter. See also *Reg.* vs. *Connor*, 2 C. & K. 518.

In the case of *Reg.* vs. *Bird*, 2 Den. 94, already cited, as the final blow to the enactment in question, in England, the Court, on the following division, decided that on an indictment for murder or manslaughter, the prisoner, under the said clause, cannot be convicted of an assault:

Against the conviction.	*For the conviction.*
Pollock, C. B.	Lord, Campbell, C. J.
Patteson, J.	Jervis, C. J.
Coleridge, J.	Parke, B.
Wightman, J.	Alderson, B.
Cresswell, J.	Maule, J.
Erle, J.	Martin, B.
V. Williams, J.	
Talfourd, J.	

In the case of *Reg.* vs. *Ganes*, in Ontario, 22 U. C. C. P., 185, already cited, the Court followed the rule laid down by the majority in *Reg.* vs. *Bird*, and decided that, under the said section 51 of our Procedure Act, a verdict of assault cannot be given upon an indictment for murder or manslaughter. It may be remarked that, in this case, Chief-Justice Hagarty distinctly said that his own individual opinion was wholly with that of the minority in *Reg.* vs. *Bird*, viz: that, in such cases, a verdict of assault is legal. See also *Reg.* vs. *Smith*, 34 U. C. Q. B. 552.

In Quebec, in the cases of *Reg.* vs. *Carr* (2nd case), *Reg.* vs. *Wright*, *Reg.* vs. *Taylor*, all since 1869, and upon indictments charging either murder or manslaughter, verdicts of "guilty of assault" have been

given and received, without the appearance of the least doubt of their legality either from the bench or bar.

Upon an indictment for rape or for an assault with intent to commit rape, under sec. 49 of 32-33 Vic. ch. 20 (see *ante*, vol. 1, p. 307) a boy under the age of fourteen years may be convicted of an assault under the said section 51 of the Procedure Act: *Reg.* vs. *Grimilow*, 2 Mood, 122.

Upon an indictment, under sec. 10 of 32-33 Vic. ch. 20 (see *ante*, vol. 1, p. 227), for feloniously assaulting with intent to murder, a verdict of common assault may be given under the said section of the Procedure Act: *Reg.* vs. *Cruse*, 2 Mood. 53; *Reg.* vs. *Archer*, 2 Mood. 283. If a man has carnal knowledge of a woman by a fraud which induces her to suppose it is her husband, upon an indictment for rape, he must be acquitted of the felony, but may, under the said section 51 of the Procedure Act, be convicted of an assault: *Reg.* vs. *Saunders*, 8 C. & P. 265, by fifteen judges; *Reg.* vs. *Williams*, 8 C. & P. 286.

But to authorize such a verdict, the felony *charged* must necessarily include an assault on the person, and, for instance, on an indictment for administering poison with intent to murder, a verdict of assault cannot be given under this clause: *Reg.* vs. *Watkins*, 2 Mood. 217; *Reg.* vs. *Dilworth*, 2 M. & Rob. 531; *Reg.* vs. *Draper*, 1 C. & K. 176; but such a verdict may be given, if the indictment charges an assault, and the

wilfully administering of deleterious drugs: *Reg.* vs. *Sutton*, 8 C. & P. 660.

It may safely be said that the authorities on the question are sufficiently clear as to one point, viz: that, under this section 51 of the Procedure Act of 1869, in *all* cases of felonies, which include an assault against the person, though an assault be not charged in terms, the jury may acquit of the felony, if such is not proved, and find a verdict of assault against the defendant, if the evidence warrants it: that is to say, if an assault forming part of the very act or transaction which the Crown prosecutes as a felony by the indictment has been proved.

It is true that as to indictments for murder or manslaughter, *Reg.* vs. *Phelps* and *Reg.* vs. *Bird*, in England, and *Reg.* vs. *Ganes* in Ontario, are given by the reporters as ruling, as an abstract principle, that in *no* case of murder or manslaughter a verdict of assault can be given under this section 51 of the Procedure Act; but a careful consideration of these cases will amply demonstrate that they do not bear such an interpretation.

In the first of these cases, *Reg.* vs. *Phelps*, as already stated, it was decided that, upon an indictment for murder, the defendant cannot, under this clause, be convicted of an assault entirely separate and distinct from the felony charged: it was there proved that when the deceased was killed, when the murder was committed, the defendant was away from the spot and

had been gone for a quarter of an hour: the judges decided that, upon this evidence, the defendant could not be convicted of an assault, though an assault had been proved to have been committed by him on the deceased a quarter of an hour before the murder took place. And this ruling has never since been questioned: it is not because a felony involves an assault that the defendant can be convicted of any assault whatever, committed on the same person: if in the course of the evidence, the witnesses happen to disclose crimes entirely distinct and disconnected from the offence charged, the jury are not thereby authorized to adjudge on anything else but the facts forming part of the crime laid in the indictment. The clause says: "on the trial of any person for any felony whatever, *where the crime charged includes an assault against the person.*" And this can never have reasonably been interpreted as meaning any other assault than the one necessarily accompanying the crime charged, and forming an integral part of it, as in *Reg.* vs. *Grimilow*, *Reg.* vs. *Cruse*, *Reg.* vs. *Birch*, *&c.*, *ante*. So much for *Reg.* vs. *Phelps*, which is clearly far from supporting the proposition that a verdict for assault cannot, under any circumstances, be found in cases of murder or manslaughter.

Then comes *Reg.* vs. *Bird*. It is a great error to cite this case as deciding anything else than the case of *Reg.* vs. *Phelps*. It is based on the following facts: The prisoners were indicted for the murder of Mary Ann Parsons, by striking and beating her. It was proved on the trial that Mary Ann Parsons' death, on the 4th of January, 1850, was caused *exclu-*

sively by one particular blow on the head, inflicted shortly before her death, but there being no evidence that the fatal blow had been struck by either of the prisoners, they were acquitted: during the course of the trial, it had been proved that the prisoners had committed different assaults on the deceased in the two months preceding her death, but that none of these assaults were connected with her death. The majority of the Court held, that on these facts, a verdict of assault could not be given against the prisoners. And why? Because the assaults committed by them on Mary Ann Parsons during the two months preceding her death, were not included in the crime charged in the indictment, but were totally different and distinct offences; because the only assault included in the indictment was the particular blow which had caused the death, and as they were found not guilty of having given that particular blow, they were entitled to a full acquittal, and the jury had not the right to say: "it is true that the assault which caused Mary Ann Parsons' death has not been proved to have been committed by the prisoners, but other assaults previously committed by them on the deceased have been proved, and we will take this occasion to find the defendants guilty of these, though they were only accused, in this case, of the particular blow which caused the death."

It is obvious that this would be trying a man for one offence, and finding him guilty of another. That is what the Court refused to do in this case, as well as in *Reg.* vs. *Phelps*, and a reference, as *infra*, to the remarks of the following judges who formed part of

the majority in *Bird's* case will show that they followed *Phelps'* case, without going an inch further:

Talfourd, 2 Den. .....pp. 147, 148
Williams, " .... " 157, 158
Cresswell, " ..... " 164, 165
Wightman, " ..... " 168, 169
Coleridge, " ..... " 180, 181
Patteson, " ..... " 183, 187

None of these learned Judges said that a verdict for assault can never be given on an indictment for murder or manslaughter. Indeed, it will be found that they all appear to think such a result possible.

Wightman, J. distinctly says: "If in the present case, it had appeared that, at the time the mortal injury was received, the prisoners were with the deceased, and had assaulted and beaten her immediately before, but that the evidence raised a doubt whether the mortal injury was occasioned by blows, or by a fall which might be attributed to accident, and on that ground the jury had acquitted the prisoners of felony, I should think that they might be convicted of assault under the statute, for in that case, the assault proved would have been involved in, and formed part of the act or transaction charged as a felony in the indictment, and prosecuted as such."

And Jervis, C. J., (*one of the minority*) says: "If it had been proved that the child had not died, it is admitted that the prisoners might have been convicted of assault upon this indictment for murder. If the death resulted from natural causes, it is admitted

that the prisoners might have been convicted of assault upon this indictment for murder."

In the Ontario case of *Reg.* vs. *Ganes* (see *ante*) the facts were almost similar to those in *Reg.* vs. *Bird*, and the only ruling in the case is that where upon an indictment for murder, the prisoners are proved to have, at different times *before* the death of the deceased, committed on him various assaults, yet they cannot be found guilty of *these* assaults, and must be acquitted, altogether, if it is proved that these assaults were not connected with the death of the deceased; but, on the contrary that the deceased died from a burning, with which the prisoners were not connected. Here, as in *Phelps'* and *Bird's* cases, the only question decided is that upon an indictment for murder or manslaugter. the defendant cannot be found guilty of any offence not included in the crime charged, of an assault, committed *at another time* than the offence charged, of any other assault than the one which the prosecution *charged as a felony*. As already stated, this is admitted: no one pretends that a man can be tried for misbehaviour or criminal conduct on a certain occasion, and, though found not guilty on that particular occasion, yet be convicted for some criminal act done upon another occasion. And the Judges, who formed the minority in *Bird's* case did not intend to overrule *Reg.* vs. *Phelps*, but thought one case distinguishable from the other.

But it is said, and this reasoning is adopted by Mr. Justice Gwynne, in *Reg.* vs. *Ganes*, that, as in murder or manslaughter, the only assault charged in the indict-

ment is the one which conduced to the death of the deceased, if the prisoner is guilty of an assault, he is guilty of the felony, and cannot, in respect of that assault, be convicted of assault merely; and that if the assault proved, does not conduce to the death, it is distinct from and independent thereof, and is, therefore, not included in the crime charged; and, therefore, that no verdict of assault can be rendered upon an indictment for homicide, in respect of such an assault.

It cannot be denied that when different assaults are brought out by the prosecution, in the course of the evidence, as supposed by Erle, J., in his remarks in Bird's case, and as was the case in *Reg.* vs. *Phelps*, *Reg.* vs. *Bird*, and *Reg.* vs. *Ganes*, this opinion seems to be unassailable. But when the defendant is accused of having, on a certain occasion, killed a person, by, for instance, striking him in the chest; cannot the jury say: "We find that, on the occasion specified, the defendant did strike the deceased, but we do not think it proved by the prosecution that the deceased died of this blow." How can it be said that the *crime charged* is the assault connected with the death, and that of the assault connected with the death only the prisoner can be found guilty, or else be acquitted altogether? This reasoning would render the clause wholly inoperative in cases of homicide. And when the clause says "for *any* felony *whatever*" surely it cannot be denied that it expressly includes murder or manslaughter. Moreover this interpretation would make the clause say that when a felony is proved, a verdict of assault *can* be returned. This would be

absurd, and the law does not say it: quite the contrary, such a finding is allowed only, *if the evidence warrants it*. The clause must be read, in cases of homicide, as if it said: "On the trial of any person for murder or manslaughter, where the homicide charged includes an assault against the person, although an assault be not charged in terms (and no assault is now, in such cases, charged in terms) the jury may acquit of the felony, and find a verdict of guilty of assault against the defendant, if the defendant's act which the prosecution called a felony, has been proved to be only an assault." The clause, indeed, says, in express terms, that in such a case, there must be an acquittal for a part, *i.e.*, "may acquit of the felony" and a conviction for another part, *i.e.*, "may find a verdict of assault," showing the operation it authorizes, of, first, divesting the act charged against the defendant of the felonious character which the prosecution endeavoured to put upon it, if the evidence warrants it, and secondly, of finding the same act to be an assault also, if the evidence warrants it.

Any other interpretation gives to the clause an absurd sense, and the rule is clear that of two possible interpretations of a statute, the one which gives it a reasonable and practicable sense is to be preferred to any other, which would make it absurd and inoperative.

In a case of *Reg.* vs. *Dingman*, 22 U. C. Q. B. 283, it was held that, under sec. 66, ch. 99, of the Consolidated Statutes of Canada, there could be no conviction for an assault, unless the indictment charged an

assault in terms, or a felony necessarily implying an assault; but the insertion of the words "*although an assault be not charged in terms*," in sec. 51 of the Procedure Act of 1869, renders this ruling now inapplicable, if it was ever correct.

In New Brunswick, the repealed statute, 1 Rev. Stat. ch. 149, sec. 20, enacted that: "Whoever, on a trial for murder or manslaughter, or any other felony which shall include an assault, shall be convicted of an assault only, shall be imprisoned for any term not exceeding three years, or fined, at the discretion of the Court."

In *Reg.* vs. *Cregan*, 1 Hannay, 36, on an indictment for murder, the jury found the prisoner guilty of an assault only, but that such assault did not conduce to the death of the deceased. The Court held this conviction illegal, and not sustained by the above statute.

Evidently the New Brunswick Court sided with the Ontario Courts, in this case, and was of opinion that a verdict of assault can never be given in a case of homicide.

In *Reg.* vs. *Cronan*, 24 U. C. C. P., 106, the Ontario Court of Common Pleas held that upon an indictment for shooting with a felonious intent, the prisoner, if acquitted of the felony, may be convicted of a common assault, and that to discharge a pistol loaded with powder and wadding, at a person, within such a distance that he might have been hit, is an assault.

ACQUITTAL OF A CRIME IS A BAR TO ACCUSATION FOR AN ATTEMPT TO COMMIT IT.

Sec. 52.—No person shall be tried or prosecuted for an attempt to commit any felony or misdemeanor who has been previously tried for committing the same offence.

There is no principle so well established in the English Criminal Law, and, in fact, in every system of jurisprudence, that "no man is to be brought into jeopardy of his life more than once for the same offence:" 4 *Blackstone*, 335; or as expressed by Lord Campbell, in *Reg.* vs. *Bird*, 2 Den. 216, in other terms: "No one ought to be twice tried for the same cause," a rule, in the civil law, contained in the words, "*nemo bis vexari debet pro eadem causa.*"

It was laid down by Mr. Justice Buller, in *Rex.* vs. *Vandercomb*, 2 Leach, 708, and has never been since doubted, that the true criterion to ascertain whether an indictment "puts any one twice in jeopardy for the same offence," is whether the facts charged in the second indictment would have been sufficient to support a conviction upon the first indictment; and by the words *a conviction upon the first indictment*, is not meant only *a conviction of the crime expressly charged in the first indictment*, but *any conviction allowed by law upon the first indictment*. So that this section 52 of the Procedure Act is altogether superfluous and unnecessary. Since, by section 49 of the same Act, if, on the trial of any person charged with any crime, the jury may convict