such person of an attempt to commit that crime, it appearing that such offence was not completed, it follows that a person who would be indicted for an attempt to commit a crime, after having already been tried for the commission of the same crime, would be accused on facts which would have been sufficient to support, upon the first indictment, a conviction for the very same offence charged in the second indictment.

There is another reason, not more conclusive, but as conclusive, against the necessity of the clause 52 of the Procedure Act, it is simply that it is already enacted in a previous section of the same Act. If the last part of sec. 49 does not say that a person tried for committing an offence shall not afterwards be tried for an attempt to commit the same offence, it is not easily understood what it says.

NO ENQUIRY CONCERNING LANDS, ETC., IN TREASON OR FELONY.

Sec. 53.—The jury empanelled to try any person for treason or felony shall not be charged to inquire concerning his lands, tenements or goods, nor whether he fled for such treason or felony.

This is the 7th and 8th Geo. IV. ch. 28, sec. 5, of the Imperial Statutes.

By the old English law, flight by any one accused of a crime was an offence, and in treason and felony, if the jury found that the prisoner "had fled for it,"

this finding carried the forfeiture of his goods and chattels, whether found guilty or acquitted of the crime charged. Long before being specially abolished by Parliament, the question "did he fly for it" had become a mere form of no consequence, as the jury always found against the flight: 4 *Blackstone*, 387 : 1 *Chitty*, 731 ; 4 *Stephen's* Comm. 460.

NO DEODANDS.

Sec. 54.—There shall be no forfeiture of any chattels, which may have moved to or caused the death of any human being, in respect of such death.

By the common law, *omnia quæ movent ad mortem sunt Deo danda.* Hence the word "deodand," which signified a personal chattel which had been the immediate occasion of the death of any reasonable creature, and which, in consequence, was forfeited to the Crown, to be applied to pious uses, and distributed in alms by the High Almoner. Whether the death were accidental or intended, whether the person whose chattel had caused the death participated in the act or not, was immaterial. The cart, the horse, the sword, or anything which had occasioned the death of a human being, or the value thereof, was forfeited, if the party died within a year and a day from the wound received. And, for this object, the coroner's jury had to inquire what instrument caused the death, and to establish the value of it. But the jury used to find a nominal value only, and confine the deodand to the very thing or part of the thing itself which caused the

death, as if a waggon, to one of the wheels only: *Rex* vs. *Rolfe*, Foster, 266; 1 *Hawkins*, 74; 1 *Blackstone*, 300; 2 *Bacon's* Abr. 292; 1 *Hale*, P. C. 419. This forfeiture, "which seemeth to have been originally founded rather in the superstition of an age of extreme ignorance than in the principles of sound reason and true policy:" *Rex.* vs. *Rolfe*, Foster, 266, was abolished in England only on the 1st day of September, 1846, by the 9–10 Vic. ch. 62.

ATTAINDER—ITS CONSEQUENCES.

Sec. 55.—Except in cases of treason, or of abetting, procuring or counselling the same, no attainder shall extend to the disinheriting of any heir, or to the prejudice of the right or title of any person, other than the right or title of the offender during his natural life only.

Sec. 56.—Every person to whom, after the death of any such offender the right or interest to or in any lands, tenements or hereditaments, should or would have appertained if no such attainder had taken place, may, after the death of such offender, enter into the same.

By the common law, a man convicted of treason or felony, stands *attaint*. By this attainder, he loses his civil rights and capacities, and becomes dead in law, *civiliter mortuus:* 1 *Stephen's* Comm. 141. He forfeits to the King all his lands and tenements, as well as his personal estate, his blood is corrupted, so that

nothing can pass by inheritance to, from or through him: 4 *Blackstone*, 380, 387; 2 *Hawkins*, 637. But the lands or tenements are not vested in the Crown during the life of the offender, *without office*, or *office-found* which is the finding by a jury of a fact which entitles the Crown to the possession of such lands or tenements: *Wharton's* Law Lexicon, *verb.* "*Inquest of office*," "*office-found*": 3 *Stephen's* Comm. 661. Though this formality is not necessary in cases of treason, where, by 33 Hen. VIII. ch. 20, sec. 2, goods and chattels become the property of the Crown without office.

The aforesaid sections 55 and 56 of the Procedure Act are taken from the 54 Geo. III. ch. 145, of the Imperial Statutes; they have the effect to abolish the corruption of blood in felonies. They seem to exclude cases of treason, or rather to assume that corruption of blood exists in treason, but, in these cases, corruption of blood never existed in this country, not being part of the criminal law of England, as introduced here, it having been abolished, in England, by 7 Anne, ch. 21, sec. 10, suspended by the 17 Geo. II. ch. 39, sec. 3, till not only the Pretender, but also his eldest, and all and every his son and sons, should be dead, an event long ago accomplished.

The 39 Geo. III. ch. 93 (Imperial), repealed these last mentioned statutes, but it is not law for us: 1 *Chitty*, 734, 741; 4 *Stephen's* Comm. 455.

This view, on this part of the law, seemed to ourself to bear such incongruous consequences, that we

thought it better to have upon it the opinion of the learned Mr. *Wicksteed*, the Law Clerk of the House of Commons.

Mr. *Wicksteed* had the kindness to write as follows:

"Sections 55 and 56 of 32-33 Vic. ch. 29, are taken from the statute of U. C. 3 Wm. IV. ch. 4, and, I think, should be read, and should have been printed as one section, as they are in the U. C. statute. Why the U. C. Legislature supposed that it was desirable to pass that Act, I do not exactly know, but suppose that, after the passing of the Imperial Act, 54 Geo. III. ch 145, 'An Act to take away the corruption of blood save in certain cases,' which does not in any way refer to the prior Acts of William III., Anne, or 39-40 Geo. III. but simply enacts that 'no attainder for felony which shall take place after the passing of the Act, save in the cases of high-treason, petty-treason or murder, or abetting or procuring or counselling the same, shall extend to disinheriting any heir,' &c., they thought that the operation of the Acts of Wm. III. and Anne was at any rate doubtful as to high-treason, and not at all doubtful as to petty-treason and murder, and they, therefore, passed an Act identical with that of the Imperial Parliament, as to high-treason, but extending the exemption to all other cases of felony, except high-treason. And it is well to observe that the Act 39–40 Geo. III. ch. 93, which is supposed to have repealed the Acts of Wm. III. and Anne, does nothing of the kind, but merely regulates the mode of indictment and trial in cases where the overt act of treason consists in a direct attempt on the life of or bodily harm to the Sovereign, and provides that, after conviction in such cases, judgment shall be nevertheless given and execution done as in other cases of high-treason: nothing is said of the consequences of the attainder, and the Act is entitled 'An Act for regulating trials for high-treason and misprision of treason in certain cases.' I do not see that this Act repeals the two foregoing statutes, (William and Anne) or restores the old law if it was repealed by them, and the Imperial Act 54 Geo. III. ch. 145 seems to assume that the old law existed, notwithstanding the three former Acts, or it ought to have repealed them. It goes to work in a better way, for they, if in force, would have abolished corruption of blood in high-treason, and left it in other felonies of minor degree. And the U. C. Stat. and our present one go still further and abolish it in all cases *but* high-treason, thus very properly reversing the operation of the statutes William III. and Anne. I am not aware that any statute of the Imperial Parliament or of any of the Provinces of Canada has re-enacted corruption of blood for high-treason. It would seem then that the Acts of William and Anne, and 17 Geo. II. ch. 39 (which I could not look at as it is absent from the library) were intended to abolish corruption of blood for treason after the death of the sons of the Pretender, the last of whom, Cardinal York, died at Rome in 1807, and, therefore, before the passing of the Imperial Act, 54 Geo. III. ch. 145, and still longer before the passing of the U. C. Act, 3 Wm. IV. ch. 4. But though the said Acts would appear to have abolished corruption of blood for treason from 1807, yet, both the

Imperial Parliament and the U. C. Legislature seem to have thought that the said Acts had not that effect, for neither the Imperial nor the U. C. Act re-enact the corruption of blood for treason, but assume that it existed, and abolish it in certain other cases. If so, then, in Lower Canada, it does not seem to have been abolished in treason or felony, until the passing of our Act of 1869. There is a little mystery about this, but, fortunately, it does not matter now, except as a curiosity of legislative history. The Imperial Parliament passed an Act, in 1870, 33-34 Vic. ch. 23, abolishing forfeitures in all cases—a very sensible thing. But the Act is necessarily long and special, as it had to provide for the management of a felon's property while undergoing sentence of imprisonment. In *Chitty's* Cr. L., vol. 1, p. 741, there is something on this matter, and he calls the 7 Anne *an ineffectual attempt to remove the corruption of blood from high-treason.* But I doubt whether *Chitty* had the Statutes before him, for the effect of 39-40 Geo. III. ch. 93, and of 54 Geo. III. ch. 145, seem both to be incorrectly stated."

These valuable notes go strongly to confirm the view of the law as expressed on the subject, *ante*; neither the U. C. Act (C. S. U. C., ch. 116) nor section 55 of the Procedure Act of 1869 can be taken as re-enacting the corruption of blood in cases of high-treason: they both, assuming that it exists, pretend to leave it in force. But it appears that it did not exist. When the criminal laws of England were introduced either in Upper or in Lower Canada, there were in force, in England, as stated *ante*, two statutes abolishing

such corruption of blood in high-treason, virtually from 1807 (see *Hawkins'* P. C., by *Curwood*, Vol. II., p. 649 note): these statutes were transmitted to us as part of our laws: they have never been repealed in Canada; so, it would seem that, in the present state of our law, there is no corruption of blood either in cases of high treason or any other felony, and that on attainder of all felonies, the criminal forfeits only his goods and chattels, and the profits of lands during life, while his real estate comes, in the ordinary channel of descent, to his heir who is thus also restored to a full capacity to inherit. See for Ontario, C. S. U. C., ch. 82, sec. 7.

In the Province of Quebec, by articles 32 and 33 of the civil code, civil death results from a condemnation to death or penitentiary for life: by art. 35, all the property of the *civiliter mortuus* is confiscated to the Crown: by art. 36, the *civiliter mortuus* cannot take or transmit by succession. Is there not a contradiction between these articles, and more particularly the last one and sections 55 and 56 of the Procedure Act of 1869? Parliament has undoubtedly exclusive jurisdiction on the judgment and all the parts of the judgment in criminal cases. But are the attainder, forfeiture, &c., a part of the judgment, or only a consequence of it? See 4 *Blackstone*, 386. If only a consequence of the judgment, do they fall within the Criminal Law, or the Civil Law?

The attainder can be reversed by Act of Parliament only: the royal pardon has not that effect: *Rochon* vs. *Leduc*, 1 L. C. Jur. 252; 2 *Hawkins*, P. C. 649.

The goods of an adjudged felon belong to the Queen, without office found, though they are allowed to remain in the possession of his wife, or any other party. So, if a larceny is committed of such goods, they must be laid in the indictment as belonging to the Queen, even if the felon is only sentenced to a short period of imprisonment; but a house or land continues to be the felon's property, as long as no office is found: *Reg.* vs. *Whitehead*, 2 Mood. 181. See, *ante*, page 286, as to the meaning of the words "*office found.*"

As remarked by Mr. Wicksteed (see *ante*), forfeitures, confiscations and attainders are now abolished in England since 1870: why not immediately do the same in Canada?

It may be useful to remark that though the rebels of 1837-38, sentenced by the Courts-Martial then established, were declared *attaint*, and their property confiscated, this was in virtue of a special statute specially passed for that purpose—the 2 Vic., ch. 7, of the Lower Canada Statutes.

JURY SEPARATING, ETC.

Sec. 57.—In all criminal cases, less than felony, the Jury may, in the discretion of the Court, and under its direction as to the conditions, mode and time, be allowed to separate during the progress of the trial.

It is a general rule that upon a criminal trial there can be no separation of the jury after the prisoner is

given in their charge, and before a verdict is given. The above enactment restricts the rule to felonies; in fact, it seems to have always been admitted that in misdemeanors the jury might be allowed to separate during the trial: *Rex* vs. *Woolf*, 1 *Chitty's* Rep. 401; *R.* vs. *Kinnear*, 2 B. & Ald. 462.

But, even under the above clause, there is no doubt that, generally speaking, the Judge ought not to allow the jury to separate after they have been addressed by the Court and their deliberations have begun. In fact, some Judges never allow the jury to separate, and if it can be done without too much inconvenience, this is, perhaps, the best practice. When, however, such separation is permitted, the Judge ought to caution the jury against holding conversation with any person respecting the cause, or suffering it in their presence, or reading newspaper reports or comments regarding it, or the like: 1 *Bishop*, Cr. Proced. 996.

The doctrine that "a jury sworn and charged in case of life or member cannot be discharged by the Court, but they ought to give a verdict," is exploded, and it may now be considered as established law that a jury sworn and charged with a prisoner, even in a capital case, may be discharged by the Judge at the trial without giving a verdict, if a necessity—that is a high degree of need—for such discharge is made evident to his mind. If after deliberating together the jury say that they have not agreed, and that they are not likely to agree, the Judge may discharge them. It lies absolutely in his discretion how long they should

be kept together, and his determination on the subject cannot be reviewed in any way: *Reg.* vs. *Charlesworth*, 2 F. & F. 326; 1 B. & S. 460; *Winsor* vs. *Reg.* (in error), 7 B. & S. 490; 3 *Burn's* Justice, 98; *Archbold*, 168.

In the course of the trial one of the jurors had, without leave, and without it being noticed by any one, left the jury box and also the Court-house, whereupon the Court discharged the jury without giving a verdict, and a fresh jury was empanelled. The prisoner was then tried anew, and convicted before the fresh jury: *Held*, by the Court of Criminal Appeal, that the course pursued was right: *Reg.* vs. *Ward*, 10 Cox, 573.

If a juryman is taken ill, so as to be incapable of attending through the trial, the jury may be discharged, and the trial and examination of witnesses begun over again, another juror being added to the eleven; but in that case the prisoner should be offered his challenges over again, as to the eleven, and the eleven should be sworn *de novo*: *R.* vs. *Edwards*, R. & R. 224; see also *R.* vs. *Scalbert*, 2 Leach, 620, and 2 *Hale*, P. C. 295; also *Reg.* vs. *Ashe*, 1 Cox, 150.

But when such a trial has to be begun over again, it is not regular, whether the prisoner assents to it or not, instead of having the witnesses examined anew *viva voce*, to simply call and swear them over again, and then read over the notes of their evidence taken by the Judge on the first trial, even if, then, each witness is asked if what was read was true and is submitted at the pleasure of the counsel on either side to fresh oral examination and cross-examination: *By the Privy Council*, in *Reg.* vs. *Bertrand*, 10 Cox, 618.

Although each juryman may apply to the subject before him that general knowledge which any man may be supposed to have, yet if he be personally acquainted with any material particular fact, he is not permitted to mention the circumstance privately to his fellows, but he must submit to be publicly sworn and examined, though there is no necessity for his leaving the box, or declining to interfere in the verdict: *R.* vs. *Rosser*, 7 C. & P. 648; 2 *Taylor* on Evid. par. 1244.

A juror was summoned in error, but not returned in the panel, and in mistake was sworn to try a case, during the progress of which these facts were discovered. The jury were discharged, and a fresh jury constituted: By Russell Gurney, in *Reg.* vs. *Phillips*, 11 Cox. 142. It is not necessary when a jury are discharged without giving a verdict to state on the record the reason why they were so discharged: *R.* vs. *Davidson*, 2 F. & F.

The rule is that the right to discharge the jury without giving a verdict ought not to be exercised, except in some case of physical necessity, or where it is hopeless that the jury will agree, or where there have been some practices to defeat the ends of justice. If, after the prisoner is given in charge, though before any evidence is given, it is discovered that a material wit-

ness for the prosecution is not acquainted with the nature of an oath, it is not a sufficient ground for discharging the jury, so that the witness might be instructed before the next assizes upon that point, and a verdict of acquittal must be entered, if the prosecution has no other sufficient evidence: *Rex.* vs. *Wade*, 1 Mood. 86. *Rex.* vs. *White*, 1 Leach, 430, seems a contrary decision, but, at all events, is now overruled by the above last cited case. Where, during the trial of a felony, it was discovered that the prisoner had a relation on the jury, Erskine, J., after consulting Tindal, C. J., held that he had no power to discharge the jury but that the trial must proceed: *Reg.* vs. *Wardle* C. & M. 647.

If it appear, during a trial, that the prisoner, though he has pleaded not guilty, is mad, the judge may discharge the jury of him, that he may be tried after the recovery of his understanding: 1 *Hale*, P. C. 34; but see *post*, sections 99 to 105 of the Procedure Act, and remarks thereunder.

EVIDENCE, WITNESSES, DEPOSITIONS.

Sec. 58.—Depositions taken in the preliminary or other investigation of any charge against any person may be read as evidence in the prosecution of such person for any other offence whatsoever, upon the like proof and in the same manner, in all respects, as they may according to law be read in the prosecution of the offence with which such person was charged when such depositions were taken.

For the understanding of this enactment, a reference must be made to the proceedings, on the preliminary investigation taken by the Magistrate, before whom, the prisoner, arrested for an indictable offence, has been brought, in accordance with the dispositions of the 32-33 Vic. ch. 30, (1869) "*An Act respecting duties of Justices of the Peace, out of Sessions, in relation to persons charged with indictable offences*," taken with certain alterations from the Imperial Act, 11-12 Vic. ch. 42 (*Jervis' Act*).

After regulating the taking of the witnesses' depositions in such cases, it is enacted by the said Act (sec. 30) . . . . *and if upon the trial of the person accused, it be proved upon the oath or affirmation of any credible witness, that any person whose deposition has been taken as aforesaid, is dead, or is so ill as not to be able to travel, or is absent from Canada, and if it be also proved that such deposition was taken in presence of the person accused, and that he, his Counsel or Attorney, had a full opportunity of cross-examining the witness, then if the deposition purports to be signed by the Justice, by or before whom the same purports to have been taken, it shall be read as evidence in the prosecution without further proof thereof, unless it be proved that such deposition was not in fact signed by the Justice purporting to have signed the same*: sec. 17 of the Imperial Act.

Doubts have arisen in England whether, under this last cited clause, the prosecution must have been identically for the same offence as charged against the prisoner, by the depositions against him as taken by

the magistrate, and it has even been held that a deposition taken on a charge of assault could not afterwards be received on an indictment for wounding: *Reg.* vs. *Ledbetter*, 3 C. & K. 108. Though in the subsequent case of *Reg.* vs. *Beeston*, Dears. 405, it was held by the Court of Criminal Appeal that a deposition taken on a charge either of assault and robbery, or of doing grievous bodily harm, or of feloniously wounding with intent to do grievous bodily harm, can, after the death of the witness, be read upon a trial for murder or manslaughter, where the two charges relate to the same transaction, yet it seems by the report of the case that if the charges on the two occasions had been substantially different, the deposition would not have been admissible: see *R.* vs. *Lee*, 4 F. & F. 63; *R.* vs. *Radbourne*, 1 Leach, 457; *R.* vs. *Smith*, R. & R. 339; *Reg.* vs. *Dilmore*, 6 Cox, 52. But now, in Canada, by the above enactment (sec. 58 of the Procedure Act of 1869), all doubts on the question are removed, and depositions taken on "*any*" charge against a person may be read as evidence in the prosecution of such person for "*any other offence whatsoever*," when the deposition is otherwise admissible.

Prisoner's Deposition.—The depositions on oath of a witness legally taken are admissible evidence against him if he is subsequently tried on a criminal charge. The only exception is in the case of answers to questions, which he objected to when his evidence was taken as tending to criminate him, but which he has been improperly compelled to answer: *Reg.* vs. *Coote*, 4 Moore's P. C. Appeals, 599; *Reg.* vs. *Garbett*, 1 Den. 236. Where a witness claims protection on the

ground that an answer may criminate him, and is compelled to answer, the answer is inadmissible, whether he claim the protection in the first instance or after having given some answers tending to criminate himself: *Reg.* vs. *Garbett*, *ubi supra*. But it seems that the part of the deposition given before such witness has so claimed the protection of the Court is admissible: *Reg.* vs. *Coote*, *ubi supra*. And the witness need not have been cautioned or put upon his guard as to the tendency of the question, in order to render his answer admissible: the 32–33 Vic., ch. 30, secs. 31 and 32, are applicable to accused persons only, and not to witnesses; and sec. 33 of the same Act enacts specially that "nothing herein contained shall prevent any prosecutor from giving in evidence any admission or confession, or other statement made at any time by the person accused or charged, which by law would be admissible as evidence against him." See 3 *Russell* on Crimes, 418, and *Reg.* vs. *Coote*, *ubi supra*.

SUMMONING OF WITNESSES IN CERTAIN CASES.

Sec. 59.—If any witness in any criminal case, cognizable by indictment in any Court of criminal jurisdiction at any term, sessions, or sittings of any such Court in any part of Canada, resides in any part thereof, not within the ordinary jurisdiction of the Court before which such criminal case is cognizable, such Court may issue a writ of subpœna, directed to such witness, in like manner as if such witness were resident within the jurisdiction of the Court; and in case such witness does not obey such writ of subpœna, the

Court issuing the same may proceed against such witness, for contempt or otherwise, or bind over such witness to appear at such days and times as may be necessary, and upon default being made in such appearance, may cause the recognizances of such witness to be estreated, and the amount thereof to be sued for and recovered by process of law, in like manner as if such witness were resident within the jurisdiction of the Court.

This enactment hardly needs explanation. At common law, writs of subpœna have no force beyond the jurisdictional limits of the Court from which they issue, but, by the above clause, any Court of criminal jurisdiction in Canada may summon a witness from any other part of Canada, for instance, a criminal Court in Quebec can summon a witness in Nova Scotia, or *vice versa*, and if the subpœna is not obeyed, the Court may proceed against the witness in like manner as if such witness were resident within the jurisdiction of the Court. In England, the 46 Geo. III ch. 92, contains a provision of the same nature. In criminal cases the witness is bound to attend, even if he has not been tendered his expenses: 3 *Russell*, 575; *Roscoe* Cr. Ev. 104.

SUMMONING WITNESSES IMPRISONED, ETC.

Sec. 60—When the attendance of any person confined in a Penitentiary, or in any other prison or gaol in Canada, or upon the limits of any gaol, is required in any Court of criminal jurisdiction in any case cognizable therein by indictment, the Court before whom such prisoner is required to attend may, or any Judge of such Court, or of any Superior Court or County Court may, before or during any such term or sitting at which the attendance of such person is required, make an order upon the Warden of the Penitentiary, or upon the Sheriff, gaoler, or other person having the custody of such prisoner, to deliver such prisoner to the person named in such order to receive him, and such person shall, at the time prescribed in such order, convey such prisoner to the place at which such person is required to attend, there to receive and obey such further order as to the said Court may seem meet.

This enactment renders unnecessary, in criminal matters, the writ of *habeas corpus ad testificandum*. It seems to go very far, and might lead to serious consequences; it, for instance, authorizes a Judge of the Court of Quarter Sessions, or of the County Court in any part of the Dominion, to order the removal of a prisoner from any other part of the Dominion. Moreover, this removal is not, as in England, to be made under the same care and custody as if the prisoner was brought under a writ of *habeas corpus*, and by the officer under whose custody the witness is, but by any other person named by the Judge in his order, thereby, against all notions on the subject, releasing for a while a prisoner from the custody of his gaoler, who, of course, ceases, *pro tempore*, to be responsible for his safe keeping. This clause should certainly be altered: the Imperial Act on the subject is the 16-17 Vic. ch. 30, sec. 9. Though our Statute does not expressly require it, an affidavit stating

the place and cause of confinement of the witness, and further that his evidence is material, and that the party cannot, in his absence, safely proceed to trial, should be given in support of the application. And if the prisoner be confined at a great distance from the place of trial, the Judge, will perhaps, require that the affidavit should point out in what manner his testimony is material: 2 *Taylor*, on Ev. par. 1149.

QUAKER MAY MAKE AFFIRMATION.

Sec. 61.—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 required to give evidence in any criminal case, shall, instead of taking an oath in the usual form, be permitted to make his solemn affirmation or declaration, beginning with the words following, that is to say: "I A.B., do solemnly, sincerely and truly declare and afirm;" which said affirmation or declaration shall be of the same force and effect as if such Quaker or other person, as aforesaid, had taken an oath in the usual form.

This enactment corresponds with the 24-25 Vic. ch. 66, 32-33 Vic. ch. 68, and 33-34 Vic. ch. 49, of the Imperial Statutes. The declaration required may be given with the affirmation as follows: "I, A.B., do solemnly, sincerely and truly declare and affirm that the taking of any oath is, according to my religious belief, unlawful, and I do also solemnly, sincerely and truly declare and affirm:" 2 *Taylor* on Ev par. 1253 and 1254. See *ante*, vol. 1, page 726, *et seq.* on section 2 of the Perjury Act.

WITNESS INTERESTED OR CONVICTED, COMPETENT.

Sec. 62.—No person offered as a witness shall, by reason of any alleged incapacity from crime or interest, be excluded from giving evidence on the trial of any criminal case, or in any proceeding relating or incidental to such case.

Sec. 63.—Every person so offered shall be admitted and be compellable to give evidence on oath, or solemn affirmation where an affirmation is receivable, notwithstanding that such person has or may have an interest in the matter in question, or in the event of the trial in which he is offered as a witness, or of any proceeding relating or incidental to such case, and, notwithstanding that such person so offered as a witness, has been previously convicted of a crime or offence.

These two clauses are taken from the 6-7 Vic. ch. 85, sec. 1, of the Imperial Statutes.

At common law, persons convicted of treason, felony, piracy, perjury, forgery, &c., were not admitted as witnesses. It was also a general rule of evidence not to admit the testimony of a witness who was interested, either directly or indirectly, in the event of the trial. These incapacities are now removed by the above enactments.

In the case of *Reg.* vs. *Webb*, 11 Cox, 133, Lush, J., held, that, notwithstanding the last part of section 63 (*ante*), a person under sentence of death is incapable of being a witness, but this ruling may, perhaps be questioned: 2 *Taylor*, on Ev. page 1169, *note*; though, the evidence of such a witness cannot be of much weight, since he is not liable to the temporal punishments attached to perjury.

By the above enactments, it is clear that where several prisoners are jointly indicted, and one of them is convicted, either on his own confession or by verdict, and sentenced before the trial of the other is concluded, the prisoner so sentenced is rendered competent for or against the other: *Reg.* vs. *Jackson*, 6 Cox, 525.

In *Reg.* vs. *Winsor*, 10 Cox. 276, it was held that where two persons are jointly indicted, but separately tried, one of them may be called as a witness against the other, although the one so called as a witness has not been tried, nor acquitted, nor pleaded guilty to the indictment, nor discharged on a *nolle prosequi*. So in *Reg.* vs. *Payne*, 12 Cox, 121, Chief-Justice Cockburn said that if prisoners jointly indicted are tried separately, there can be no objection to calling one prisoner as witness for another.

In *Reg.* vs. *Deeley*, 11 Cox, 607, Mellor, J. allowed two of the prisoners to be called as witnesses on behalf of the third, though they were jointly indicted and tried together. But this case is overruled, and in *Reg.* vs.

Payne, 12 Cox, 118, it was held, by sixteen judges, that after several prisoners, jointly indicted and tried, are given in charge to the jury, one, whilst in such charge, cannot be called as a witness for another. And in *Reg.* vs. *Thompson*. 12 Cox, 202, upon the same principle, it was held that the wife of a prisoner, jointly indicted and given in charge to the jury with other prisoners, cannot be called as a witness by one of the other prisoners whilst the husband is so in charge with them.

These two cases, with *Reg.* vs. *Winsor*, *ubi supra*, are unquestionably applicable to Canada, and to be followed, under the above sections of the Procedure Act. Whenever, therefore, the Crown or the defendant intend to call as a witness one of the co-defendants they should ask for a separate trial; if it is only after the defendants have jointly been given in charge to the jury that the evidence of one of the defendants is discovered to be necessary, then, if for the Crown, a *nolle prosequi* may be entered, or a verdict of acquittal may be taken, in the discretion of the Court, if no evidence has been given against the party who is sought to be made a witness. Then the discharged prisoner becomes competent to testify either for the Crown or for his former co-defendants: 2 *Taylor*, on Ev. par. 1223.

If, on a first trial of two prisoners jointly indicted and tried together, the jury are discharged without giving a verdict, there is nothing to prevent the prosecution from trying only one of the prisoners on the *ven-*

ire de novo, and then, on this second trial, to call as a witness on this issue, the other prisoner: *Reg.* vs. *Winsor*, 10 Cox, 276.

CROSS-EXAMINATION AS TO PREVIOUS STATEMENTS IN WRITING.

Sec. 64.—Upon any trial, a witness may be cross-examined as to previous statements made by him in writing, or reduced into writing relative to the subject matter of the case, without such writing being shown to him; but if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; and the Judge at any time during the trial, may require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he thinks fit.

Of course the words "upon any trial" mean "upon any trial *in any criminal case*." This enactment is sec. 5 of 28 Vic. ch. 18 of the Imperial Statutes, *an Act for amending the law of evidence and practice on criminal trials*: upon which see 2 *Taylor* on Ev. par. 1301, 1302, 1303; 3 *Russell*, on Crimes, 550. The general rule was that, when a contradictory statement alleged to have been made by the witness was contained in a letter or other writing, the cross-examining party should produce the document as his evidence, and have it read, in order to base any questions to the

witness upon it. The above clause abrogates this rule, under which was excluded one of the best tests by which the memory and integrity of a witness can be tried: 2 *Taylor* on Ev. par. 1301. Before the abrogation of the rule, the witness could not be asked whether he did or did not state a particular fact before the magistrate, without first allowing him to read, or have read to him his deposition: *R.* vs. *Edwards*, 8 C. & P. 26. And it was irregular to question a witness as to the contents of a former declaration, affidavit, letter or any writing made or written by him, or taken in writing as his declaration or deposition, without first having the said writing read: *The Queen's case*, 2 Brod. & B. 288. In many of our criminal courts, it seems to be forgotten that this is not now the law. The prosecution cannot use or refer to the depositions without putting them in: *Reg.* vs. *Muller*, 10 Cox, 43, by Pollock, C. B., and Martin, B.

But if the former declarations of the witness were not in writing, but merely by parol, he may be cross-examined on the subject of it, and if he deny it, another witness may be called to prove it, if it be a matter relevant to the issue; if not relevant to the issue, the witness's answer is conclusive: 2 *Taylor* on Ev. par 1295.

PROOF OF PREVIOUS CONVICTION OF A WITNESS.

Sec. 65.—A witness may be questioned as to whether he has been *convicted* of any felony or misdemeanor, and upon being so questioned, if he either denies the

fact or refuses to answer, the *opposite party* may prove such conviction, and a certificate, as provided in section twenty-six, shall, upon proof of the identity of the witness as such convict, be sufficient evidence of his conviction, without proof of the signature or the official character of the persons appearing to have signed the certificate.

This enactment is taken from the 28 Vic. ch. 18, sec. 6, of the Imperial Statutes, *An Act for amending the law of evidence and practice on criminal trials.*

As to the form and substance of the certificate required by the said section, see *ante*, remarks under section 26.

Questions tending to expose the witness to criminal accusation, punishment or penalty, need not be answered; no one can be forced to criminate himself. But this privilege can be invoked only by the witness himself. Nor is the Judge bound to warn the witness of his right, though he may deem it proper to do so: 2 *Taylor* on Ev. par. 1319; *Reg.* vs. *Coote*, 4 Moore's P. C. Appeals, 607; 12 Cox, 557. Whether the answer may tend to criminate the witness, or expose him to a penalty or forfeiture, is a point which the Court will determine, under all the circumstances of the case, as soon as the protection is claimed, but without requiring the witness fully to explain how the effect would be produced; for, if this were necessary, the protection which the rule is designed to afford to the witness would at once be annihilated.

It is now decided, contrary to an opinion formerly entertained by several of the Judges, that the mere declaration of a witness on oath that he believes that the answer will tend to criminate him, will not suffice to protect him from answering, when the other circumstances of the case are such as to induce the Judge to believe that the answer would not really have that tendency. In all cases of this kind the Court must see from the surrounding circumstances, and the nature of the evidence which the witness is called to give, that reasonable ground exists for apprehending danger to the witness from his being compelled to answer. When, however, the fact of such danger is once made to appear, considerable latitude should be allowed to the witness in judging for himself of the effect of a particular question; for it is obvious that a question, though at first sight apparently innocent, may, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. On the whole, as Lord Hardwicke once observed, "these objections to answering should be held to very strict rules," and, in some way or other, the Court should have the sanction of an oath for the facts on which the objection is founded: 2 *Taylor* on Ev. par. 1311.

If the prosecution to which the witness might be exposed, or his liability to a penalty or forfeiture, is barred by lapse of time, the privilege has ceased and the witness must answer: 2 *Taylor* on Ev., par. 1312.

Whether a witness is bound to answer any question,

the direct and immediate effect of answering which might be to degrade his character, seems doubtful, although where the transaction as to which the witness is interrogated forms any material part of the issue, he will be obliged to answer, however strongly his evidence may reflect on his character.

Where, however, the question is not directly material to the issue, but is only put for the purpose of testing the character and consequent credit of the witness, there is much more room for doubt. Several of the older dicta and authorities tend to show that in such case the witness is not bound to answer; but the privilege, if it still exists, is certainly much discountenanced in the practice of modern times. Even Lord Ellenborough, who is reported to have held on one occasion that a witness was not bound to state whether he had not been sentenced to imprisonment in a house of correction, and on another, that the question could not so much as be put to him, seems in a later case to have disregarded the rules thus enunciated by himself; for, on a witness declining to say whether or not he had been confined for theft in gaol, his Lordship harshly observed: "If you do not answer the question I will send you there."

No doubt cases may arise where the Judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a remote date might, in general, be rightly suppressed; for the interests of justice can seldom require that the errors of a man's

life, long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked. But the rule of protection should not be further extended; for if the inquiry relates to transactions comparatively recent, bearing directly upon the moral principles of the witness, and his present character for veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding the answer may disgrace him. It has, indeed, been termed a harsh alternative to compel a witness either to commit perjury or to destroy his own reputation; but, on the other hand, it is obviously most important that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause: 2 *Taylor* on Ev., par. 1313, 1314, 1315; 3 *Russell* on Crimes, 543, 547.

By the words "*or refuses to answer*" in the said section 65 of the Procedure Act of 1869 (and these words are also in the Imperial Statute), it would, at first sight, seem that the witness questioned as to a previous conviction is not bound to answer; but it is obvious that this is not so; and that the above quotation from *Taylor* goes to show clearly that the question, if insisted

upon by the Court, must be answered. Indeed, in a great many cases, the party putting the question could not be expected to be ready, on the spot, to prove the conviction of the witness, otherwise than by himself.

WHEN ATTESTING WITNESS NEED NOT BE CALLED.

Sec. 66.—It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto.

This is *verbatim*, sec. 7 of 28 Vic. ch. 18, of the Imperial Statutes. Formerly the rule was that if an instrument, on being produced, appeared to be signed by subscribing witnesses, one of them, at least, should be called to prove its execution. The above clause abrogates this rule. Of course, it applies only to instruments to the validity of which attestation is not requisite. In 2 *Taylor*, on Ev. par. 1637 *et seq.* will be found a list of the principal documents requiring attestation in England. This enumeration applies but little to Canada; at least, to the Province of Quebec. It is clear that this is a subject governed by the civil law of each of the Provinces.

COMPARISON OF DISPUTED WRITING WITH GENUINE.

Sec. 67.—Comparison of a disputed writing with any writing proved to the satisfaction of the Court to be genuine, shall be permitted to be made by witnesses;

and such writings and the evidence of the witnesses respecting the same, may be submitted to the Court and Jury, as evidence of the genuineness or otherwise of the writing in dispute.

As in the preceding clauses this enactment is taken from the 28 Vic. ch. 18 of the Imperial Statutes, and is *verbatim* section 8 thereof. Before this enactment, it was an established rule that, in a criminal case, handwriting could not be proved by comparing a paper with any other papers acknowledged to be genuine: 3 *Russell*, on Crimes, 361; *Archbold*, 267; neither the witness nor the jury were allowed to compare two writings with each other, in order to ascertain whether both were written by the same person: 2 *Taylor* on Ev. par. 1667.

PARTY, HOW TO DISCREDIT HIS OWN WITNESS.

Sec. 68.—A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but in case the witness in the opinion of the Court, proves adverse, such party may contradict him by other evidence, or by leave of the Court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he did make such statement.

This is *verbatim* sec. 3 of the 28 Vic. ch. 18, of the Imperial Statutes, *An Act for amending the law of evidence and practice on Criminal trials.*

In the Province of Quebec a similar enactment is contained in article 269 of the Code of Civil Procedure.

The word *adverse* in the above clause does not mean merely *unfavourable*, but *hostile*: 2 *Taylor* on Ev. par. 1282. However, in *Dear* vs. *Knight*, 1 F. & F. 433, Erle, J. appears to have regarded a witness as "adverse," simply because he made a statement contrary to what he was called to prove.

The first part of the clause seems to have always been the law. It was decided in *Ewer* vs. *Ambrose*, 3 B. & C. 750, that if a witness called to prove a fact prove the contrary, his credit could not be impeached by general evidence, but, in *R.* vs. *Ball*, 8 C. & P. 745, that the party is at liberty to make out his case by other and contradictory evidence. The portion of the clause allowing a party to prove that his witness made at any time a different account of the same transaction seems to be a new law, by the said case of *R.* vs. *Ball*, *ubi supra.*

PROOF OF CONTRADICTORY STATEMENTS BY WITNESSES.

Sec. 69.—If a witness, upon *cross-examination* as to a former statement made by him, *relative to the subject matter of the case*, and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact

make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he did make such statement.

This enactment is taken from sec, 4, of the 28 Vic. ch. 18, of the Imperial Statutes.

Formerly there was some difference of opinion as to whether, in such a case, proof might be given that the witness had made the statement denied by him. It must be observed that the clause applies only to a statement *relative to the subject matter of the case.* If it is not *relative to the subject matter of the case*, the answer given by the witness must be taken as conclusive. It seems that questions respecting the motives, interest or conduct of the witness as connected with the cause or with either of the parties, are relevant *quoad* this enactment, though, Coleridge, J., in *R.* vs. *Lee*, 2 Lew C. C. 154, held that if a witness denies that he has tampered with the other witnesses, evidence to contradict him cannot be received. Of course this case was before the statute, and does not specially apply to a *former statement* made by a witness. As to the last part of the clause, it is based on a principle always received under the rules of evidence. It was held in *The Queen's case*, 2 Brod. & B. 311, that where a witness for a prosecution has been examined in chief, the defendant cannot afterwards give evidence of any declaration by such witness, or of acts done by him, to procure persons corruptly to give evidence in support

of the prosecution, unless he have previously cross-examined such witness as to such declarations or acts.

AMENDMENT OF VARIANCES AS TO DOCUMENTS, ETC. BETWEEN PROOF AND RECITAL.

Sec. 70.—When in the indictment whereon a trial is pending before any Court of Criminal Jurisdiction in Canada, any variance appears between any matter in writing or in print produced in evidence, and the recital or setting forth thereof, such Court may cause the indictment to be forthwith amended in such particular or particulars, by some officer of the Court, and after such amendment the trial shall proceed in the the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared.

This enactment is taken from the 11–12 Vic. ch. 46 sec. 4 of the Imperial Statutes.

At common law, any variance between an instrument as alleged in the indictment and the instrument itself as produced in evidence was fatal: *R.* vs. *Powell*, 2 East, P. C. 976; see *post*, remarks under the next section.

AMENDMENT OF INDICTMENT.

Sec. 71.—Whenever on the trial of an indictment for any felony or misdemeanor, any variance appears between the statement in such indictment and the evidence offered in proof thereof, in names, dates,

places, or other matters or circumstances therein mentioned, not material to the merits of the case, and by the misstatement whereof the person on trial cannot be prejudiced in his defence on such merits, the Court before which the trial is pending may order such indictment to be amended according to the proof, by some officer of the court or other person, both in that part of the indictment where the variance occurs, and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury as such Court thinks reasonable; and if the trial be postponed, the Court may respite the recognizances of the prosecutor and witnesses, and of the defendant and his sureties (if any), in which case they shall respectively be bound to attend at the time and place to which the trial is postponed without entering into new recognizances, and as if such time and place had been mentioned in the recognizances respited as those at which they were respectively bound to appear.

Sec. 72.—After any such amendment the trial shall proceed, whenever the same is proceeded with, in the the same manner and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and in all other respects, as if no such variance had occurred.

Sec. 73.—In such case the order for the amendment shall be endorsed on the Record, and all other rolls and proceedings connected therewith shall be amend-

ed accordingly by the proper officer, and filed with the indictment, among the proper records of the Court.

Sec. 74.—When any such trial is had before a second jury, the Crown and the defendant respectively shall be entitled to the same challenges as they were entitled to with respect to the first jury.

Sec. 75 —Every verdict and judgment given after the making of any such amendment shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it is after such amendment has been made.

Sec. 76.—If it becomes necessary to draw up a formal record in any case where an amendment has been made as aforesaid, such record shall be drawn up in the form in which the indictment remained after the amendment was made, without taking any notice of the fact of such amendment having been made.

These clauses are taken from the 14-15 Vic. ch. 100 of the Imperial Statutes (Lord Campbell' s Act), in relation to which Mr. *Greaves* remarks:—

"This is one of the most important sections in the Act, and, if the power given by it be properly exercised, will tend very materially to the better administration of criminal justice. Formerly, if any variance occurred between any allegation in an indictment, and the evidence adduced in support of it, the prisoner was entitled to be acquitted. This led to much inconvenience. It caused the multiplication of counts, vayirng the statement in as many ways as it was possible to conceive the evidence could support, and thereby greatly increased the expense of the prosecution. It sometimes led to the entire escape of heinous offenders, for it happened in some cases that the Grand Jury were discharged before the acquittal took place ; and though such acquittal in many cases would not have operated as a bar to another indictment, yet the prosecutor chose rather to submit to the first defeat, than to prefer another indictment at a subsequent assizes; and even in some cases an acquittal took place under such circumstances that the prisoner was enabled successfully to plead it in bar to another indictment. Thus in *Sheen's case*, 2 C. & P. 634, where the prisoner had been indicted for the murder of Charles William Beadle, and acquitted on the ground that the name of the deceased could not be proved, to a subsequent indictment, which charged him with the murder of Charles William, he pleaded the former acquittal, and that the deceased was as well known by the name mentioned in the one indictment as by the name mentioned in the other, and so the jury found. This case clearly shows that the preferring a new bill was not in all cases sufficient to prevent a failure of justice in consequence of a variance; and many like cases have occurred.

"The provisions as to the amendment of variances in criminal cases have been gradually extended. The first statute, which introduced the power of amendment, was the 9 Geo. IV. c. 15, which empowered any Judge at Nisi Prius, or any Court of Oyer and Terminer and General Gaol Delivery to amend any

variance, in cases of misdemeanor, between any matter *in writing or in print*, and the recital thereof on the record. After this statute had been in operation for the full period of twenty years, and no injurious consequences had been found to arise from it, the 11–12 Vic. ch. 46, sec. 4, empowered any Court of Oyer and Terminer and General Gaol Delivery to amend any variance, *in any offence whatever, between any matter in writing or in print*, and the recital thereof on the record; *sec.* 70 *of our Procedure Act of* 1869. And the provisions of this Act were extended to the Sessions, aa far as they are applicable to offences within their jurisdiction, by the 12–13 Vic. ch. 45, sec. 10.

"As these enactments only applied to variances between matters in writing and the record, a very numerous class of variances was left unprovided for, and the first clause in this Act was intended to apply to all such variances. As this section originally stood immediately after the words 'persons whatsoever therein named or described,' followed the general words 'or any variance between such statement and the evidence offered in proof in any other matter or thing whatsoever.' These words were objected to as being too general, and struck out on that ground in the House of Lords. The words 'or in the name or description of any matter or thing therein named or described' were then inserted in the Lords. A doubt subsequently arose whether in case any property were described as belonging to certain persons, and it turned out to belong to more or less in number than the persons named, an amendment could be made as the clause then stood: in other words, whether the clause

warranted an amendment in the *number* of owners of property; and to avoid this difficulty, the words 'or in the ownership of any property therein named or described,' were inserted. The striking out of the general words is much to be regretted, as cases precisely within the same mischief as those provided for will very probably occur.

"As the clause now stands, it is limited to the particular variances therein enumerated, and, not only so, but it is so cautiously framed, that whilst on the one hand it is so worded as to prevent the escape of offenders by reason of variances not material to the merits of the case, so on the other it does not permit any amendment to be made whereby the defendant may be prejudiced in his defence *upon such merits*. In every case, therefore, where a variance occurs, the Court will have to consider the following questions: 1st, whether the variance be in one of the matters specified in the section; 2ndly, whether it be 'not material to the merits of the case;' and lastly, if it appear not material to the merits of the case, whether the defendant may be prejudiced by the amendment 'in his defence on such merits.'

"The terms, 'merits of the case,' as applied to all ordinary criminal cases, obviously mean the substantial truth and justice of the case with reference to the guilt or innocence of the prisoner. When we say that a prisoner has been acquitted upon the merits, we mean that the jury have heard and considered all the evidence with reference to the question of the guilt or innocence of the prisoner of the crime charged, and have acquitted him on the ground that the charge was

not proved. It would be a perversion of language to apply such an expression to a case where the prisoner was acquitted on the ground of a trifling variance or a technical quibble.

"It may be well to observe that a matter may well constitute some part of the merits of a case, and yet a variance as to the name or description of such matter may not be material to the merits of the case. Thus, upon the trial of an indictment for stealing an animal, the proof of the animal stolen constitutes a part of the merits of the case, and yet the description of it, as an ewe instead of a lamb, may not be in the least degree material to the merits of the case as above explained.

"It is to be carefully noticed, also, that an amendment is *only* prohibited where the defendant may be prejudiced in his defence *upon the merits*, not in his defence simply. Indeed, wherever any variance occurs which makes an amendment necessary, it may be truly said that the defendant may be prejudiced in his defence by making it, for if the amendment be not made the defendant would be entitled to be acquitted. The prejudice, therefore, to the defendant, which is to prevent an amendment, is properly confined to a prejudice in his defence *upon the merits*, which plainly means a substantial, and not a formal or technical defence to the charge made against him.

"The clause applies in terms to six classes:

"I.—The name of any county, riding, division, city, borough, town corporate, parish, township or place, mentioned or described in the indictment.

"II.—The name or description of any person or persons, or body politic or corporate, stated to be the

owner or owners of any property which forms the subject of any offence charged in the indictment.

"III.—The name or description of any person or persons, body politic or corporate, alleged to be injured or damaged, or intended to be injured or damaged by the commission of the offence charged in the indictment.

"IV.—The christian name or surname, or both christian name and surname, or other description of any person or persons named or described in the indictment.

"V.—The name or description of any matter or thing whatsoever, named or described in the indictment.

"It is observed, that by the Interpretation Clause (sec. 30, *post*, p. 32*a*), (*sec.* 1 *of the Procedure Act of* 1869), the term 'indictment,' includes inquisition, information, presentment, plea, replication, and other pleading, as well as a *nisi prius* record, consequently the power of amendment extends to all.

"With regard to the cases in which an amendment ought to be made or refused, as the questions whether the variance be material to the merits of the case, and whether the defendant may be prejudiced in his defence on the merits by making an amendment, are questions which must necessarily depend on the particular charge and particular circumstances of each case, it is impossible to lay down any general rule by which the Court may be guided in all cases; indeed it is very possible that the very same identical variance, which ought unquestionably to be amended in one case, ought just as clearly not to be amended in

another, as it may so happen that the amendment in the one case could not possibly prejudice the prisoner in his defence on the merits, but in the other might materially prejudice the prisoner in such defence.

"Cases may easily be put where no doubt can exist that the variance is not material to the merits, and that the defendant cannot be prejudiced by an amendment in his defence on the merits. For instance, a man steals a sheep in the night out of a field, being ignorant at the time of the name of the owner of the sheep; in such a case it is very difficult to conceive that the name of the owner can be material to the merits, or that the defendant can be prejudiced in his defence by the name of the owner being amended according to the proof. So also if a man were to shoot into a crowd and wound or kill an individual, the name of such individual could hardly by possibility be material. In each case, however, the Court must form its own judgment upon a consideration of the whole facts of the case, and the manner in which the variance is brought under its notice; and it may not unfrequently be material to see whether any such question has been raised before the committing magistrate, for if the case has proceeded before the sitting magistrate without any such question being raised, that may afford some ground at least for concluding that the defendant did not consider the point material to his defence, and that it is not entitled to be so considered upon the trial.

"Before determining upon making an amendment, the Court should receive all the evidence applicable to the particular point, otherwise it might happen that that which appeared to be a variance upon the evidence at

one stage of the trial, might afterwards be shewn to be no variance by the evidence at a later period of the trial; and if the Court were to amend on the evidence at the earlier period, it would be obliged to direct an acquittal upon the evidence at the subsequent period, for *the clause gives no power to amend the same identical particular more than once.*

"Again, in order to ascertain whether the prisoner may be prejudiced in his defence by the amendment, the Court ought to look, not only to the facts in evidence on the part of the prosecution at the time when the amendment is applied for, but also to the defence already set up, or intended to be set up; for which purpose it may, perhaps, in some cases be necessary to examine a witness or two on behalf of the defendant. It must be remembered that the question is one entirely for the Court, and that the Court must decide it itself; and, generally speaking, where this is the case, the Court will not determine the question before it on the evidence on one side, but will permit the other side immediately to introduce any evidence that may bear upon the question, so that the whole facts relating to the particular question may be before the Court at once.

"Thus—to mention an analogous case—where the plaintiff proposed to put in evidence an account signed by the defendant, and the defendant proposed to exclude the account on the ground that it had been delivered to the plaintiff, an attorney, in his character of attorney for the defendant, Erle, J., held that the defendant was entitled immediately to put in a letter, and call a witness to prove that the ac-

count was so delivered, though the plaintiff's case was not closed: *Cleave* vs. *Jones*, Hereford Summer Assizes, 1851. It must be noticed, also, that the power to amend clearly does not extend to altering the charge in the indictment from one offence to another offence. For instance, an indictment for 'forging' could not be altered into an indictment for 'uttering,' nor an indictment for 'stealing' into an indictment for 'obtaining by false pretences.'

"Equally clear is it that the amendment ought not to be made so as to apply to a different transaction. Every offence, however simple it may be, consists of a number of particulars; it must have time, and place, and its component parts, all of which together constitute one individual transaction. Now the real meaning of the clause is that, provided you to keep to the same identical transaction, you may amend any such error as is mentioned in the clause as to one or more of the particulars included in such transaction. For instance, a burglary is charged in the house of James Jones, in the parish of Winkhill, and stealing the goods of *John* Jeffs. The evidence shows that a burglary was committed in every respect as alleged, except that the goods were the property of *James* Jeffs. There an amendment would clearly be right. But suppose, instead of such a case, it was proposed to prove a burglary at another time, at another place in another man's house, and the stealing of other goods; this clearly would not be a case for amendment. The proper mode to consider the question is this: the Grand Jury have had evidence of one transaction, upon which they found the bill; the case before the Petty Jury

ought to be confined to the same transaction, but if it is, it may turn out that, either through insufficient investigation or otherwise, the Grand Jury have been in error as to some particular or other, and upon the trial the error is discovered. Now this is just the case to which the clause applies. A civil case may afford an apt illustration. The plaintiffs declared on a promissory note for £250, made by *the defendant*, dated the 9th of November, 1838, payable to the plaintiffs, or their order, *on demand;* the defendanf pleaded that he did not make the note; the plaintiffs proved on the trial a *joint and several* promissory note for £250, made by the defendant *and his wife*, dated the 6th of November, payable *twelve months after date*, with interest. There was no proof of the existence of any other note. Although it was objected that there was a material variance in the substantial parts of the note, the date the parties, and the period of its duration, it was held that the declaration was properly amended, so as to make it correspond with the note produced; for it was a mere misdescription, and it was just the case in which the Legislature intended that the discretionary power of amendment should be exercised: *Beckett* vs. *Dutton*, 7 M. & W. 157. The amendment was made under the 3 & 4 Wm. IV., ch. 42, sec. 23.

"The following appear to be the sort of variances which are amendable: In an indictment for bigamy, a woman described as a 'widow' who is proved to be unmarried: *Rex.* vs. *Deely*, R. & M. C. C. R. 303; 4 C. & P. 579; or as 'Ann Gooding,' where the register described her as 'Sarah Ann Gooding:' *Reg.* vs. *Gooding*, C. & M. 297. In an indictment for night poaching

describing a wood as 'The Old Walk,' its real name being 'The Long Walk:' *Reg:* vs. *Owen*, R. & M. C. C. R. 118. In an indictment for stealing 'a cow,' which was 'a heifer;' *Cooke's* case, 1 Leach, 105; 'a sheep,' which turned out to be 'a lamb': *Rex.* vs. *Loom*, R. & M. C. C. R. 160; or 'ewe': *Rex.* vs. *Puddifoot*, R. & M. C. C. R. 247; 'a filly,' which was a 'mare': *Reg.* vs. *E. Jones*, 2 Russ. C. & M. 140; 'a spade,' which turned out to be the iron part, without any handle; *Rex.* vs. *Stiles*, 2 Russ. C. & M. 109. So in an indictment for a nuisance, by not repairing, or by obstructing a highway the termini of the highway might be amended. So where an indictment alleges a burglary, or house-breaking, in the parish of St. Peter, in the County of W., and it appears that only part of the parish is situated in such County, the indictment may be amended: *Reg.* vs. *Brookes*, 1 C. & M. 543; *Reg.* vs. *Jackson*, 2, Russ. C. & M. 801.

"Such are some of the instances in which amendments would clearly be right, but it is easy to suggest other cases in which an amendment ought not to be made. Suppose, on the trial of an indictment for stealing a sheep, evidence were given of stealing a cow, or *vice versa*, or on an indictment for stealing geese it were proposed to prove stealing fowls: these are cases in which no amendment ought to be made; it is impossible to conceive that the Grand Jury can have made such a mistake, and the offence, though in law the same, and liable to the same punishment, is obviously as different as if it were different in law, and liable to a different punishment.

"Many decisions have been made by the courts in

civil cases as to the instances in which amendments ought to be made, and some of the principles laid down in those decisions may form a useful guide in questions arising under this clause, and they are, therefore, here introduced.

"It has been well laid down by a great Judge, that the fairest test of whether a defendant can be prejudiced by an amendment is this: 'Supposing the defendant comes with evidence that would enable him to meet the case as it stands on the record unamended, would the same enable him to meet it as amended:' per Rolfe, B., *Cooke* vs. *Stratford*, 13 M. & W. 379. If, whatever would be available as a defence under the indictment as it originally stood, would be equally so after the alteration was made, and any evidence the defendant might have would be equally applicable to the indictment in the one form as in the other, the amendment would not be one by which the defendant could be prejudiced in his defence, or in a matter material to the merits: *Gurford* vs. *Bailey*, 3 M. & G. 781. If the transaction is not altered by the amendment, but remains precisely the same, the amendment ought to be allowed: *Cooke* vs. *Stratford*, 13 M. & W. 379. But if the amendment would substitute a different transaction from that alleged, it ought not to be made: *Perry* vs. *Watts*, 3 M. & G. 549: *Brashier* vs. *Jackson*, 6 M. & W. 549; and the Court will look at all the circumstances of the case to ascertain whether the transaction would be changed by the amendment. If the amendment would render it necessary to plead a different plea, the amendment

ought not to be made: *Perry* vs. *Watts*, 3 M. & G. 775; *Brashier* vs. *Jackson*, 6 M. & G. 549.

"It was laid down in two cases of perjury, which were tried some years ago, that amendments in criminal cases ought to be made sparingly under the 9 Geo. IV. ch. 15: *Rex* vs. *Cooke*, 7 C. & P. 559; *Reg.* vs. *Hewins*, 9 C. & P. 786. These cases occurred at a time when amendments in criminal cases were looked upon with great disfavour; but the opinion of the Legislature, evidenced by the 11-12 Vic. ch. 46, sec. 4, the 12-13 Vic. ch. 45, sec. 10, and the present statute, clearly is in favour of amendments being made in all cases where the amendment is not material to the merits, and the prisoner is not prejudiced by it. In civil suits, the 9 Geo. IV. ch. 15, and the 3-4 Wm. IV. ch. 42, sec. 23, *being remedial Acts*, have always received a liberal construction: *Smith* vs. *Brandram*, 2 Scott, N. R. 545, 2 M. & G. 244; *Smith* vs. *Knoweldon*, 2 M. & G. 561; *Sainsbury* vs. *Matthews*, 4 M. & W. 343; and it has been held, that the fact of an action being a harsh and oppressive proceeding on the part of a landlord, who was taking advantage of a forfeiture in order to get possession of property on which the defendant had laid out a large sum of money, was not a consideration which ought to influence a Judge against allowing an amendment; for if the amendment did not prejudice the defendant in his defence, it ought to be allowed: *Doe* d. *Marriott* vs. *Edwards*, 1 M. & Rob. 319, Parke, B.

"In fact the Legislature has carefully specified the questions to be considered previous to making an amendment: these are, 1st, whether the variance be material to the merits of the case; and 2ndly, whether

the defendant may be prejudiced by the amendment in his defence on such merits. These are plain and simple questions, and form a certain guide for the determination of each case; and if the Courts, as they certainly ought, will only determine each case with reference to these questions alone, there can be little doubt that there will be an uniformity in the decisions upon this clause. But if, contrary to the plain intention of the Legislature, any Court shall, on the ground of any supposed hardship or otherwise, refuse to make an amendment of a variance not material to the merits, and whereby the defence will not be prejudiced in his defence on the merits, uncertainty of decisions will necessarily arise, and the beneficial effect of this clause be much diminished. The Courts, in considering the propriety of making an amendment, should ever remember that the great object of the statute is to cause *every case to be determined according to the very right and justice of the case upon the merits.*

"The amendment must be made in the course of the trial, and certainly before the jury give their verdict, because the trial is to proceed and the jury are to give their opinion upon the amended record: per Alderson, B.; *Brassier* vs. *Jackson*, 6 M. & W. 549. It would be better, indeed, in all cases to make it immediately before any further evidence is given, and where the amendment is ordered in the course of the case for the prosecution, it certainly should be made before the defence begins, for it is to the amended record that the defence is to be made.

"It may be observed, that as the power to amend is vested entirely in the *discretion* of the Courts, a case

cannot be reserved under the 11-12 Vic., ch. 78 (establishing the Court of Crown Cases Reserved), as to the propriety of making an amendment, as that statute only authorizes the reservation of 'a question of law.' If, however, a case should arise in which the question was, whether the Court had *jurisdiction* to make a particular amendment—in other words, whether a particular amendment fell within the terms of the statute, there the Court might reserve a case for the opinion of the Judges as to that point, as that would clearly be a mere question of law:" Lord Campbell's Acts, by *Greaves*, p. 2.

The English statute is not exactly in the same terms as ours: it reads thus:

"From and after the coming of this Act into operation, whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, *in the name of any county, riding, division, city, borough, town corporate, parish, township or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offence, or in the Christian name or surname, or both Christian name and surname, or other description whatsoever of any*

person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the Court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby on his defence on such merits, to order such indictment to be amended according to the proof by some officer of the Court or other person."

It will be seen that all the words above cited in *italics* are replaced in our Statute by the words, "*in names, dates, places, or other matters or circumstances therein mentioned*," which cover all the subjects mentioned in the English Statute, and have, besides, a more extensive meaning.

In the English statute, the words "if it shall consider such variance not material to the merits of the case" show clearly that there it is the *variance* which must be not material, whilst in our statute, it is the names, dates, places, or other matters or circumstances which must be not material to the merits of the case.

Another difference between the two statutes consists in that, in the Imperial Act, as interpreted by *Greaves*, and it must be remembered that he framed it, it is the *amendment* by which the defendant must not be prejudiced, whilst, in our statute, it is the *misstatement* which must not prejudice the defendant in

his defence on the merits. This certainly seems an error in our statute. The misstatement, as long as it remains, can prejudice the prosecutor, not the defendant, whilst the amending of that misstatement is what the legislator did not intend to allow, when the defendant could suffer from such an amendment in his defence on the merits: See 3 *Russell* on Crimes, 322; and *Greaves*' Remarks, *ante*, on the English Statute.

Section 75 is an enactment *ex majori cautela*, and section 76 is intended to prevent any question being raised by writ of error as to any amendment that might be made: Lord Campbell's Acts, by *Greaves*, page 10; 1 *Taylor* on Ev. par. 205; but, whilst in England, the provision re-enacted in our section 76 applies to all amendments made under the Act, including those made in virtue of the enactment reproduced in section 32 of our Procedure Act (see *ante*), it is clear that the substitution of the words "as aforesaid" in the said section 76 of our Procedure Act for the words "under the provisions of this Act" in the English corresponding clause has the effect to render the enactment not applicable to amendments made under the said section 32 of our Procedure Act, and that in the case of such an amendment having been made, it must so appear, if a formal record has to be drawn up. The same may, perhaps, be said of any amendment under section 70.

Greaves, in 3 *Russell* on Crimes, 324, has the following remarks on the English statute:—

"It has been well laid down by a very learned judge, (Byles, J., in *Reg.* vs. *Welton*, 9 Cox, 297) that a statute like the 14-15 Vic. ch. 100 should have a wide construction, and should not be interpreted in favour of technical strictness, and there are very strong reasons why a liberal construction should be made on such a statute. If a prisoner is acquitted on the ground of a variance, he may be again more correctly indicted, and wherever this course is adopted, the effect of an acquittal on such a variance is to put both the prosecutor and prisoner to additional trouble and expense. And in case where no fresh indictment is preferred the result is that the costs of the prosecution are thrown away, and an offender, possibly a very notorious one, escapes the punishment he deserves. In every case where an acquittal takes place in consequence of a variance, the Court may order a fresh indictment to be preferred, and the prisoner to be detained in prison or admitted to bail till it is tried, and it may be well for the Court, where a variance occurs, to consider whether the prisoner might not fairly be presented with the option either of having the amendment made or of being indicted anew in a better form."

WHEN THE AMENDMENT MUST BE MADE.

It had been laid down in *Reg.* vs. *Rymes*, 3 C. & K. 326, that an amendment should not be allowed after the counsel for the defence has addressed the jury, but this case is now no authority, and an amendment may be allowed after the prisoner's counsel has addressed the jury: *Reg.* vs. *Fullarton*, 6 Cox, 194.

But it must be made before verdict: *Reg.* vs. *Frost*, Dears. 474; *Reg.* vs. *Larkin*, Dears. 365.

"Upon full consideration," says *Greaves*, 3 *Russell*, on Crimes, 329, "it seems that the verdict is the dividing line. Any one familiar with criminal trials must have met with cases where variances have not been discovered until just before the verdict is given, and the only limit to the time for amendment is in the words 'on the trial,' and the trial is clearly continuing until the verdict, as the power to amend is given '*whenever* on the trial' there shall appear to be any variance.

"Before making an amendment the Court shall receive all the evidence bearing upon the point; and as this is a question to be determined by the Court, but is not to be left to the jury, the evidence bearing upon it, which may be in the possession of the prisoner, may be interposed when the point arises in the course of the case for the prosecution, and this is much the best course, as the Court is thereby enabled to dispose of the point at once; indeed, it is now settled that in all cases, whether civil or criminal, where a question is to be decided by the Court, the proper course is for the Judge to receive the evidence on both sides at once, and then to determine the question."

DECISIONS ON THE STATUTE.

The clause gives no power to amend the same identical particular more than once, and the Court will not amend an amendment: *Reg.* vs. *Barnes*, L. R. 1 C. C. 45; *Greaves*'s remarks, (see *ante*) on sec. 1 of 14–15 Vic. ch. 100.

And when an indictment is amended at the trial, the Court of Crown Cases Reserved cannot consider it as it originally stood, but only in its amended form: *Reg.* vs. *Pritchard*, L. & C. 34; *Reg.* vs. *Webster*, L. & C. 77.

Under this Statute, an amendment in the name of the owner of stolen property, by substituting a different owner than the one alleged, may be made at the trial: *Reg.* vs. *Vincent*, 2 Den. 464; *Reg.* vs. *Senecal*, 8 L. C. Jur. 287.

In *Reg.* vs. *Welton*, 9 Cox, 297, the prisoner was charged with throwing Annie Welton into the water with intent to murder her: there being no proof of the name of the child, it was held, by Byles, J., that the indictment might be amended by striking out "Annie Welton" and inserting "a certain female child whose name is to the jurors unknown."

An indictment alleged that a footway led from a turnpike-road into the town of Gravesend, but the highway was a carriage way from the turnpike-road to the top of Orme House Hill, and from thence to Gravesend it was a footway, and the nuisance alleged was between the top of Orme House Hill and Gravesend; it was held that the indictment might be amended by substituting a description of a footway running from Orme House Hill to Gravesend, as this appeared to be

the very sort of case for which the statute provides: *Reg.* vs. *Sturge*, 3 El. & Bl. 734.

Where an indictment for perjury alleged that the crime was committed on a trial for burning a *barn*, and it was proved that the actual charge was one of firing a *stack of corn*, it was held that the words *stack of corn* might be inserted instead of barn: *Reg.* vs. *Neville*, 6 Cox, 69.

Where the indictment stated that the prisoner had committed perjury, at the hearing of a summons before the Magistrates, charging a woman with being "drunk" whereas the summons was really for being "drunk and disorderly," the Court held that it had power, under this statute, to amend the indictment by adding the words "and disorderly": *Reg.* vs. *Tymms*, 11 Cox, 645.

In an indictment for perjury, perjury was alleged to have been committed at a Petty Sessions of the Peace, at Tiverton, in the County of Devon, before John Lane and Samuel Garth, then respectively being Justices of the Peace assigned to keep the peace in and for *the said county*, and acting in and for the borough of Tiverton, in the said county. It appeared by the proof that these gentlemen were Justices for the Borough of Tiverton only, and were not Justices for the County. Blackburn, J., allowed to amend the indictment by striking out the words, *the said county*, so as to make the averment be, "Justices assigned to keep the Peace in and for, and acting in and for the

Borough of Tiverton, in the said county." The Court of Criminal Appeal, composed of Kelly, C. B., Keating, J., M. Smith, J., Piggott, B., and Lush, J., held that the Judge had power so to amend: *Reg.* vs. *Western*, 11 Cox, 93.

The secretary of a friendly society, of which A. B. and others were the trustees, was charged with embezzling money belonging to the society. In the indictment, the property was laid as of "A. B. and others," without alleging that they were trustees of the society: *Held* that the indictment might be amended by adding the words, "trustees of:" *Reg.* vs. *Marks*, 10 Cox, 367; see *Reg.* vs. *Sénécal*, 8 L. C. Jur. 287.

The description of an Act of Parliament, in an indictment, can be amended. By the Court of Criminal Appeal: *Reg.* vs. *Westley*, Bell, C. C. 193.

In an indictment for larceny of property belonging to a banking company, the property was laid to be in the manager of the bank: the banking business was carried on by a Joint-Stock Banking Company, and there were more than twenty partners or shareholders. The Judge amended the indictment by stating the property to be in "W. (one of the partners) and others:" *Held* that this amendment was right: *Reg.* vs. *Pritchard*, L. & C. 34, 8 Cox, 461.

But an amendment changing the offence charged to another offence should not be allowed. Where the prisoner was indicted for a statutable felonious for-

gery, but the evidence only sustained a forgery at common law, the prosecutor was not allowed to amend the indictment by striking out the word "feloniously," and thus convert a charge of felony into one of misdemeanor: *Reg.* vs. *Wright*, 2 F. & F. 320.

So upon an indictment for having carnal knowledge of a girl between ten and twelve years of age, it appearing by the proof that she was under ten, Maule, J., held that the indictment could not be amended: *Reg.* vs. *Shott*, 3 C. & K. 206. The offence as charged in this case is a misdemeanor: the offence as proved, and as desired to be substituted by amendment, is a felony, and it would be outrageous to pretend that a felony can, by amendment, be substituted for a misdemeanor, or *vice versa*: see *Reg.* vs. *Wright*, 2 F. & F. 320.

The words "felonious" or "feloniously," if omitted, can never be allowed to be inserted: 1 *Russell* on Crimes, *note a* by *Greaves*. An amendment altering the nature or quality of the offence charged cannot be allowed: *Archbold*, 208.

When an indictment against two bankrupts alleged that they embezzled a part of their personal estate to the value of £10—to wit, certain bank-notes and certain moneys, and it rather seemed that the money converted was foreign money, it was held that "moneys" meant English moneys, and the Court refused to amend the indictment: *Reg.* vs. *Davison*, 7 Cox, 158. But Greaves is of opinion that the case

seems to be one in which an amendment clearly might have been made: 3 *Russell* on Crimes, 327.

An indictment alleged that the prisoner pretended that he had served a certain order of affiliation on J. Bell; but the evidence was, that the prisoner had said that he had left the order with the landlady at the Chesterfield Arms, where Bell lodged, he being out: it was held that this variance was not amendable under the English Statute, as it was not a variance in the name or description of any matter or thing named or described in the indictment: *Reg.* vs. *Bailey*, 6 Cox, 29. But in Canada it seems that such a variance would be amendable, being covered by the more general terms of the statute.

A woman charged with the murder of her husband was described as "A., wife of J. O., late of ," the Judge ordered this to be amended by striking out the word "wife," and inserting the word "widow:" *Reg.* vs. *Orchard*, 8 C. & P. 565.

Where in an indictment for false pretences, the words "with intent to defraud" are omitted, the indictment is bad, and cannot be amended under this statute: Per Lush, J., *Reg.* vs. *James*, 12 Cox, 127. These words are certainly material to the merits of a case, if at all necessary.

An indictment charged the prisoner with stealing nineteen shillings and sixpence. At the trial, it was objected by the prisoner's counsel that there was no

case, for the evidence showed that if the prisoner was guilty of stealing anything, it was of stealing a sovereign. Thereupon the Court amended the indictment by striking out the words "nineteen shillings and sixpence," and inserting in lieu thereof "one sovereign." The jury found the prisoner guilty of stealing a sovereign. *Held*, by the Court of Criminal Appeal, that the Court had power to amend under the 14-15 Vic. ch. 100, sec. 1: *Reg.* vs. *Gumble*, 12 Cox, 248.

RECORD OF CONVICTION OR ACQUITTAL.

Sec. 77.—In making up the record of any conviction or acquittal on any indictment, it shall be sufficient to copy the indictment with the plea pleaded thereto, without any formal caption or heading, and the statement of the arraignment and the proceedings subsequent thereto, shall be entered of record in the same manner as before the passing of this Act, subject to any such alterations in the forms of such entry, as may from time to time be prescribed by any rule or rules of the Superior Courts of Criminal Jurisdiction respectively, which rules shall also apply to such inferior Courts of Criminal Jurisdiction as shall be therein designated.

There is no statutory enactment, in England, corresponding to this one, and, there, the caption has, yet, to be entered of record immediately before the indictment, when the record has to be made up in form.

The record of judicial proceedings in criminal cases

is always, in the first instance, taken down by the Clerk of the Court in the way of short entries made upon his docket, or of indorsements upon papers filed and the like. When he has to make the extended record, or record proper, resort is had to these docket entries, to the documents filed, and to the several indorsements upon them, which serve as *memoranda* for him. The record, formally made up, is the history or narration of the proceedings in the case, stating:

1st.—The Court before which the indictment was found, and where and when holden.

2ndly.—The Grand Jurors by whom it was found,

3rdly.—The time and place where it was found, and that the indictment was found under oath.

(*These three particulars form the caption.*)

4thly.—The indictment.

5thly.—The appearance or bringing in of the defendant into Court.

6thly.—The arraignment.

7thly.—The plea.

8thly.—The joinder in issue, or *similiter*.

9thly.—The award of the jury process.

10thly.—The verdict.

11thly.—The *allocutus*, or asking of the defendant why sentence should not be passed on him.

12thly.—The sentence.

It is probably now only when a writ of error is issued or to prove *autrefois acquit or autrefois convict* (section 35, *ante*) that it will be necessary to draw up a formal record, as sections 26 and 65 (see *ante*) of the

Procedure Act of 1869 take away the necessity of so doing in the two other cases, where it could have been wanted.

The necessity of a formal caption or heading to a made-up record is taken away by section 77.

The caption of the indictment is no part of the indictment itself, but only the style or preamble thereto, the formal history of the proceedings before the grand jury; 2 *Hale*, P. C. 165; 1 *Starkie*, Cr. Pl. 233; 2 *Hawkins*, P.C. 349; 1 *Chitty*, Cr. L. 325; *Archbold*, 37; 1 *Bishop*, Cr. Proc. 655.

The form of the caption is as follows:

Dominion of Canada. } In the Court of Queen's Bench
Province of Quebec. } —Crown Side.

District of Quebec.—Be it remembered, that at a term of the Court of Queen's Bench, Crown side, holden at the City of Quebec, in and for the said District of Quebec, on the day of (*the first day of the term*), in the year of our Lord , upon the oath of (*insert the names of the grand jurors*) good and lawful men of the said district, now here sworn and charged to inquire for our Sovereign Lady the Queen, and for the body of the said district, it is presented in the manner following, that is to say: (*this ends the caption*).

Then the record continues to recite the indictment, &c., as follows, and by sec. 77 of the Procedure Act, may commence here:

District of Quebec.—The jurors for our Lady the Queen, upon their oath, present that John Jones, on the fifth day of June, in the year of our Lord one thousand eight hundred and seventy, feloniously, wilfully and of his malice aforethought, did kill and murder one Patrick Ray, against the peace of our Lady the Queen, her Crown and dignity; whereupon the Sheriff of the aforesaid district is commanded, that he omit not for any liberty in his bailiwick, but that he take the said John Jones, if he may be found in his bailiwick, and him safely keep to answer to the felony and murder whereof he stands indicted. And afterwards, to wit, at the same term of the said Court of Queen's Bench, before the said Court of Queen's Bench, on the said day of , in the said year of our Lord : here cometh the said John Jones under the custody of William Brown, Esquire, Sheriff of the district aforesaid (in whose custody in the gaol of the district aforesaid, for the cause aforesaid, he had been before committed), being brought to the bar here in his proper person by the said Sheriff, to whom he is here also committed. And he, the said John Jones, forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, saith that he is not guilty thereof, and therefore he puts himself upon the country. And the Honorable George Irvine, Attorney-General of our said Lady the Queen, who prosecutes for our said Lady the Queen in this behalf, doth the like. Therefore let a jury thereupon immediately come before the said Court of free and lawful men of the said District of Quebec, by whom

the truth of the matter may be the better known, and who are not of kin to the said John Jones, to recognize upon their oath whether the said John Jones be guilty of the felony in the indictment above specified or not guilty; because, as well, the said George Irvine, who prosecutes for our said Lady the Queen in this behalf, as the said John Jones have put themselves upon the said jury. And the jurors of the said jury, by the Sheriff for this purpose impannelled and returned—to wit (*naming the twelve*)—being called, come who to speak the truth of and concerning the premises being chosen, tried and sworn upon their oath, say that the said John Jones is guilty of the felony aforesaid, on him above charged, in manner and form aforesaid as by the said indictment is above supposed against him. And thereupon it is forthwith demanded of the said John Jones, if he hath or knoweth anything to say why the said Court here ought not, upon the premises and verdict aforesaid, to proceed to judgment against him; who nothing further saith. unless as he has before said. Whereupon, all and singular the premises being seen and fully understood by the said Court here, it is considered and adjudged by the said Court here that the said John Jones be taken to the common gaol of the said District of Quebec, from whence he came, and that he be taken from thence to the place of execution, on Friday, the day of next ensuing, and there be hanged by the neck until he be dead; and the Court orders and directs the said execution to be done on the said John Jones in the manner provided by law.

If the defendant against whom an indictment has been found, happen to be present in Court, or in the custody of the Court, he may at once be arraigned upon the indictment without previous process: 1 *Chitty*, 338; *Archbold*, 78.

Then the record, when made up, instead of the words "whereupon the Sheriff of the aforesaid district is commanded, &c.," as in the above form, must read "Whereupon, to wit, on the said day of at the same term of the said Court of Queen's Bench, before the said Court of Queen's Bench here cometh the said John Jones under the custody of William Brown, Esquire, Sheriff of the district aforesaid, (in whose custody, in the gaol of the district aforesaid, he stood before committed) &c."

In the reports of the case of *Mansell* vs. *Reg.*, in error, Dears. & B., 375, can be seen a lengthy form of a record; also in *Reg.* vs. *Fox*, 10 Cox, 502; *Whelan* vs. *Reg.*, 28 U. C. Q. B. 2; *Holloway* vs. *Reg.*, 2 Den. 287; and 4 *Blackstone*, app.

Two important and essential formalities must be remembered in making up a record. 1st. Every adjournment of the Court must appear, and 2nd, at each sitting of the Court so adjourned, a special entry must appear of the presence of the defendant.

In the case of *Whelan* vs. *Reg.*, cited *supra*, it was held in Upper Canada, that if, notwithstanding sec. 77 of the Procedure Act (sec. 52, ch. 99, Con. Stat. Can). a formal caption is prefixed to the indictment, this caption may be rejected, if it proves defective.

FORMAL DEFECTS CURED AFTER VERDICT.

Sec. 78.—No judgment upon any indictment for any felony or misdemeanor whether after verdict or outlawry, or by confession, default or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record," or of the words "with force of arms," or of the words "against the peace," nor for the insertion of the words "against the form of the statute," instead of the words "against the form of the statutes," or vice versa, *or the omission of such words or words of like import*, nor for that any person mentioned in the indictment is designated by a name of office or other descriptive appellation, instead of his proper name, *nor for the want of or any imperfection in the addition of any defendant or other person*, nor 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, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or exhibiting the information, or on an impossible day, or on a day that never happened, *nor 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 such value, price, damage, injury or spoil, is not of the essence of the offence*, nor for the want of a proper or perfect venue, where the court appears by the indictment to have had jurisdiction over the offence.

This clause is taken from the 7 Geo. IV. ch. 64, sec. 20 of the Imperial Statutes: the words above given in italics are not in the Imperial Act.

It would seem that this clause might well have been omitted; it is difficult to see its necessity, considering the enactment of section 23, see *ante*, which covers the same defects as this one, besides the "want of a proper or formal conclusion." See *ante*, p. 102, *et seq.* remarks under section 23.

CERTAIN FORMAL DEFECTS NOT TO STAY OR REVERSE JUDGMENT.

Sec. 79.—Judgment, after verdict upon an indictment for any felony or misdemeanor, shall not be stayed or reversed for want of a similiter, nor by reason that the jury process has been awarded to a wrong officer, upon an insufficient suggestion, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who was not returned as a juror by the Sheriff or other officer; and where the offence charged is an offence created by any Statute, or subjected to a greater degree of punishment by any Statute, the indictment shall, after verdict, be held sufficient, if it describes the offence in the words of the Statute creating the offence, or prescribing the punishment, *although they be disjunctively stated or appear to include more than one offence, or otherwise.*

This clause is taken from 7 Geo. IV. 4, ch. 64, sec.

21 of the Imperial Statutes, except the words given in italics.

Under it, the first defect cured by verdict is the want of a similiter. The *similtier* is the joinder in issue, contained, in the record, (see *ante*, under section 77 for form of a record) in these words: "And——— who prosecutes for our said Lady the Queen in this behalf, doth the like." Under section 35, *ante*, a form of the similiter, in the case of a plea of *autrefois acquit* is given.

The second formal defect cured by verdict, under this clause is the wrongful award of the jury process upon an insufficient suggestion. The jury process is usually directed to the Sheriff, but if one of the parties represent that the Sheriff is interested, or of kin to one of the parties, or in any way disqualified to act in the case (see *Archbold*, 153, for grounds against Sheriff, of challenge to the array), an entry of this suggestion is made on the back of the indictment first, and then on the record, when it is made up formally; and then the jury process is awarded to the coroner, if not disqualified, and if disqualified, then to two elisors named by the Court, and sworn, in which last case, the return is final, and no challenge to the array is allowed: *Jervis*, on Coroners 54; 1 *Chitty*, 514; *Wharton*, Law Lexicon, *Verb* "elisors": *Archbold*, 154. By the above clause, these formalties cannot be questioned or investigated after verdict, and no misnomer or misdescription of the officer returning the process or of any of the jurors can invalidate the verdict.

This clause says thirdly that no motion in arrest of judgment or writ of error will avail on the ground that any person has served upon the jury who was not returned as a juror by the Sheriff or other officer.

In the Province of Quebec, by par. 9, of sec. 7, 27-28 Vic. ch. 41, it is enacted that:

"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."

The fourth and most important part of this section 79 of the Procedure Act consists in the words: "And where the offence charged is an offence *created by any Statute*, or subjected to a *greater* degree of punishment by any Statute, the indictment shall, *after verdict*, be held sufficient, if it describes the offence in the words of the Statute creating the offence, or prescribing the punishment, although they be disjunctively stated or appear to include more than one offence, *or otherwise*."

It will not be attempted here to find out the meaning of these two last words "*or otherwise*." It would be looking in vain for what does not exist. "Although *they* be disjunctively stated" means of course "although *these words* be disjunctively stated" "as unlawfully or maliciously" instead of "unlawfully and maliciously."

The words "or appear to include more than one offence" are not new law: see *Reg.* vs. *Ferguson*, 1

Dears. 487; *Reg.* vs. *Haywood*, Leigh & Cave, 451; *Archbold*, 69; and, *ante*, remarks under section 16. As said before, the words after "although" in the clause are additions to the Imperial Act. They do not seem to be a great improvement.

The following decisions on the interpretation of the part of the clause rendering valid, after verdict, indictments describing the offence in the words of the statute creating it, or subjecting it to a greater degree of punishment, may be usefully inserted here.

In *Reg.* vs. *Larkin*, Dears. 365, it was held that if an indictment charging a felonious receiving of stolen goods, does not aver that the prisoner knew the goods to have been so stolen, it is defective, and the defect is not cured by verdict.

An indictment under 14-15 Vic. ch. 100, sec. 49, (32-33 Vic. ch. 20, sec. 50, Dominion Statutes) for procuring the defilement of a girl by false pretences, false representations or other fraudulent means, did not set out or allege what were the false pretences, false representations or other fraudulent means. The defendant having been found guilty, brought a writ of error on this ground, and the conviction was quashed: *Howard* vs. *Reg.*, 10 Cox, 54.

In *Rex.* vs. *Warshaner*, 1 Moody, 466, an indictment for having unlawfully in possession *five florins*, was held sufficient after verdict, though not showing what *florins* were, and their value, it being a foreign coin, as

the indictment described the offence in the words of the Statute creating it.

After verdict, defective averments in the second count of an indictment are cured by reference to sufficient averments in the first count: *Reg.* vs. *Waverton*, 2 Den. 340.

If, before 32-33 Vic. ch. 21, sec. 93 (1869), in an indictment for obtaining property by false pretences, it did not appear who was the owner of the property so alleged to have been unlawfully obtained, the defect was not cured by verdict, and notwithstanding the above clause 79 of the Procedure Act, in such a case, a conviction, upon a writ of error, would have been quashed: *Reg.* vs. *Bullock*, Dears. 653; *Sill* vs. *Reg.*, Dears. 132; *Reg.* vs. *Martin*, 8 A. & E. 481.

In *Reg.* vs. *Bowen*, 13 Q. B. 790, the indictment was for obtaining by false pretences, and did not contain the word "knowingly" with "unlawfully" but the Court held the conviction good after verdict, as the indictment was in the words of the Statute.

But an indictment for felony must always allege that the act which forms the subject matter of the indictment was done feloniously; if an indictment for felony does not contain the word "feloniously," it is bad, though in the words of the Statute creating the offence, and is not cured by verdict: *Reg.* vs. *Gray*, L. & C. 365.

If an indictment under sec. 104, of the Dominion Larceny Act, 32-33 Vic. ch. 21, alleges the goods to have been "unlawfully obtained, taken, and carried away, and that the receiver knew them to have been unlawfully obtained" instead of "unlawfully obtained *by false pretences*," the indictment is bad and not cured by verdict. See *Reg.* vs. *Wilson*, 2 Mood. 52.

An indictment under the same section, charged that defendant "unlawfully did receive goods which had been unlawfully, and knowingly, and fraudulently obtained by false pretences with intent to defraud, as in this count before mentioned," but omitting to set out what the particular false pretences were. *Held*, that the objection, if at any time valid, was cured by the verdict of guilty: *Reg.* vs. *Goldsmith*, 12 Cox, 479. See *ante*, vol. 1, page 114, remarks under sec. 104 of the Larceny Act.

Would an indictment for obtaining property by false pretences, not setting out the false pretences, be good after verdict?

In *Reg.* vs. *Goldsmith*, 12 Cox, 483, Chief Justice Bovill said, in 1873: "I am not aware whether the question has been raised after verdict since the passing of the Statute of 7-8 Geo. IV. ch. 64," (sec. 79 of our Procedure Act). See section 27, *ante*, of the Procedure Act, and the form of indictment for obtaining by false pretences in the schedule of the same Act.

Section 27 enacts that the forms given will be sufficient and the form given for obtaining by false pretences does not state what are the false pretences. On the

other hand, section 35 of ch. 99, Con. Stat. Can. specially made it unnecessary to set out any of the pretences in an indictment for false pretences. This enactment has been repealed by the General Repeal Act of 1869, and not re-enacted. There is certainly here a contradictory legislation, which Parliament should remedy. It is doubtful notwithstanding the form given with the Procedure Act, if, before verdict, such an indictment would be sufficient, if not alleging what are the false pretences.

But, *after verdict*, it would seem to be sufficient, both at common law, and under section 79 of the Procedure Act, by the remarks of the Judges in *Reg.* vs. *Goldsmith*, 12 Cox, 482; *Reg.* vs. *Wilkinson*, 12 Cox, 271; and *Heymann* vs. *Reg.*, 12 Cox, 384; though *Howard* vs. *Reg.*, 10 Cox, 54, cited *ante*, seems a contrary decision, but this last case was not argued.

It will be seen, *ante*, under sec. 27, that, in *Reg.* vs. *Carr* (Quebec, March, 1872), the Court of Queen's Bench quashed the indictment on the ground of the omission therein of the words "feloniously, wilfully, and of his malice aforethought," though the form given in the schedule of the Procedure Act for the offence created by the clause under which the prisoner was indicted has not these words.

In *Reg.* vs. *Deery* (Montreal, September, 1874), the jury found the prisoner guilty on the following count of the indictment, under sec. 10, ch. 20, 32-33 Vic.: "And the jurors aforesaid, on their oath aforesaid, do further present that the said Cornelius Deery, on the day and year aforesaid, one Alfred Baignet feloniously

and unlawfully did wound, with intent thereby then to commit murder."

The prisoner moved to stay the judgment, "because the said second count of the said indictment is illegal, null and void, and does not disclose any offence, inasmuch as the crime therein charged is not alleged to have been committed with the *malice aforethought* of the said Cornelius Deery." Upon a reserved case, the Court of Queen's Bench—Dorion, C. J., Taschereau, J., Sanborn, J. (Monk, J., *dissentiens*, and Ramsay, J., absent)—held that, under sec. 79 of the Procedure Act, the count of the indictment objected to was sufficient after verdict.

There seems to be another possible objection to the said indictment, though it was not noticed, either by counsel or by the Court. Is it sufficient in an indictment, under the said section 10, of ch. 20, 32-33 Vic., for wounding with intent to murder, to aver simply "with intent to commit murder" generally without naming the person intended by the prisoner, or if his name is not known, alleging "a person to the jurors unknown?"

Chief Justice Jervis, in *Reg.* vs. *Lallement*, 6 Cox, 204, said that, *after* verdict, he had no doubt that "with intent to commit murder" would be sufficient, being the words of the statute, but doubted if such an indictment could not be successfully demurred to.

And *Greaves*, 3 *Russell* 1003, *note g*, and 1004, *note h*, says that it is questionable whether such an indictment is sufficient, even after a verdict, relying on *Reg.*

vs. *Martin*, 8 Ad. & E. 481, cited *supra*, to say that in many cases it is not sufficient, even after verdict, to follow the words of the statute. Against these opinions, the case of *Reg.* vs. *Ryan*, 2 M. & Rob. 215, can be cited, where an indictment alleging "with intent to commit murder" generally was prepared, under the express direction of the Court, and the prisoner tried and convicted.

Then, the forms of indictment given, in *Archbold*, under sec. 11, 24-25 Vic., ch. 100, and the following sections, all contain a count, averring "with intent to commit murder:" see vol. 1, *ante*, page 227 *et seq.* The question seems unsettled so far, and it will be prudent, in all such indictments, to follow *Greaves'* advice, and avoid the necessity of such a count as much as posible.

In *Reg.* vs. *Carr*, March, 1872, Quebec, the indictment was in the following terms:

"The jurors for our Lady the Queen, upon their oath, present that John Carr, on the twentieth day of June, in the year of our Lord one thousand eight hundred and seventy-one, in the parish of St. Colomb de Sillery, in the District of Quebec, did feloniously wound Lawrence Byrne, with intent then and there to murder the said Lawrence Byrne, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity."

The prisoner, having been found guilty, moved in arrest of judgment, "for that it is not alleged and charged against the said John Carr, in and by the said

indictment, that he the said John Carr did wound the said Lawrence Byrne, of the malice aforethought of him the said John Carr."

The presiding Judge having reserved the case, the Court of Queen's Bench—Duval, C. J., Badgley, J., and Monk, J. (Caron, J., and Drummond, J., *dissentientibus*)—held that the indictment was defective, on the ground taken by the prisoner, and that the defect was not cured by verdict.

There is this difference between this last case and *Reg.* vs. *Deery*, cited *ante*. In *Reg.* vs. *Deery* the indictment averred "with intent to commit murder" generally, and was in the express words of the statute, whilst in *Reg.* vs. *Carr* the averment of the intent was not "to commit murder," in the words of the statute, but "with intent to murder the said Lawrence Byrne." To "commit murder" means to commit the crime known in law as "of malice aforethought to kill and murder," whilst on an indictment charging that the defendant murdered, without saying "of malice aforethought," the defendant can only be convicted of manslaughter: 1 East, P. C. 345, 346. So in an indictment for burglary: if the indictment avers that the defendant did feloniously and burglariously break and enter . . . . with intent to commit murder, it is sufficient, whilst if the averment as to the intent refers to any person in particular, it must state "with intent feloniously, and of his malice aforethought, to kill and murder the said J. N.:" see 2 *Bishop* Cr. Proced. 82, 145.

It is true that in these two cases of *Deery* and *Carr*, the objection was that the indictment did not charge "feloniously and of his malice aforethought did wound;" but if the indictment in Carr's case had averred "feloniously did wound with intent then and there feloniously and of his malice aforethought to murder," it would certainly not have been open to the objection taken; and the forms given in *Archbold* are "feloniously and unlawfully did wound with intent to commit murder," whilst if the person the prisoner intended to murder is known, the form is "feloniously and unlawfully did wound with intent, thereby then feloniously, wilfully and of his malice aforethought, the said J. N. to kill and murder."

The decision in *Deery's* case, viewed in that light, is not adverse to *Reg.* vs. *Carr*, though it was thought to be so. Both decisions seem quite correct. The indictment in *Carr's* case was defective, even after verdict; the indictment in *Deery's* case was good, even before verdict—that is to say, so far as objected to by the prisoner.

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: *Reg.* vs. *Waters*, 1 Den., 356; see also, *ante*, remarks under section 32 of the Procedure Act.

When an indictment is quashed or judgment upon it arrested for insufficiency or illegality thereof, the

Court will order that a new indictment be preferred against the prisoner, and may detain the prisoner in custody therefor: 1 *Bishop*, Cr. Proced. 739; 2 *Hale*, 237; 2 *Hawkins*, 514; *Rex.* vs. *Turner*, 2 Mood. 241.

In *Rex* vs. *Vandercomb*, 2 Leach, 711, the jury, by the direction of the Court, acquitted the prisoners, as the charge as laid against them had not been proved; but as it resulted from the evidence adduced that another offence had been committed by the prisoners, and as the grand jury were not discharged, the prisoners were detained in custody, in order to have another indictment preferred against them.

In *Rex.* vs. *Semple*, 1 Leach, 420, the Court quashed the indictment, upon motion of the prisoner, upon the ground of informality, but ordered the prisoner to be detained till the next session: See also 1 *Chitty*, Cr. L. 304.

So, upon a demurrer, if the defendant succeeds, he only obtains a little delay, for the judgment is that the indictment be quashed, and the defendant will be detained in custody until another accusation has been preferred against him, except, of course, where the demurrer has established that the defendant has not committed any legal offence whatsoever, in which case he will be altogether discharged from custody: 1 *Chitty*, Cr. L. 442.

In *Rex.* vs. *Gilchrist*, 2 Leach, 657, the prisoner was found guilty of forgery, but, upon motion in arrest of judgment, the Court held that the indictment, being

repugnant and defective, the prisoner should be discharged from it; but that as the objection went only to the form of the indictment, and not to the merits of the case, the prisoner should be remanded to prison until the end of the session, to afford the prosecutor an opportunity, if he thought fit, of preferring another and better indictment against him. See also *Rex.* vs. *Pelfryman*, 2 Leach, 563.

In *Archbold*, page 166, it is said: Upon the delivery of the verdict, if the defendant be thereby acquitted on the merits, he is forever free and discharged from that accusation, and is entitled to be immediately set at liberty, unless there be some other legal ground for his detention. If he be acquitted from some defect in the proceedings, so that the acquittal could not be pleaded in bar of another indictment for the same offence, *he may be detained to be indicted afresh.* So in 1 *Chitty*, Cr. L. 649, and *Rex.* vs. *Knewland*, 2 Leach, 721.

APPEAL AND NEW TRIAL.

Sec. 80.—So much of the chapter thirteen or of chapter one hundred and thirteen of the Consolidated Statutes for Upper Canada, as allows any appeal to the Court of Error and Appeal, in any criminal case where the conviction has been affirmed by either of the Superior Courts of common law, on any question of law reserved for the opinion of such Court, is hereby repealed as regards any conviction had after this Act is in force, and the judgment of such Superior Court

on any question so reserved shall be final and conclusive; and so much of chapter one hundred and thirteen of the said Consolidated Statutes, or of chapter seventy-seven of the Consolidated Statutes for Lower Canada, or of any other Act, as would authorize any Court in the Province of Ontario or Quebec, to order or grant a new trial in any criminal case, shall be and so much of any of the said Acts is hereby repealed, as regards any conviction had after the coming into force of this Act; and no writ of error shall be allowed in any criminal case unless it be founded on some question of law which could not have been reserved, or which the judge presiding at the trial refused to reserve for the consideration of the Court having jurisdiction in such cases; but nothing in this section shall be construed to prevent the subsequent trial of the offender for the same offence, in any case where the conviction is declared bad for any cause which makes the former trial a nullity, so that there was no lawful trial in the case.

Chapter 13 of the Con. Stat. U. C. is also repealed by the General Repeal Act of 1869, in so far as it is inconsistent with the Procedure Act. Chapter 113 of the same statutes is also repealed by the General Repeal Act, with the exception of sections 5, 16 and 17. But section 5 has been subsequently repealed by 36 Vic. ch. 3, sec. 2. Sec. 63 of chapter 77 of the Con. Stat. Low. Can. is also repealed by the General Repeal Act.

Mr. *Clarke*, in his Criminal Law of Canada, p. 631,

says: "The statutes authorizing the granting of new trials in criminal cases have been repealed, and now throughout the Dominion, there is one uniform law, similar to that of England on this point." And this was held to be the law by Mr. Justice Ramsay in *Reg.* vs. *Dougall* (*Montreal Witness* libel case, Queen's Bench, Crown side, Montreal, September, 1874).

On this section 80 of the Procedure Act, the following subjects may be appropriately considered: 1st, New trials; 2ndly, *Venire de novo*; 3rdly, Motions in arrest of judgment; 4thly, Cases reserved; 5thly, Writs of error; and 6thly, Appeals to the Privy Council in criminal cases.

New Trials.—In misdemeanors there is no doubt that the Superior Courts may grant a new trial, in order to fill the purposes of substantial justice: 1 *Chitty*, Cr. L. 654. A new trial may be allowed on the application of a defendant, after conviction, on the ground that the prosecutor has omitted to give notice of trial, in the cases where it ought to have been given, or that the verdict is contrary to evidence or the directions of the Judge, or for the improper reception or rejection of evidence, or other mistake or misdirection on the part of the Judge, or misconduct on the part of the jury, or where for any other cause, it shall appear to the Court that a new trial is essential to justice: 8th Cr. L. Com. Report, p. 159. If the defendant has been acquitted, the prosecutor is, in general, not entitled to a new trial, though it seems admitted that where the defendant shall have kept back any of the prosecutor's

witnesses, or obtained an acquittal by fraudulent means or practice, a new trial may be granted in the case of an acquittal: 8th Cr. L. Com. Report, . 161, and authorities there cited; *Archbold*, 179. A motion for a new trial is generally not received after the expiration of the first four days of the term next after trial or after sentence: *R.* vs. *Cauldwell, note* a, 2 Den. 372. The offender, or if more than one, all the offenders who have been convicted, must be present in Court, when the motion is made for a new trial: *idem*, 1 *Chitty*, Cr. L. 658; unless some special ground be laid for dispensing with the rule: *Reg.* vs. *Parkinson*, 2 Den. 459. Where one or more of several defendants have been convicted, and another or others acquitted, a new trial may be granted as to the former only: 1 *Chitty*, Cr. L. 659; *R.* vs. *Teale*, 11 East R. 307. As a general rule, no motion for a new trial is received after a motion in arrest of judgment; though the Court, may, in its discretion receive it: 1 *Chitty*, Cr. L. 658; *Reg.* vs. *Rowlands*, 2 Den. 364.

Mr. Justice Aylwin, in *Reg.* vs. *Bruce*, 10 L. C. Rep. after consulting the other Judges, held that in Lower Canada where the Court is held before one Judge and *in banco*, and never before more than two, the motion for a new trial in cases of supposed misdirection becomes impracticable. And in *Reg* vs. *Dougall*, (Indictment for libel, Queen's Bench, Montreal, September, 1874) Mr. Justice Ramsay seemed to be of opinion that he had no jurisdiction to hear and determine a motion for a new trial.

It is well established that no new trial can be

granted in a case of felony. In *Reg.* vs. *Scaife et al*, 2 Den. 281, a contrary doctrine seems to have been held, but it was said by Sir J. T. Coleridge, in *Reg.* vs. *Bertrand*, 10 Cox, 618, that the attention of the Court, in *Reg.* vs. *Scaife*, had not been directed to this question, and that the decision therein, so far, has taken no root in our law and borne no fruit in our practice. In this case of *Reg.* vs. *Bertrand*, the prisoner, in New South Wales, having been found guilty of murder and sentenced to death, moved for a new trial before the Supreme Court, on the ground of alleged irregularities on his trial. The Supreme Court granted this application, and setting aside the verdict, granted a new trial. The Privy Council (in 1867), reversed this judgment, and ordered that the verdict and sentence against the prisoner should stand, on the express ground that a new trial cannot be granted in a case of felony.

The same doctrine was upheld, in 1869, by the Privy Council, upon another appeal from New South Wales, in *Reg.* vs. *Murphy*, 11 Cox, 372. In delivering the judgment in this case, Sir William Erle said that the cases in which a verdict upon a charge of felony has been held to be a nullity and a *venire facias de novo* awarded, have been cases of defect of jurisdiction in respect of time, place or person, or cases of verdicts so insufficiently expressed or so ambiguous that a judgment could not be founded thereon, but that there is no valid authority for holding a verdict of conviction or acquittal in a case of felony, delivered before a competent tribunal in due form, to be a nullity by reason of some conduct on the part of the jury con-

sidered unsatisfactory by the Court, and if irregularity occurs in the conduct of a trial not constituting a ground for treating the verdict as a nullity, the remedy to prevent a failure of justice, is by application to the authority with whom rests the discretion either of executing the law or commuting the sentence.

Venire facias de novo.—The "material difference" says *Chitty*, Cr. L. 654, "between a new trial and a *venire facias de novo*, is that the latter is only grantable where some mistake is apparent on the record, but the former may be granted on the ground of improper direction, false evidence, misconduct of jurors, and a variety of other causes which never appear on the face of the proceedings."

Manning, Serjt., in a note to *Gould* vs. *Oliver*, 2 M. & G., 238, says: "The distinction between an award of a *venire de novo* and a rule for a new trial appears to be that the former is always founded upon some irregularity or miscarriage apparent upon the face of the record, whilst the latter is an interference by the Court in the discretionary exercise of a species of equitable jurisdiction, for the purpose of relieving a party against a latent grievance. After a rule for a new trial and a new trial had thereon the record is in the same state as if no trial, except the last had taken place, whereas, upon a *venire de novo*, the fact of the first trial, and the circumstances under which that trial became nugatory or abortive, and which rendered a second trial a matter not of discretion, but of right, necessarily appear on the record."

As to when a writ of *venire facias de novo* may issue the Cr. Law Com. in their eighth Report, p. 160, say: "A writ of *venire facias de novo* may be awarded by the Court of Queen's Bench where the jury have been improperly chosen, or irregularly returned, or a challenge has been improperly disallowed, or where, by reason of misconduct on the part of the jury, or some uncertainty or ambiguity or other imperfection in their verdict, or of any other irregularity or defect in the proceedings or trial, appearing on the record, the proper effect of the first *venire* has been frustrated or the verdict become void in law."

The record at the Quarter Sessions, after stating that the defendants were indicted for stealing oats, to which they pleaded not guilty, and a verdict of guilty thereon was given, added, "that because it appeared to the justices, that, after the jury had retired, one of them had separated from the other jurors, and conversed respecting his verdict with a stranger, it was considered that the verdict was bad," and it was therefore quashed and a *venire de novo* awarded to the next sessions; and it then proceeded to set out the appearance of the parties at such sessions, and the trial and conviction by the second jury, "whereupon all and singular the premises being seen and considered judgment was given:" *Held*, on a writ of error, that such judgment was right: *Rex.* vs. *Fowler*, 4 B. & A. 273.

In *Campbell* vs. *Reg.*, 2 Cox, 463; *Gray* vs. *Reg.*, 11 Cl. & Fin. 427; and *Reg.* vs. *Winsor*, 10 Cox, 276, the award of a *venire de novo*, in felony as well as misde-

meanor, was held legal and right, in all cases where, from any reason, the first trial has proved abortive.

In the case of *Reg.* vs. *Murphy*, 11 Cox, 372, cited *ante*, the judgment reversed by the Privy Council was a judgment granting a *venire de novo* in a case of felony but their Lordships considered the application was, in substance, for a new trial, and an attempt, by the exercise of a discretion, to grant a new trial in a case of felony on the ground that the conviction was considered to be unsatisfactory by reason of some irregularity in the conduct of the trial. And, in 1870, the very next year after the decision in *Reg.* vs. *Murphy*, the Privy Council, in *Levinger* vs. *Reg.*, 11 Cox, 613, quashed a conviction in a case of felony, and awarded a *venire de novo*, on the ground that the prisoner had been improperly refused the challenge of a juror. See also *Reg.* vs. *Martin*, 12 Cox, 206.

If the conviction is set aside from some cause not depending upon the merits of the case, and in any case where the former trial has been a nullity or a mis-trial, a *venire de novo* ought to be awarded. If the circumstances of the case are such that the prisoner could not plead *autrefois convict* to a second indictment for the same offence, there is no reason why a *venire de novo* should not be awarded on the first indictment, provided, of course, that it has not been quashed, or the conviction set aside on the ground of irregularities or illegality in the said first indictment. So in *Reg.* vs. *Yeadon*, L. & C. 81, the Court of Crown Cases Reserved,

holding that there had been a mis-trial, awarded a *venire de novo*: see also *Levinger* vs. *Reg.*, cited *supra*.

In *Reg.* vs. *Mellor*, Dears. & B. 468, a juror by mistake answered to the name of another and was sworn. The fact was discovered after the trial was over, the prisoner having been found guilty and sentenced to death. Upon a case reserved, Crowder, Willes and Byles, J.J., were of opinion that there had been no mistrial; Pollock, Erle, Williams, Crompton and Channell, JJ., were of opinion that as the Court of Crown Cases Reserved, they had not the right to award a *venire de novo*; Campbell, C. J., Cockburn, C. J, Wightman and Watson, JJ., were of opinion that there had been a mis-trial and that, as the Court of Crown Cases Reserved, they had the power, under the Statute, to order a *venire de novo*; Coleridge and Martin, JJ., were also of opinion that the first trial was a nullity, and that the entry on the record should be that there had been a mis-trial, that the conviction was wrong and null, and that the prisoner must be again tried for the same offence. The majority of the judges, in this case, was then of opinion that a *venire de novo* can be ordered by the Court of Crown Cases Reserved in a case of felony. It will be seen *post* that in England, Ontario, Quebec, Nova Scotia and New Brunswick, the Statutes creating the Courts of the Crown Cases Reserved are all similar.

But in *Mellor's* case, it seems by the remarks of Pollock, C. B., Dears. & B. 487, that all the Judges were of opinion that a *venire de novo* cannot be grant-

ed where improper evidence has been received. But this seems to be an *obiter dictum*, on which it would not be prudent to place too much reliance, though see *R.* vs. *Ball*, R. & R. 132 and 1 *Bishop* Crim. Proced. 1042.

At the same time, it must be remarked that, in the Province of Quebec, since the passing of the Procedure Act and of the General Repeal Act of 1869, and consequently since the Statutory Law on cases reserved is similar in England, Ontario, Quebec, Nova Scotia, and New Brunswick, the Court of Queen's Bench, in two instances, on setting aside the convictions, has awarded a *venire de nove*, for admission of illegal evidence.

The first case is *Reg.* vs. *Pelletier*, 15 L. C. Jur. 146, in 1870, by Duval, C. J., Caron, Drummond, Badgley and Monk, J.J., unanimously.

The second case is *Reg.* vs. *Coote*, in 1871, 12 Cox, 557; 4 Moore's P. C. Appeals, 599; 10 U. C. L. J. 107; 18 L. C. Jur. 103, before the same Judges, (Badgley and Monk, *dissentientibus*), but apparently, not on the question of the *venire de novo*. This last case was brought in appeal before the Privy Council, where the judgment was reversed on the ground that the first trial and conviction were valid so that the question of the power of the Court to award a *venire de novo*, when the verdict is vacated on the admission of illegal evidence, was not adjudicated upon, on this appeal.

In a late case of *Reg.* vs. *Guay*, 18 L C. Jur., 306 (Quebec, September, 1874), the Court of Queen's Bench, upon a case reserved for its consideration

on the legality of certain evidence received at the trial, held that the evidence had been improperly admitted, and quashed the verdict, but did not order either the discharge of the prisoner or a *venire de novo*.

So in *Reg.* vs. *Chamillard*, in 1873, 18 L. C. Jur. 149, upon a case reserved, the Court of Queen's Bench vacated the judgment, on the ground that the first trial was null and void, but gave no order, either as to the discharge or the trial *de novo* of the prisoner. In this case, the prosecutor subsequently moved for a *venire de novo* before the original Court, upon which the Judge reserved a second case for the consideration of the full Court on the question whether he had the right to order a *venire de novo*; but the Court of Queen's Bench refused to decide the point, on the ground that they had not jurisdiction to do so, evidently overruling *Reg.* vs. *Daoust*, 10 L. C. Jur. 221, though the report does not show that the Judges' attention was called to this last case. See note to 1 *Bishop*, Crim. Proced. 1047, on the subject.

In these two cases, the Quebec Court of Queen's Bench seemed to doubt whether it had the power, as the Court of Crown Cases Reserved, to order that the defendants should be tried *de novo*, though, as it has been seen, the same tribunal, in *Reg.* vs. *Pelletier*, and *Reg.* vs. *Coote*, did not hesitate to assume this power. The cases of *Reg.* vs. *Yeadon*, *Reg.* vs. *Mellor*, and *Levinger* vs. *Reg.*, cited *supra*, seem to leave no doubt on this question. If the judgment or sentence has been passed by the Court, where the trial was held,

the Court of Crown Cases Reserved can either reverse, affirm, or amend the *judgment* (not the *verdict*), or avoid such judgment, *and* (meaning *that is to say*) order an entry to be made on the record that the party convicted ought not to have been convicted. If the sentence or judgment has not been passed by the the Court whence the case comes, then the Court of Crown Cases Reserved can arrest the judgment or order that such judgment be given by the Court whence the case comes at a subsequent session thereof. In both cases, the Court of Crown Cases Reserved has the power to make such other order as justice requires.

But, as said by Channell, B., in *Reg.* vs. *Yeadon*, *ubi supra*, the Court of Crown Cases Reserved cannot reverse, affirm or amend the *verdict*. It can affirm, reverse or amend the *judgment*, if there is one; if there is none yet, it may arrest it, or order it to be pronounced. Then it may order anything else which justice requires. If the first trial is a mis-trial, for any reason appearing on the face of the record, and the case reserved, of course, appears on the face of the record, then, as in *Reg.* vs. *Yeadon*, the Court declares it to have so been, and orders a *venire de novo*, or such other order as justice requires.

The saving enactment contained in the last part of section 80 of the Procedure Act of 1869 certainly implies that in any case where the former trial has been adjudged to be a nullity, the offender may be subsequently tried for the same offence. If there has been a mis-trial, the defendant has not been put in jeopardy.

If it appears by the record that no legal judgment can be given on the first verdict, it is, as it has been seen, one of the cases specially mentioned, where a *venire de novo* not only may, but must issue. This is not an application left to the discretion of the Judge, as in the case of a motion for a new trial by the defendant. A *venire de novo* cannot be refused any more than the first *venire* could have been. In the eyes of the law there can, it is true, be had only one *legal* trial for the same offence; but it is that *legal* trial, which is ordered on a *venire de novo*. The proceedings held in the case so far are declared not to be in law a trial: see *R* vs. *Fowler*, 4 B. & Ald. 273. If the indictment has not been quashed, the offender stands charged of an offence for which he has not yet been punished, though not acquitted of the charge. The former conviction against him does not any longer exist. He could not plead it in bar to a second indictment, because it was not a lawful conviction: 1 *Chitty*, Cr. L. 461, and he was not lawfully liable to suffer judgment for the offence charged against him: *R.* vs. *Drury*, 3 C. & K. 190 If he may be tried again on a new indictment, why not try him on the same indictment, if it stands, and avoid delays, costs and annoyances to the prisoner as well as to the prosecutor.

There is no doubt that on a writ of error, a *venire de novo* could be awarded, if the first trial is a nullity. "A mis-trial vitiates and annuls the verdict in *toto*, and the only judgment is a *venire de novo*, because the prisoner was never, in contemplation of law, in any jeopardy on his first trial:" *Whelan* vs. *Reg.*, 28 U. C. Q. B. 137.

There is no law which says that this can be done only on a writ of error, and every time that the first verdict is set aside, on account of a mis-trial, such a *venire de novo* should issue.

In *Reg.* vs. *Winsor*, 10 Cox, 276, Chief Justice Cockburn said:

"No man ought to be put in peril twice on the same charge. I entirely agree with that maxim. But we must take that fundamental maxim of the criminal law according to what is really meant by it. It means this, that a man shall not twice be put in peril. After a verdict has been once pronounced, that verdict being one which it was competent for the jury to pronounce, you shall not harass a man a second time if he has been once convicted *and sentenced*. Still less shall you harass a man a second time if he has been pronounced not guilty by a jury of his country. It does not follow because from any particular circumstance or reason a trial has proved abortive, that then the question involved in the case shall not be again submitted to the consideration of a jury, and determined as right and justice may require. . . . For the reasons given by Crampton, J. in *Conway and Lynch* vs. *the Queen*, which I will not repeat, I quite concur in his conclusion that the principle is this: that where, upon the jury process going there has not been a verdict *decisive of either guilt or innocence*, whether it be from error in the Judge, or the fault of the jury, or inevitable accident, or the Judge improperly discharging the jury, the indictment has not been disposed of, and in all such cases there ought to be a *venire de novo*."

Motion in arrest of judgment.—The defendant, after conviction, may move at any time in arrest of judgment, before the sentence is actually pronounced upon him. This motion can be grounded only on some objection arising on the face of the record itself, and no defect in the evidence, or irregularity at the trial, can be urged at this stage of the proceedings. But any want of sufficient certainty in the indictment, as in the statement of time or place (where material), of the person against whom the offence was committed, or of the facts and circumstances constituting the offence, or otherwise, which has not been amended during the trial, and is not aided by the verdict, will be a ground for arresting the judgment: see *ante*, sections 23, 32, 78 and 79 of the Procedure Act, and remarks thereunder.

The Court will *ex proprio motu*, arrest the judgment, even if the defendant omits to move for it, when it is satisfied that the defendant has not been found guilty of any offence in law. Notwithstanding sections 32 and 79 of the Procedure Act, if a substantial ingredient of the offence does not appear on the face of the indictment, the Court will arrest the judgment: *Reg.* vs. *Carr*, Quebec, 1872. Judgment will also be arrested if the Court does not appear by the indictment to have had jurisdiction over the offence charged: sections 15 and 78, Procedure Act; 8th Crim. L. Com. Report, 162; *R.* vs. *Fraser*, 1 Mood. 407.

A party convicted of felony must be present in Court, in order to move in arrest of judgment; so a party convicted of a misdemeanor, unless his presence

be dispensed with at the discretion of the Court: *Chitty*, Cr. L. 663; Cr. L. Com. Rep. *loc. cit.*

If the judgment be arrested, the indictment and all the proceedings thereupon, are set aside, and judgment of acquittal is given by the Court, but such acquittal is no bar to a fresh indictment: *Archbold*, 170; 8th Cr. L. Com. Rep. 163; 3 *Burn's* Just. 58.

See next sub-title.

Cases reserved.—In England, by the 11 & 12 Vic. c. 78, the Judge, after conviction, in a criminal case, may reserve, in his discretion any question of law which shall have arisen on the trial for the consideration of the justices of either Bench and Barons of the Exchequer, called, in practice, when sitting under this law, the Court of Crown Cases Reserved. Statutory enactments of the same nature and almost all and each of them in the same words as the Imperial Act are in force in Ontario, Quebec, Nova Scotia, and New Brunswick.

In Ontario, ch. 112, Con. Stat. U. C.; in Quebec, ch. 77, Con. Stat. L. C. in Nova Scotia, ch. 171 of the Revised Statutes; and in New Brunswick, ch. 159 of the Revised Statutes, enact that the Judge presiding over a criminal trial may, after conviction of the defendant, reserve any question of law, which shall have arisen at the trial, for the consideration of the tribunal named in each of these Statutes: that thereupon the said Judge shall state in a case to be signed him the question or questions of law so reserved, with the special circumstances upon which the same

arose: that the Court of Crown Cases Reserved shall finally hear and determine such question or questions of law so reserved, and reserve, affirm or amend any judgment given on the indictment, or avoid such judgment, *and* order an entry on the record that in the judgment of the said Court the party convicted ought not to have been convicted, or arrest the judgment, or order judgment to be given thereon by the Co[illegible]t whence the case comes, if no judgment has before that time been given, or make such other order as justice requires.

The word *and* above given in italics is replaced in the Nova Scotia and Ontario Statutes by *or*. The English Statute has *and*, as the Quebec and New Brunswick Acts.

The Statute gives no jurisdiction to the Court of Crown Cases Reserved to hear a case reserved on a judgment on a demurrer. There must have been a trial and a conviction to give jurisdiction to this Court. *Reg.* vs. *Fuderman*, 1 Den. 565; *Reg.* vs. *Paxton*, 2 L. C. L. J. 162; *Reg.* vs. *Clark*, 12 Jur. N. S. 946.

In *Reg.* vs. *Daoust*, 9 L. C. Jur 85, the defendant having been found guilty of felony, a motion for a new trial had been granted by Mr. Justice Mondelet. At the next term of the Court, the prosecutor moved to fix a day for this new trial before Mr. Justice Aylwin, who then reserved for the Court of Crown Cases Reserved the question whether a second trial could be had in a case of felony. The Court of Queen's Bench

Duval, C. J., Aylwin, Meredith, and Drummond, JJ., held that the question was properly reserved, and that the Statute gave them jurisdiction to decide it: 10 L. C. Jur. 221. Nothwithstanding the high legal reputation of these learned judges, it may be doubted whether in this case they had jurisdiction *before* the second trial and conviction, if a second conviction there had been.

A question raised in the Court below by a motion in arrest of judgment, is a question arising on the trial, and properly reserved: *Reg.* vs. *Martin*, 1 Den. 398; 3 Cox, 447; *Reg.* vs *Carr*, Quebec, 1872; *Reg.* vs. *Deery*, Q. B., Montreal, 1874.

The Statute gives jurisdiction to the Court of Crown Cases Reserved to take cognizance of defects apparent on the face of the record, when questions upon them have been reserved at the trial: *Reg.* vs. *Webb*, 1 Den. 338.

What a jury may say in recommending a prisoner to mercy is not a matter upon which a case should be reserved. When the jury say guilty, there is an end to the matter: that is the verdict, and a recommendation to mercy is no part of the verdict: *Reg.* vs. *Trebilcock*, Dears. & B. 459.

On a trial for murder, the name of A. a juror on the panel was called; B. another juror on the same panel appeared by mistake, answered to the name of A. and was sworn as a juror. The prisoner was convicted and sentenced to death. The next day, this irregularity in the jury was discovered, when the Judge, being informed of it, reserved the question as to the effect of the mistake on the trial. *Held*, by eight judges, against six, that the conviction must stand: *Reg.* vs. *Mellor*, Dears. & B. 468. The judges were divided on the question whether the Court of Crown Cases Reserved had jurisdiction over the case: see this case *supra*.

The Court expects cases reserved to be submitted in a complete form, and will ordinarily refuse to send back a case for amendment: *Reg.* vs. *Holloway*, 1 Den. 370.

If a counsel should think that any material point raised at the trial has been omitted in the case, it would be proper for him to communicate with the Judge who reserved the case, and suggest any amendment that in his judgment may be necessary: *Reg.* vs. *Smith*, Temple & Mews' Criminal Appeal Cases, 214. Where a case reserved does not, in the opinion of the counsel, fairly raise all the points that were in issue, the proper course is to apply to the Judge reserving to amend it: *Reg.* vs. *Smith*, 1 Den. 510.

The Court will not send a case back for amendment on the mere application of counsel, but will do so if on the argument it appears that it is imperfectly stated: *Reg.* vs. *Hilton*, Bell, 20. Where a case reserved has been re-stated by order of the Court, an application, supported by affidavit, to have it again re-stated will be refused. This Court has no jurisdiction to inter-

fere compulsorily with the Judge's exercise of his discretion: *Reg.* vs. *Studd*, 10 Cox, 258.

The Court must deal with the case as it is stated, and upon the evidence returned by the Judge: *Reg.* vs. *Brummitt*, L. & C. 9.

By the express words of the statute, the Court of Crown Cases Reserved has its jurisdiction limited to the question of law reserved, and mentioned in the case sent up: it has no right to adjudicate on any other question: *Reg.* vs. *Tyres*, 1 C. C. R. 177; *Reg.* vs. *Blakemore*, 2 Den. 410; *Reg.* vs. *Smith*, Temple and Mews' Cr. Ap. 214.

So, in *Reg.* vs. *Overton*, 1 Car. & M. 655, on a Crown case reserved, it was held that the Judges will not allow the prisoner's counsel to argue objections that are apparent on the face of the indictment, unless they were reserved by the Judge, but will leave the prisoner to his writ of error.

The rule that a jury should not convict on the unsupported evidence of an accomplice is a rule of practice only, and not a rule of law, and questions of law only can be reserved: *Reg.* vs. *Stubbs*, Dears. 555.

The Court of Crown Cases Reserved cannot amend the indictment: *Reg.* vs. *Garland*, 11 Cox, 224. Where an amendment, without which the indictment was bad, had been improperly made at the trial, after verdict, this Court ordered the record to be restored to its

original state, and a verdict of not guilty to be entered: *Reg.* vs. *Larkin*, Dears. 365.

On the argument of a case reserved, the counsel for the defendant must begin: *Reg.* vs. *Gate Fulford*, Dears. & B. 74.

Supra, under the sub-title *venire de novo*, will be found the cases where the Court of Crown Cases Reserved ordered or refused a *venire de novo*.

In *Reg.* vs. *Deery*, Montreal, December, 1874, the Court of Queen's Bench, at the hearing of a case reserved upon a motion in arrest of judgment, ordered the prisoner to be brought in Court and to stand at the bar during the argument. This has never been done before, either in England, Ontario, or the Quebec Court of Queen's Bench itself. If consistent, on any case reserved, say from Gaspé, Ottawa, or any other part of the country, the Court of Queen's Bench will now order the prisoner to be brought up. Evidently the learned Judges must have had in their minds the practice of the Court on writs of error.

By the 38 Vic., ch. 45, it is provided, for *Ontario* only, that any Judge, Junior Judge, or Deputy Judge, trying any person, under the 32–33 Vic., ch. 35, *An Act for the more speedy trial in certain cases of persons charged with felonies and misdemeanors*, may, in his discretion, reserve any question of law arising on such trial, in the same manner and to the same extent as may be done by the Court of General Sessions of the

Peace in that Province, under chapter one hundred and twelve of the Consolidated Statutes for Upper Canada.

Writ of error.—When once judgment is given, the writ of error is the only remedy for any defect in the proceedings: 1 *Chitty*, 747, if the Judge presiding at the trial has not reserved a case, as shown under the last sub-title. By the statute, the judgment on a Crown case reserved is final, and no error lies from that judgment, or on the same grounds, and by sec. 80 of the Procedure Act, "no writ of error shall be allowed in any criminal case unless it be founded on some question of law which could not have been reserved, or which the Judge presiding at the trial refused to reserve for the consideration of the Court having jurisdiction in such cases:" see *Reg.* vs. *Faderman*, 1 Den. 569.

In *Reg.* vs. *Mason*, 22 U. C. C. P. 256, Gwynne, J., said, citing secs. 32 and 80 of the Procedure Act: "Our law as to what may or may not be objected on error essentially differs from that of England."

A writ of error is the proper remedy after judgment for every defect in substance in an indictment, where a question of law has not been reserved, for irregularity in awarding the jury process, for irregularity in the verdict or judgment, for any manifest error on the face of the record, for a challenge wrongly disallowed, or for an error in the sentence, if the sentence is not authorized by law; also, in capital cases,

if the *allocutus*, or demand of the defendant why the Court should not proceed to judgment against him, has been omitted: *Archbold*, 186; *Chitty* Cr. L. 747; *Whelan* vs. *Reg.*, 28 U. C. Q. B. 2; 8th Cr. L. Com. Rep. 170.

The Criminal Law Commissioners, *loc. cit.*, say that the matters apparent upon the face of the record, which are sufficient to falsify or reverse a judgment upon a writ of error, are the same as are sufficient to arrest or bar a judgment, and also any material defect in the judgment itself, as a judgment which sentences a party to suffer a punishment not warranted by law. In this last case the writ of error can issue at the instance of the Crown. But although it is issued at the instance of the Crown, the Court is not limited to the errors assigned; but the whole record is before the Court, and the prisoner has the right to the benefit of all substantial defects in it, and the conviction will be quashed, if such a defect exists: *Reg.* vs. *Fox*, 10 Cox, 510; see *ante*, remarks under secs. 32, 78 and 79 of the Procedure Act.

No writ of error, either in felony or misdemeanor, can issue without the fiat of the Attorney-General or Solicitor-General. This *fiat* cannot be signed by the Crown prosecutor acting for the Attorney-General. The Court cannot control the exercise of the discretion left to the Attorney-General on this subject: *Archbold*, 188; *Dunlop* vs. *Reg.*, 11 L. C. Jur. 271; *Notman* vs. *Reg.*, 13 L. C. Jur. 255.

By section 13 of the Procedure Act, the writ of error

need not be on parchment. The original writ itself is served and delivered to the Clerk of the Court, who has the custody of the indictment, and who then makes up the record (see sec. 77, *ante*) and makes the return to the Court. This return must be signed by the Judge. See *Archbold*, 191, for forms of fiat, præcipe, writ, return, assignment of error, &c.

If the whole record be not certified, or not truly certified, the plaintiff in error may allege a diminution of the record, showing by affidavits that part of the record has been omitted, and a *certiorari* will be awarded: *Archbold*, 192; *Duval* vs. *Reg.*, 14 L. C. Rep. 71.

On a charge of felony the party suing out the writ must appear in person to assign errors: if he is in custody, he must be brought up by *habeas corpus*, obtained on affidavit. The expenses of the writ and the gaoler's travelling charges are borne by him. In misdemeanors it is not necessary that the plaintiff in error should assign error in person, or be present when the case is heard or judgment given: 8th Crim. L. Com. Rep. 172; *Archbold*, 192.

In *Murray* vs. *Reg.*, 3 D. & L. 100, the Court, on special reasons, did not insist, in a case of felony, on the presence of the plaintiff in error.

No fact can be assigned for error which contradicts the record: *R.* vs. *Carlisle*, 2 B. & Ad. 362.

Formerly, if the Court below had pronounced an erroneous judgment, the Court of Error had no power

at common law, to pronounce the proper judgment, or remit the record to the Court below, but were bound to reverse the judgment and discharge the defendant: *Bourne* vs. *Rex.* 7 A. & E. 58; 2 N. & P. 248. And it is so yet where there is no Statute authorizing the Court of Error to pronounce the proper judgment, or to remit the record to the Court below for sentence. In England, the 11-12 Vic. ch. 78 contains such an enactment. In Quebec, ch. 77 of the Con. Stat. L. C. sec. 62; in Ontario, ch. 113 of the Con. Stat. U. C. sec. 17, and in New Brunswick ch. 160, sec. 1 of the Revised Statutes also enact that the Court of Error is authorized to pronounce the proper judgment, or to remit the record to the Court below, in order that such Court may pronounce the proper judgment.

A judgment reversed on a writ of error is no bar to a second indictment, if the proper judgment is not given or ordered by the Court of Error, when it has power to do so: *R.* vs. *Drury*, 3 C. & K. 193; 1 *Chitty* Cr. L. 756; 4 *Blackstone*, Comm. 393.

In *Ramsay* vs. *Reg.*, 11 L. C. Jur. 158, the Court of Queen's Bench, in Montreal, held that no writ of error lay on a judgment of a criminal court on a rule for a contempt of Court.

In capital felonies the prisoner is remanded and kept in custody during the pendency of a writ of error: *Whelan* vs. *Reg.* 28 U. C. Q. B. 2.

In the Province of Quebec, sec. 56 of ch. 77 Con. Stat. L. C. enacts that the writ of error shall operate a stay of execution of the judgment of the Court below, and in *Spelman* vs. *Reg.* 13 L. C. Jur. 154, and 14 L. C. Jur. 281, the prisoner was admitted to bail on *habeas corpus*, during the pendency of a writ of error.

But at common law, this is not allowed, and in *Rex* vs. *Wilkes*, 4 Burr. 2543, Lord Mansfield said that he knew of no case where a person convicted of misdemeanor had been bailed without the consent of the prosecutor. Now, in England, by statute, upon the issue of a writ of error, a defendant, in misdemeanors, can be bailed: 8-9 Vic. ch. 68, and 16-17 Vic. ch. 32. But, without any Statute law to that effect, in no case can a prisoner in custody in execution of a judgment, be admitted to bail, even when a writ of error has issued. Before the above Statutes, in England, R. S. Sowler, Esq., said (Appendix to 8th Rep. Cr. L. Com.): "In the present state of the law a writ of error in a criminal case does not suspend judgment, and the party convicted is subject to receive sentence, and to be consigned to punishment." Though see art. 32, p. 173, 8th Cr. L. Com. Rep. as to the case where the judgment has not been wholly or *partially* carried into effect.

Appeals to the Privy Council (or to the Court substituted for the Privy Council.)—In *Reg.* vs. *Whelan*, 28 U. C. Q. B. 185, the prisoner, after judgment on a writ of error by the Ontario Court of Error and Appeal affirm-

ing the sentence rendered against him, applied to the said Court for leave to appeal to the Judicial Committee of the Privy Council, citing *Macpherson's* Practice of the Judicial Committee, pp. 3, 4, 5, and the cases there referred to.

Draper, C. J., said: "We find nothing among the rules given in the appendix to the work cited, by which it is declared that the leave now asked for must be obtained. In the cases from India referred to, which we have examined, a clause in the charter of the Court appealed from rendered it necessary; but there are exceptional cases where an appeal has been entertained, though by the charter leave could not be granted: *Macpherson's* Practice, p. 21. There is nothing to show that such leave is necessary here, and, therefore, assuming that the Privy Council have jurisdiction and would entertain an appeal in this case, a question we do not enter into, we think they will do so without express leave to appeal being given by this Court. We therefore make no order granting it."

The reporter adds: "The prisoner applied for a further respite to enable him to appeal to the Judicial Committee of the Privy Council, but this was not granted, and he was executed on the 11th February. * *

"As to the right of appeal and the jurisdiction of the Privy Council, no appeal to England is expressly given by our Statutes in criminal cases, and there has been no instance of such an appeal from this country. It would seem that the Queen in Council has an inherent prerogative right to exercise an appel-

late jurisdiction in all cases, criminal as well as civil arising in the colonies, where, by Statute or otherwise the power of the Crown has not been parted with. Had this been an application for new trial, under Con. Stat. U. C. ch. 113, no appeal apparently could have been entertained, for that Statute declares that any order of our Court of Error and Appeal shall be final. Where the power exists, however, the circumstances under which an appeal will be entertained in a criminal case must be very special, and the instances are very rare: see *Reg.* vs. *Bertrand*, L. R. 1 P. C. 530; *Regina* vs. *Murphy*, L. R. 2 P. C. 35; *Reg.* vs. *Eduljee Byramjee*, 5 Moo. P. C. 276; *In re Ames*, 3 Moo. P. C. 409; *Macpherson's* Practice, chapters 1 and 2. As to appealing from a decision in error, see *Tronson* vs. *Dent*. 8 Moo. P. C. 419."

It cannot be doubted that an appeal is allowable by and to the Privy Council from judgments of a colonial Court in criminal cases. In *Reg.* vs. *Bertrand*, 10 Cox, 618, the prisoner had been found guilty of murder, in New South Wales, and sentenced to death. The Supreme Court of the colony, upon the motion of the prisoner quashed the verdict and ordered a new trial. The Attorney-General applied to the Privy Council for leave to appeal from this judgment, which leave was granted. At the argument, the counsel for the prisoner expressly contended that no appeal lay from a colonial Court to the Privy Council in a criminal case.

But Sir J. J. Coleridge, delivering the judgment said:

"It was contended first, on behalf of the respondent that their Lordships ought not to entertain the appeal, but they do not accede to this. Upon principle and reference to the decisions of this Committee, it seems undeniable that in all cases, criminal as well as civil, arising in places from which an appeal would lie, and where, either by the terms of a charter or a statute, the authority has not been parted with, it is the inherent prerogative right, and on proper occasions the duty of the Queen in Council to exercise an appellate jurisdiction, with a view not only to insure so far as may be the due administration of justice in the individual case, but also to preserve the due course of procedure generally. The interest of the Crown, duly considered, is, at least, as great in these respects in criminal as in civil cases; but the exercise of this prerogative is to be regulated by a consideration of circumstances and consequences, and interference by Her Majesty in Council in criminal cases is likely in so many instances to lead to mischief and inconvenience that, in them, the Crown will be very slow to entertain an appeal by its officers on behalf of itself or by individuals. The instances of such appeals being entertained are, therefore, very rare."

In this case, the appeal was sustained and the judgment of the Colonial Court granting a new trial reversed. This was in 1867. In *Reg.* vs. *Mookerjee*, 272, 1 Moore's P. C. cases, in 1862, leave to appeal from the judgment of a criminal court in India was applied for to the Privy Council, and not granted, but on the express intimation by their Lordships that the

decision they had come to in this particular case should not be taken as throwing any doubt on the power of the Privy Council to grant an appeal in criminal cases from the colonies.

In the *Falkland Islands Co.* vs. *Reg.* 1 Moore's P. C. cases, 299, leave was granted by the Privy Council, in 1863, to appeal from the judgment of the Magistrate's Court of the Falkland Islands, in the exercise of their summary jurisdiction in a criminal case.

The *Attorney-General for New South Wales* vs. *Murphy*, in 1869, 11 Cox, 372; *Reg.* vs. *McPherson*, in 1870, 11 Cox, 604; *Levinger* vs. *Reg.* also in 1870, 11 Cox, 613, are appeals to the Privy Council from judgments of Colonial Courts in criminal cases. In the first case, the defendant having been convicted of murder in New South Wales, the Supreme Court there had quashed the verdict, and ordered a *venire de novo*. The Privy Council reversed this judgment of the Supreme Court. In the second case, the same Colonial Court had quashed, on demurrer, an information for a common assault; the Privy Council also reversed this judgment. In the third case Levinger had been found guilty of manslaughter before the Supreme Court of Melbourne, Australia; the Privy Council quashed the verdict and conviction, and ordered a *venire de novo*, on the ground that the defendant, appellant, had been improperly refused one of his challenges.

Then in 1870, on the petition of Thomas Kennedy Ramsay, a judgment of the Court of the Queen's

Bench (Montreal, Canada, Crown Side) fining him for a contempt of Court was set aside and reversed by the Privy Council. This case, though was not properly speaking an appeal. It was allowed by the Privy Council under the 3 & 4 Will. IV, ch. 41, sec. 4, which enacts that it shall be lawful for the Crown to refer to the Judicial Committee of the Privy Council for hearing or consideration any matter whatever which Her Majesty shall think fit, and that such Committee shall thereupon hear and consider the same, and advise Her Majesty thereon: L. R., 3 P. C., 427; 15 L. C. Jur. 17.

The recent case of *Reg.* vs. *Coote* has settled the question of the right, in criminal cases, of appeal to the Privy Council from the Courts of the Dominion, or, more properly speaking, the right of the Privy Council to allow such appeals. In this case, the defendant had been found guilty of arson before the Court of Queen's Bench, Crown Side, Montreal. The Judge presiding at the trial reserved a case for the full Court of Queen's Bench upon the legality of certain evidence received on the trial. This Court declared the evidence illegal and quashed the conviction. An application for leave to appeal to the Privy Council from this judgment was then made by the Attorney-General to the Court of Queen's Bench, but refused, but, on petition of the Attorney-General, the Privy Council granted leave to appeal, and subsequently reversing the judgment of the Court of Queen's Bench, affirmed the conviction of Coote, and directed the Court of Queen's Bench to pass the proper sentence in the case L. R. 4 P. C., 599; 12 Cox, 557; 18 L. C. Jur. 103; 10 U. C. L. J. 197.

It is trite to say that the right of the Privy Council to allow appeals from the Colonial Courts cannot be restricted by Colonial legislation, and that a Colonial Statute enacting that the decision of a Court shall be final and conclusive, does not affect the prerogative rights of Her Majesty's Privy Council: *In re Marois*, 15 Moore's P. C., 189; *Reg.* vs. *Coote*, *ubi supra*; *McPherson's* Priv. Council Practice, 5, 22, 80.

In the Province of Quebec, the following enactment, contained in sec. 6 of ch. 105, Con. Stat. L. C., stands unrepealed:

"Inasmuch as His late Majesty King George the Third was pleased to signify it to be his royal pleasure that appeals be admitted to himself in Privy Council, in all cases of fines imposed for misdemeanors, provided the fines so imposed amounted to or exceeded the sum of one hundred pounds sterling, the appellant first giving good security that he would effectually prosecute the same, and answer the condemnation if the sentence imposing such fine was affirmed. Therefore, as often as such case happens, the execution, and all proceedings in the nature of execution, shall be stayed as to such fine, whenever such security is offered by recognizance filed for that purpose; and whenever a doubt arises concerning the sufficiency of the security, it shall be deemed to be valid, and stay execution, unless the Governor, in twenty days from the filing of the said recognizance, certifies in writing to the Court his disapprobation of the security so offered, and so *toties quoties*, until sufficient security is given in the manner aforesaid.

THE SUPREME COURT ACT.

The following clauses of the 38 Vic., ch. 11, "*An Act to establish a Supreme Court and a Court of Exchequer for the Dominion of Canada*," may be inserted here for reference. It may not be very long before it is found out that further legislation on the subject is necessary.

Sec. 47.—The judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard: saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal prerogative.

Sec. 49.—Any person convicted of treason, felony or misdemeanor, before any Court of Oyer and Terminer or gaol delivery, or before the Court of Queen's Bench in the Province of Quebec on its Crown side, or before any other Superior Court of criminal jurisdiction, whose conviction has been affirmed by any Court of last resort, or in the Province of Quebec by the Court of Queen's Bench on its appeal side, or any person in custody within the Dominion of Canada, whose extradition is claimed in pursuance of any treaty, and whose application for discharge on a writ of *Habeas Corpus ad subjiciendum* has been refused, may appeal to the Supreme Court against the affirma-

tion of such conviction or the refusal of such application; and the said Court shall make such rule or order therein, either in affirmance of the conviction, or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect, anything in the eightieth section of the Act passed in the session held in the thirty-second and thirty-third years of Her Majesty's reign, chapter twenty-nine, to the contrary notwithstanding: Provided that no such appeal shall be allowed where the Court affirming the conviction is unanimous, nor unless notice of appeal in writing has been served on the Attorney-General for the proper Province, within fifteen days after such affirmance or refusal.

Sec. 50.—Unless the appeal is brought on for hearing by the appellant at the term of the Supreme Court during which such affirmance or refusal takes place, or the term next thereafter (if the said Court be not then sitting in term), the appeal shall be held to have been abandoned, unless otherwise ordered by the Supreme Court.

PILLORY ABOLISHED.

Sec. 81.—The punishment of the pillory shall not be awarded by any Court.

The pillory was a frame erected in a public place on a pillar, and made with holes and moveable boards,

through which the heads and hands of criminals were put. The punishment of the pillory, which had been abolished, in England, in all other cases, by 56 Geo. III., ch. 138, was retained for the punishment of perjury and subornation of perjury, but it is now altogether abolished by 7 Wm. IV., and 1 Vic., ch. 23: 1 *Chitty*, C. L. 797; *Wharton*, law lexicon, *Verb. Pillory*.

A ludicrous story is told of Chief-Justice Pratt. While on a visit to the Lord Dacre, in Essex, accompanied in a walk by a gentleman notorious for his absence of mind, he came to the parish stocks (pillory). Having a wish to know the nature of the punishment, the Chief Justice begged his companion to open them, so that he might try. This being done, his friend sauntered on and totally forgot him. The imprisoned Chief tried in vain to release himself, and, on asking a peasant who was passing by to let him out, was laughed at, and told he "wasn't set there for nothing." He was soon set at liberty by the servants of his host. Afterwards, on the trial of an action for false imprisonment against a magistrate by some fellow whom he had set in the stocks, on the counsel for the defendant ridiculing the charge and declaring that it was no punishment at all, his lordship leaned over and whispered, "Brother, were you ever in the stocks?" The counsel indignantly replied: "Never, my lord." "Then I have been," said the Chief Justice, "and I can assure you it is not the trifle you represent it:" *Foss*, Biographical Dictionary of the Judges of England.

PERSONS CONVICTED ON CONFESSION, ETC.

Sec. 82.—Any person indicted for any offence made capital by any statute, shall be liable to the same punishment, whether he be convicted by verdict or confession, and this, as well in the case of accessories as of principals.

This is an *ex abundanti cautela* enactment, and not calling for any observations.

SECOND CONVICTION FOR FELONY.

Sec. 83.—If any person be convicted of felony not punishable with death, committed after a previous conviction for felony, such person shall, on subsequent conviction, be imprisoned in the penitentiary for life or for any term not less than two years, or be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, unless some other punishment be directed by any statute for the particular offence, in which case the offender shall be liable to the punishment thereby awarded, and not to any other.

This clause is taken from the 7-8 Geo. IV. ch. 28, sec. 11 of the Imperial Statutes. The Imperial Act provides at length for the procedure in such cases, but this is provided for, in Canada, by section 26 (see *ante*) of the Procedure Act of 1869, under which will be found observations which are entirely applicable to the present clause.

ESCAPE AND FELONIOUS RESCUE.

Sec. 84.—Whosoever escapes from or rescues, or aids in rescuing any other person from lawful custody, or makes or causes any breach of prison, if such offence does not amount to felony, is guilty of misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement for any period less than two years;—and whosoever is convicted of a felonious rescue, shall in any case where no special punishment is provided by any statute, be liable to be imprisoned in the penitentiary for any term not exceeding seven 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, with or without hard labour, and with or without solitary confinement.

Sec. 85.—Whosoever knowingly and unlawfully, under colour of any pretended authority, directs or procures the discharge of any prisoner not entitled to be so discharged, is guilty of misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement for any period less than two years, and the person so discharged shall be held to have escaped.

By the common law, and the 25 Edw. III. ch. 39, if a Justice of the Peace bails a person not bailable by law, he is guilty of a negligent escape, and finable. The first part of section 85 of the Procedure Act is then but a confirmatory enactment of this law, with a new and definite punishment. But the last part of it enacting that a person bailed illegally is guilty of a

negligent escape was never law before, and seems an extraordinary enactment. Of course, if a prisoner finds the doors of his prison opened, he is not allowed to take advantage of it and run away; if he does so, he is guilty of an escape, as will be seen hereafter; but if a Justice of the Peace admits him to bail, surely, if he has obtained the Justice's order without fraud or artifice of any kind, he ought not to be punished for not going voluntarily, without restraint, to the gaoler, and saying to him: "Here I am; you must put me in prison: that Justice of the Peace who has let me go free did not know what he was doing." And, in fact, the gaoler would rightly refuse, in this case, to receive him without a warrant, of which the prisoner would certainly not be the bearer. Such an enactment ought to be struck off our statute book.

The above section 84 provides the punishment for escapes and felonious rescues. Though it says what the punishment shall be in escapes as an offence by a prisoner, or prison-breakings, when such are misdemeanors, it does not provide for the punishment when such are felonies, or for escape as an offence by an officer, and is defective in that respect. Felonious rescues only are provided for in the last part of the clause, and escapes as an offence by officers, whether felonious or not, and prison-breakings, when felonious, remain punishable at common law, whilst escapes, as against prisoners, and prison-breakings that are misdemeanors are now, by the said clause, punishable by imprisonment for any period less than two years.

Section 4 of the C. S. U. C., ch. 97, which provided for the punishment of persons guilty of rescuing or attempting to rescue prisoners convicted of murder or committed for murder, is repealed, by the General Repeal Act of 1869. It was taken from the Imperial Statute, 25 Geo. II. ch. 37, sec. 9, which is also repealed in England. Sec. 5 of ch. 148, of the Revised Statutes of New Brunswick, and sec. 5 of ch. 163 of the Revised Statutes of Nova Scotia are also repealed by the General Repeal Act. So that the criminal offences of escape, prison-breaking and rescue fall entirely under the common law and the Imperial Statutes in force in the Dominion, and under sections 84 and 85 of the Procedure Act of 1869, as to the punishment thereof, with the exception of such of these offences as are specially provided for in the "Act repecting Penitentiaries" of 1875, 38 Vic. ch. 44.

It may then be useful to see 1st, what is an escape; 2ndly, when is an escape a felony, and when a misdemeanor; 3rdly, what is a prison-breaking, and when is it a felony or a misdemeanor; 4thly, what is a rescue and when is it a felony or a misdemeanor.

What is an escape.—An escape is where one who is arrested gains his liberty without force before he is delivered by due course of law. The general principle of the law on the subject is that as all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it, those who, declining to undergo a legal imprisonment when arrested on criminal process, free themselves from it

by any artifice, and elude the vigilance of their keepers, are guilty of an offence of the nature of a misdemeanor. It is also criminal in a prisoner to escape from lawful confinement, though no force or artifice be used on his part to effect such purpose. Thus, if a prisoner go out of his prison without any obstruction, the doors being opened by the consent or negligence of the gaoler, or if he escape in any other manner, without using any kind of force or violence, he will be guilty of a misdemeanor: *Reg.* vs. *Nugent*, 11 Cox, 64. The officer by whose default a prisoner gains his liberty before he is legally discharged is also guilty of the offence of escape, divided in law, then, in two offences, a *voluntary* escape or a *negligent* escape. To constitute an escape, there must have been an actual arrest in a criminal matter.

A *voluntary* escape is where an officer, having the custody of a prisoner, knowingly and intentionally gives him his liberty, or by connivance suffers him to go free, either to save him from his trial or punishment, or to allow him a temporary liberty, on his promising to return, and, in fact, so returning. Though, some of the books go to say that, in this last case, the offence would amount to a *negligent* escape only.

A *negligent* escape is where the party arrested or imprisoned escapes against the will of him that arrests or has him in charge, and is not freshly pursued and taken again before he has been lost sight of. And in this case, the law presumes negligence in the officer, till evident proof on his part to the contrary. The Sheriff is as much liable to answer for an escape suffered by his officers, as if he had actually suffered

it himself. A Justice of the Peace who bails a person not bailable by law is guilty of a negligent escape, and the person so discharged is held to have escaped: sec. 85 of the Procedure Act.

When is an escape a felony, and when a misdemeanor.—An escape by a prisoner himself is no more than a misdemeanor, whatever be the crime for which he is imprisoned. Of course, this does not apply to prison-breaking, but simply to the case of a prisoner running away from the officer or the prison without force or violence. This offence falls under the first part of sec. 84 of the Procedure Act, and is punishable by imprisonment for any period less than two years. An officer guilty of a *voluntary* escape is involved in the guilt of the same crime of which the prisoner is guilty, and subject to the same punishment, whether the person escaping were actually committed to some gaol, or under an arrest only, and not committed, and whether the offence be treason, felony or misdemeanor, so that, for instance, if a gaoler *voluntarily* allows a prisoner committed for larceny to escape, he is guilty of a felonious escape, and punishable as for larceny, whilst if such prisoner so voluntarily by him allowed to escape was committed for obtaining money by false pretences, the gaoler is then guilty of a misdemeanor, punishable under the common law, by fine or imprisonment, or both, as sec. 84 of the Procedure Act does not apply to escape as an offence by an officer or gaoler, either when a felony or a misdemeanor. Greaves, note *r*, 1 *Russell*, 587, says that the gaoler might also, in felonies, be tried as an accessory after the fact, for voluntary escape,

under 31 Vic. ch. 72 of our Statutes. A *negligent* escape is always a misdemeanor, and is punishable, at common law, by fine or imprisonment or both, section 84 of the Procedure Act, as remarked before, not applying to escapes as an offence as against the officer, even when such are only misdemeanors.

What is a prison-breaking, and when is it a felony or a misdemeanor.—The offence of prison-breach is a breaking and going out of prison by force by one lawfully confined therein. Any prisoner who frees himself from lawful imprisonment by what the law calls a breaking, commits thereby a felony or a misdemeanor, according as the cause of his imprisonment was of one grade or the other. But a mere breaking is not sufficient to constitute this offence: the prisoner must have escaped. The breaking of the prison must be an actual breaking, and not such force and violence only as may be implied by construction of law. Any place where a prisoner is lawfully detained is a prison *quoad* this offence, so a private house is a prison, if the prisoner is in custody therein. If the prison-breaking is by a person lawfully committed for a misdemeanor, it is, as remarked before, a misdemeanor, and then punishable under section 84 of the Procedure Act; but if the breaking is by a person committed for felony, then his offence amounts to felony, and would be punishable, under sec. 88 of the Procedure Act.

A prisoner was indicted for breaking out from the lock-up, being then in lawful custody for felony. It appeared that the prisoner and another man had been

given into the custody of a police officer, without warrant, on a charge of stealing a watch from the person. They were taken before a Magistrate. No evidence was taken upon oath, but the prisoner was remanded for three days. The prisoner broke out of the lock-up and returned to his home. He appeared before the Magistrate on the day to which the hearing of the charge had been adjourned, and on the investigation of the charge, it was dismissed by the Magistrate, who stated that in his opinion it was a lark, and no jury would convict. The prisoner contended that the charge having been dismissed by the Magistrate, he could not be convicted of prison-breaking, citing 1 *Hale*, 610,611, that if a man be subsequently indicted for the original offence and acquitted, such acquittal would be a sufficient defence to an indictment for breach of prison. But Martin, B., held that a dismissal by the Magistrate was not tantamount to an acquittal upon an indictment, and that it simply amounted to this, that the justices did not think it advisable to proceed with the charge, but it was still open to them to hear a fresh charge against him. The prisoner was found guilty: *Reg.* vs. *Waters*, 12 Cox, 390.

What is a rescue and when is it a felony or a misdemeanor.—Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment. A rescue in the case of one charged with felony is felony in the rescuer, and a misdemeanor, if the prisoner is charged with a misdemeanor. But though, upon the principle that wherever the arrest of a felon is lawful the rescue of him is a felony, it will not be material whether the

party arrested for felony, or suspicion of felony, be in the custody of a private person or of an officer, yet, if he be in the custody of a private person, it seems that the rescuer should be shown to have knowledge of the party being under arrest for felony. The 16 Geo. II, ch. 31 makes it a felony to aid or assist a prisoner to attempt to make his escape from any gaol, although no escape is actually made, if such prisoner is committed for a felony, expressed in the warrant of commitment, and a misdemeanor, if such prisoner is detained for a misdemeanor, or for a sum amounting to one hundred pounds: also, under the same circumstances, either a felony or a misdemeanor, to convey any disguise or instruments into any prison, to facilitate the escape of prisoners. A rescue, either when a felony or a misdemeanor, is now punishable under section 84 of the Procedure Act.

Sections 17 and 39 of the Act concerning offences against the person contain special enactments on assaults with intent to resist or prevent lawful apprehensions: see, *ante*, Vol. 1, pp. 244, 285.

The authorities referred to for the above synopsis of the law on escape, rescue, and prison-breaking are 1 *Russell*, 581 *et seq.*; 4 *Stephen's* Comm. 227 *et seq.*; 1 *Hale*, P.C. 595; 2 *Hawkins*, p. 183; 5th Rep. Cr. L. Com. (1840) p. 53; 2 *Bishop*, Cr. L. 1066.

For forms of indictment, see *Archbold*, 795; 2 *Chitty*, Cr. L. 165; 5 *Burn's* Just. 137; 3 *Burn's* Just. 1332; 2 *Burn's* Just. 10.

By sec. 49, of the Procedure Act, upon an indictment for any of these offences, the defendant may be found guilty of the attempt to commit the offence charged, if the evidence warrants it.

By sec. 64, of ch. 77, Consol. Stat. L. C. the forgery or uttering of a certificate, required by the clauses relating to the Court of Crown Cases Reserved and the erection thereof, with the intent to cause any person to be discharged from custody, is declared to be a felony. The corresponding Statutes of Ontario, New Brunswick, and Nova Scotia have not that clause.

The following are the clauses of the Penitentiary Act of 1875, ch. 44, 38 Vic. on escapes and rescues of convicts.

Sec. 26.—Every prisoner who, being ordered to be detained in any penitentiary, escapes from the person or persons having the lawful custody of such prisoner, when being conveyed thereto, shall be guilty of felony, and being convicted thereof, shall not have less than two years added to the original term of his imprisonment, and any prisoner who at any time breaks prison or escapes, or attempts to escape from the custody of any officer, guard or other servant of the penitentiary while at work, or passing to or from work, either within or beyond the prison walls or penitentiary limits, shall, on conviction thereof, be punished by an addition not exceeding three years to the term of his imprisonment, besides forfeiting the whole of the period of remission of sentence hereinafter mentioned, which he may have earned, and he may also be again

confined in the penal prison or solitary cells, if any, attached to such penitentiary, as in the prison rules may be prescribed.

The first part of this clause makes it a felony for a convict to escape, *when being conveyed to any penitentiary*, whether he stands convicted of a felony or a misdemeanor. The attempt to escape, *when being so conveyed*, is not provided for by the clause, and would, in consequence, fall under the common law, and be a misdemeanor, punishable by fine or imprisonment, or both.

Sec. 27.—Every prisoner in any penitentiary, who at any time attempts to break prison, or who forcibly breaks out of his cell, or makes any breach therein with intent to escape therefrom, whether successful or not, shall, on conviction thereof, be punished by an addition not exceeding one year to the term of his imprisonment, besides forfeiting the whole of the period of remission of sentence earned by him, and being again confined as in the next preceding section mentioned.

This clause does not say whether the offences therein mentioned shall be felonies or misdemeanors, and to establish the degree of each of these offences recourse must be had to the common law rules on the subject.

Sec. 29.—Every person who rescues or attempts to rescue any prisoner, while being conveyed to any

penitentiary, or while being imprisoned therein, or while passing to or from work at or near any penitentiary, and every person who, by supplying arms, tools or instruments of disguise, or otherwise in any manner aids any such prisoner in any escape or attempt at escape, shall be guilty of felony.

The punishment, not being specially provided for, would be guided by sec. 88 of the Procedure Act.

In *Reg.* vs. *Payne*, 12 Cox, 231, it was held that a crowbar came within the words "any other article or thing" in the clause of the Imperial Prisons Act of 1865, to which the above section of the Canadian Statute corresponds. There is no doubt that it would be so held here: the words "arms, tools," clearly include a crowbar.

Sec. 30—Every person having the custody of any such prisoner as aforesaid, or being employed by the person having such custody, as a keeper, turnkey, guard or assistant, who carelessly allows any such convict to escape, shall be guilty of a misdemeanor, and, on conviction thereof, shall be liable to fine or imprisonment or to both, at the discretion of the Court; and every such person as aforesaid, who knowingly or willingly allows any such convict to escape shall be guilty of felony.

The last part of this clause makes a voluntary escape as regards the penitentiary and any prisoner being conveyed thereto, a felony, whether the prisoner is convicted of a felony or of a misdemeanor, and is, in

this respect, a deviation from the common law. The first part of the clause is the common law on the subject.

PUNISHMENT FOR FRAUD, CHEATING OR CONSPIRACY.

Sec. 86.—Whosoever is convicted of fraud or of cheating, or of conspiracy, shall, in any case where no special punishment is provided by any statute, be liable to be imprisoned in the penitentiary for any term not exceeding seven 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, with or without hard labour, and with or without solitary confinement.

The Imperial Act, 14–15 Vic., ch. 100, sec. 29 (*Lord Campbell's Act*), also provides for the punishment of cheats, frauds and conspiracies, not otherwise specially provided for.

In *Reg.* vs. *Roy*, 11 L. C. Jur. 94, Mr. Justice Drummond said: "The only cheats or frauds punishable at common law are the fraudulent obtaining of the property of another by any deceitful and illegal practice, or token, *which affects or may affect the public, or such frauds as are levelled against the public justice of the realm.*"

It is not every species of fraud or dishonesty in transactions between individuals which is the subject

matter of a criminal charge at common law: 2 *East.* P. C. 816.

Fraud, to be the object of criminal prosecution, must be of that kind which in its nature is calculated to defraud numbers, as false weights or measures, false tokens, or where there is a conspiracy: per Lord Mansfield, *Reg.* vs. *Wheatly*, 3 Burr. 1125.

So cheats, by means of a bare lie, or false affirmation in a private transaction, as if a man selling a sack of corn falsely affirms it to be a bushel, where it is greatly deficient, has been holden not to be indictable: *R.* vs. *Pinkney*, 2 *East*, P. C. 818.

So, in *R.* vs. *Channell*, 2 *East*, P. C. 818, it was held that a miller charged with illegally taking and keeping corn could not be criminally prosecuted.

And in *Rex.* vs. *Lara*, cited in 2 *East*, P. C. 819, it was held that selling sixteen gallons of liquor for and as eighteen gallons, and getting paid for the eighteen gallons, was an unfair dealing and an imposition, but not an indictable offence.

The result of the cases appears to be, that if a man sell by *false weights*, though only to one person, it is an indictable offence, but if, without false weights, he sell, even to many persons, a *less quantity* than he pretends to do, it is not indictable: 2 *Russell*, 610; *Reg.* vs. *Eagleton*, Dears. 376, 515.

If a man, in the course of his trade, openly and publicly carried on, were to put a false mark or token upon an article, so as to pass it off as a genuine one, when in fact it was only a spurious one, and the article was sold and money obtained by means of that false token or mark, that would be a cheat at common law, but the indictment, in such a case, must show clearly that it was by means of such false token that the defendant obtained the money: by Chief Justice Cockburn, in *Reg.* vs. *Closs*, Dears. & B. 466; 7 Cox, 494.

Offences of this kind would now generally fall under the "*Trade Marks Offences Act*": see, *ante*, Vol. 1, page 113.

Frauds and cheats by forgeries or false pretences are also regulated by Statute: see, *ante*, Vol. 1 pages 65, 584

All frauds affecting the Crown or the public at large are indictable, though arising out of a particular transaction or contract with a private party. So the giving to any person unwholesome victuals, not fit for man to eat, *lucri causa*, or from malice and deceit is an indictable misdemeanor: 2 *East.* P. C. 821, 822. And if a baker sell bread containing alum in a shape which renders it noxious, although he gave directions to his servants to mix it up in a manner which would have rendered it harmless, he commits an indictable offence: he, who deals in a perilous article, must be wary how he deals; otherwise, if he observe not proper caution, he will be responsible. The intent to injure in such

cases is presumed, upon the universal principle that when a man does an act of which the probable consequence may be highly injurious, the intention is an inference of law resulting from doing the act: *Rex.* vs. *Dixon*, 3 M. & S. 11.

If a person maim himself in order to have a more specious pretence for asking charity, or to prevent his being enlisted as a soldier, he may be indicted, and on conviction, punished under sec. 86 of the Procedure act. 1 *Hawkins*, p. 108; 1 *Russell*, 608.

Cheating at games, cards, or in betting are provided for by sec. 97 of the *Larceny Act*: see, *ante*, Vol. 1, p. 604.

Cheats and frauds by bankrupts, traders, &c., are provided for by the *Insolvency Act of* 1875; 38 Vic. ch. 16.

In indictments for a cheat or fraud at common law, it is not sufficient to allege generally that the cheat or fraud was effected by means of certain false tokens or false pretences, but it is necessary to set forth what the false tokens or pretences were, so that the Court may see if the false tokens or pretences are such within the law: 2 *East*, P. C. 837. But the indictment will be sufficient if upon the whole it appears that the money has been obtained by means of the pretence set forth, and that such pretence was false: 2 *East.* P. C. 838.

It would seem that sec. 113 of the Larceny Act, see, *ante*, Vol. 1, page 628; does not apply to cheats and frauds at common law, and that therefore, the Court has no power of awarding restitution of the property fraudulently obtained, upon convictions on indictments other than those brought under the Larceny Act: 2 *East* P. C. 839.

Upon an indictment for any misdemeanor, if 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, the jury may convict of the attempt: sec. 49, Procedure Act of 1869.

It would seem that an indictment for a cheat or a fraud at common law is not to be preceded by any of the formalities required by section 28 of the Procedure Act. *Sed quære?*

By sec. 50 of the Procedure Act, 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, unless the Court thinks fit to discharge the jury, and to direct such person to be indicted for felony.

Section 86 of the Procedure Act now under consideration, also provides for the punishment of conspira-

cy, when not otherwise specially provided for by any Statute.

Conspiracies to murder are provided for by sec. 3 of the Act of 1869, concerning offences against the person; *ante*, Vol. 1, page 220. Assaults arising from conspiracies are regulated by sec. 42 of the same Statute; *ante*, Vol. 1, page 289. The *Trade Union Act*, 35 Vic. ch. 30, has also special enactments as to conspiracies between workmen; *ante*, Vol. 1, page 292.

Conspiracy is a combination of two or more persons to accomplish some unlawful purpose, or a lawful purpose by unlawful means. This is the definition of conspiracy as given by Lord Denman in *R.* vs. *Seward*, 1 A. & E. 713; and though questioned by the learned Judge himself in *Reg.* vs. *Peck*, 9 A. & E. 683, as an antithetical definition, and in *Reg.* vs. *King*, 7 Q. B. 782, as not sufficiently comprehensive, it seems to be, so far adopted as the most correct definition of this offence: *R.* vs. *Jones*, 4 B. & Ad. 345; 3 *Russell*, 116. *Bishop*, 2 Cr. L. 171, has in a clear and concise manner said "Conspiracy is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end."

But the word "unlawful" used in these definitions of conspiracy, does not mean "indictable" or "criminal." The combining to injure another by fraud, or to do a civil wrong or injury to another is an indictable conspiracy. So in a case where the prisoner and L. were in partnership, and there being notice of dis-

Court, within such limits (if any) as are prescribed by any Statute in that behalf.

Sec. 90.—When imprisonment is to be awarded for any offence, and no definite period is fixed by law, the term of such imprisonment shall always be in the discretion of the Court passing the sentence; and when a fine is to be awarded for any offence and no amount is fixed, the amount shall be in the discretion of the Court passing the sentence.

Sec. 91.—The period of imprisonment in pursuance of any sentence shall commence on and from the day of passing such sentence, but no time, during which the convict may be out on bail, shall be reckoned as part of the term of imprisonment to which he is sentenced.

Sec. 92.—Whenever sentence is passed for felony on a person already imprisoned under sentence for another crime, the Court may award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person has been previously sentenced; and where such person is already under sentence of imprisonment, the Court may award sentence for the subsequent offence, to commence at the expiration of the imprisonment for which such person has been previously sentenced, although the aggregate term of imprisonment may exceed the term for which such punishment could otherwise have been awarded, and such subsequent imprisonment, if for

any term not less than two years, shall be in the penitentiary.

Sec. 93.—When the sentence of imprisonment is for a term less than two years, such imprisonment shall, if no other place be expressly mentioned, be in the common gaol of the district, county or place in which the sentence is pronounced, or if there be no common gaol there, then in that common gaol which is nearest to such locality, or in some lawful prison or place of confinement other than the penitentiary, in which the sentence may be lawfully executed.

Sections 88, 89, 90 and 91 do not call for any observations. The Statutes creating felonies generally provide for the punishment thereof. Ch. 6, sec. 97 of 31 Vic., *An Act respecting the Customs* and "*The Penitentiary Act of* 1875," are instances of exceptions to this rule, and the felonies thereby created would, consequently, be punishable under the above section 88 of the Procedure Act.

Section 92 is taken from the 7 & 8 Geo. IV., ch. 68, section 10 of the Imperial Statutes, which seem declaratory of the common law: *R.* vs. *Wilkes*, Burr. 2577; *R.* vs. *Williams*, 1 Leach, 536.

Section 93, in New Brunswick and Nova Scotia, was replaced by section 5 of the General Repeal Act of 1869, 32-33 Vic. ch. 36, which enacted that any offender sentenced under any of the Criminal Acts of 1868 or 1869, before the first day of January, 1871, in the said Pro-

vinces, to imprisonment for a term less than two years, might be sentenced to undergo such imprisonment in the Penitentiary. But by 33 Vic. ch. 30, section 5 it is enacted that no person sentenced in New Brunswick or Nova Scotia to imprisonment with hard labour for less than one year, shall be imprisoned in the Penitentiary after the 1st of May, 1873, and that, after the 1st of May, 1874, no one sentenced to imprisonment with hard labour for less than two years, shall be imprisoned in the Penitentiary. And by 36 Vic. ch. 52, these dates are respectively extended to the 1st day of May, 1875 (instead of 1st of May, 1873) and the 1st of May, 1876 (instead of the 1st of May, 1874).

SOLITARY CONFINEMENT, WHIPPING, ETC

Sec. 94.—When a person has been convicted of an offence for which imprisonment other than in the Penitentiary may be awarded, then the Court may sentence the offender to be imprisoned, or if hard labour be part of the punishment, to be imprisoned and kept to hard labour in the common gaol, or other place of confinement, and if solitary confinement be part of the punishment, may also direct that the offender shall be kept in solitary confinement for a portion or for portions of the term of such imprisonment, not exceeding one month at any one time, and not exceeding three months in any one year.

Sec. 95.—Whenever whipping may be awarded for any indictable offence, the Court may sentence the offender to be once or oftener (but not more than three

times) whipped within the limits of the prison under the supervision of the medical officer of the prison; and the number of the strokes, and the instrument with which they shall be inflicted, shall be specified by the Court in the sentence.

These two clauses, in the Imperial Consolidation Acts of 1861, are repeated in each of the said Acts. With us, they, of course, apply to any Statute awarding these punishments, whether passed before or since the Confederation of the Provinces.

PENITENTIARIES—SENTENCE TO PENITENTIARIES.

Sec. 96.—Each of the penitentiaries in Canada shall be maintained as a prison for the confinement and reformation of persons, male and female, lawfully convicted of crime before the Courts of Criminal Jurisdiction of that Province for which it is appointed to be the penitentiary, and sentenced to confinement for life, or for a term not less than two years; and whenever any offender is punishable by imprisonment, such imprisonment, if it be for life or for two years or any longer term, shall be in the penitentiary; but this shall not prevent the reception and imprisonment in any penitentiary of any prisoner sentenced for any period of time by any military, naval or militia Court Martial, or by any military or naval authority under any Mutiny Act, or of any prisoner sentenced in New Brunswick or Nova Scotia to imprisonment with hard labour for less than two years.

Sec. 97.—The sentence of any person to be imprisoned in the penitentiary shall (whether expressed or not) include hard labour, and the offender so sentenced shall be subject to the discipline and regulations of the penitentiary, prescribed or made by lawful authority under any Statute in that behalf.

See *ante*, under section 98, as to special provisions in New Brunswick and Nova Scotia, on imprisonments in the penitentiary.

The Penitentiary Act of 1875, is now the statute law on the subject for the whole of the Dominion.

For the Province of Manitoba, sec. 7 of 34 Vic. ch. 14, enacts that in the absence of any penitentiary building, any common gaol or other place of confinement shall be held to be a penitentiary for the confinement and reformation of persons convicted of crime before the Courts of the said Province, and sentenced to confinement for life, or for a term of not less than two years, and whenever any offender is punishable by imprisonment, such imprisonment, whether it be for life, or two years, or for any longer term, shall be in any such common gaol or other place of confinement, according to the judgment of the Court.

And sec. 7 of 37 Vic. ch. 42 contains a similar enactment for British Columbia.

REFORMATORY PRISONS.

Sec. 98, *as amended by 38 Vic. ch.* 43.—Provided always that the Court before which any offender,

whose age, at the time of his trial, does not, in the opinion of the Court, exceed sixteen years, is convicted, whether summarily or otherwise, of any offence punishable by imprisonment may, in its discretion, sentence such offender to imprisonment in the reformatory prison (if any), in the Province in which such conviction takes place, and such imprisonment shall in such case be substituted for the imprisonment in the penitentiary or other place of confinement, by which the offender would otherwise be punishable under any Act or law relating thereto, which shall be construed subject to this provision: Provided, that in no case shall the sentence be less than two years' or more than five years' confinement in such reformatory prison, and in every case where the term of imprisonment is fixed by law to be more than five years, then such imprisonment shall be in the penitentiary.

Special provisions for the Province of Quebec are contained in the 32-33 Vic. ch. 34, and the 34 Vic. ch. 30, on reformatory prisons.

The Penitentiary Act of 1875 contains provisions for the transfer of juvenile offenders from the penitentiary to a reformatory prison, or from a reformatory prison to the penitentiary.

INSANE PRISONERS.

Sec. 99.—In all cases where it is given in evidence upon the trial of any person charged with any offence whether the same be treason, felony or misdemeanor, that such person was insane at the time of the commission of such offence, and such person is acquitted,

the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether he is acquitted by them on account of such insanity; and if they find that such person was insane at the time of committing such offence, the Court before whom such trial is had, shall order such person to be kept in strict custody in such place and in such manner as to the Court seems fit, until the pleasure of the Lieutenant-Governor be known.

Sec. 100.—The Lieutenant-Governor of the Province in which the case occurs may thereupon give such order for the safe custody of such person during his pleasure, in such place and in such manner as to him seems fit.

Sec. 101.—In all cases where any person, before the passing of this Act, has been acquitted of any such offence on the ground of insanity at the time of the commission thereof, and has been detained in custody as a dangerous person by order of the Court before whom such person was tried, and still remains in custody, the Lieutenant-Governor may give the like order for the safe custody of such person during pleasure, as he is hereby enabled to give in the case of persons acquitted under the ninety-ninth section of this Act, on the ground of insanity.

Sec. 102.—If any person indicted for any offence be insane, and upon arraignment be so found by a jury empannelled for that purpose, so that such person can-

not 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.

Sec. 103.—If any person charged with an offence be brought before any Court to be discharged for want of prosecution, and such person appears to be insane, the Court shall order a jury to be empannelled to try the sanity of such person, and if the jury so empannelled find him to be insane, the Court shall order such person to be kept in strict custody, in such place and in such manner as to the Court seems fit, until the pleasure of the Lieutenant-Governor be known.

Sec. 104.—In all cases of insanity so found, the Lieutenant-Governor may give such order for the safe custody, during pleasure, of the person so found to be insane, in such place and in such manner as to him seems fit.

Sec. 105, *as amended by* 36 *Vic. ch.* 51.—The Lieutenant-Governor, upon such evidence of the insanity of any person imprisoned for an offence, or imprisoned for safe custody charged with an offence, or imprisoned for not finding bail for good behaviour or to keep the peace, as the Lieutenant-Governor shall consider sufficient, may order the removal of such insane

person to a place of safe-keeping; and such person shall remain there, or in such other place of safe-keeping as the Lieutenant-Governor may from time to time order, until his complete or partial recovery shall be certified to the satisfaction of the Lieutenant-Governor who may then order such insane person back to imprisonment, if then liable thereto, or otherwise to be discharged.

It is said in 1 *Russell*, 29: "If a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner become mad, he shall not be tried, as he cannot make his defence. If, after he is tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced, and if after judgment he becomes of nonsane memory, execution shall be stayed; for, peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. . And, by the common law, if it be doubtful, whether a criminal who at his trial is, in appearance, a lunatic, be such in truth or not, the fact shall be investigated. And it appears that it may be tried by the jury, who are charged to try the indictment, or by an inquest of office to be returned by the Sheriff of the county wherein the Court sits, or, being a collateral issue, the fact may be pleaded and replied to *ore tenus*, and a *venire* awarded returnable *instanter*, in the nature of an inquest of office. And

if it be found that the party only feigns himself mad, and he refuses to answer or plead, he would formerly have been dealt with as one who stood mute, but now a plea of not guilty may be entered under the 7 & 8 Geo. IV., ch. 28, sec. 2:" sec. 34 of the Procedure Act of 1869.

The above sections of the Procedure Act, on the procedure in the case of insane prisoners, are taken from the 39 & 40 Geo. III., ch. 94, and the 3 & 4 Vic. ch. 54.

Where, on a prisoner being brought up to plead, his counsel states that he is insane, and a jury is sworn to try whether he is so or not, the proper course is for the prisoner's counsel to begin the evidence on this issue, and prove the insanity, as the sanity is always presumed: *Reg.* vs. *Turton* 6 Cox, 385.

It has been seen, *ante*, under sec. 37, that no peremptory challenges are allowed on collateral issues.

The jury may judge of the sanity or insanity of the prisoner from his demeanour in their presence without any evidence: *Reg.* vs. *Goode*, 7 Ad. & E., 536.

The jury are sworn as follows:—"You shall diligently inquire and true presentment make for and on behalf of our Sovereign Lady the Queen, whether A. B. the prisoner, be insane or not, and a true verdict give according to the best of your understanding; so help you God."

If a prisoner has not at the time of his trial, from the defect of his faculties, sufficient intelligence to under-

stand the nature of the proceedings against him, the jury ought to find that he is not sane, and upon such finding, he may be ordered to be kept in custody: *R.* vs. *Dyson*, 7 C. & P. 305.

A Grand Jury have no right to ignore a bill against any person on account of his insanity, either when the offence was committed, or at the time of preferring the bill, however clearly shown: *Reg.* vs. *Hodges*, 8 C & P. 195; 1 *Russell*, 32; *Dickinson's* Quarter Sessions, 476.

CAPITAL PUNISHMENT, EXECUTION OF.

Sec. 106.—Whenever any offender has been convicted before any Court of Criminal Jurisdiction, of an offence for which such offender is liable to and received sentence of death, the Court shall order and direct execution to be done on the offender in the manner provided by law.

Sec. 107, *as amended by* 36 *Vic. ch.* 3 *sec.* 1.—In the case of any prisoner sentenced to the punishment of death, the Judge before whom such prisoner has been convicted, shall forthwith make a report of the case to the Secretary of State of Canada for the information of the Governor; and the day to be appointed for carrying the sentence into execution, shall be such as, in the opinion of the Judge, will allow sufficient time for the signification of the Governor's pleasure before such day, and if the Judge thinks such prisoner ought to be recommended for the exercise of the Royal Mercy, or if from the nondecision of any point of law reserved

in the case, or from any other cause, it becomes necessary to delay the execution, he or any other Judge of the same Court, or who might have held or sat in such Court, may, from to time, either in term or in vacation, reprieve such offender for such period or periods beyond the time fixed for the execution of the sentence as may be necessary for the consideration of the case by the Crown.

Sec. 108.—Every person sentenced to suffer death shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners, and no person but the gaoler and his servants, the medical officer or surgeon of the prison, a chaplain or a minister of religion, shall have access to any such convict, without the permission, in writing, of the Court or Judge before whom such convict has been tried, or of the Sheriff.

Sec. 109.—Judgment of death to be executed on any prisoner after the coming into force of this Act, shall be carried into effect within the walls of the prison in which the offender is confined at the time of execution.

Sec. 110.—The Sheriff charged with the execution, and the gaoler and medical officer or surgeon of the prison, and such other officers of the prison and such persons as the Sheriff requires, shall be present at the execution.

Sec. 111.—Any Justice of the Peace for the district,

county, or place to which the prison belongs, and such relatives of the prisoner or other persons as it seems to the Sheriff proper to admit within the prison for the purpose, and any minister of religion who may desire to attend, may also be present at the execution.

Sec. 112.—As soon as may be after judgment of death has been executed on the offender, the medical officer or surgeon of the prison shall examine the body of the offender, and shall ascertain the fact of death, and shall sign a certificate thereof, and deliver the same to the Sheriff: see form, *post*, under sec. 124.

Sec. 113.—The Sheriff, and the gaoler of the prison, and such justices and other persons present (if any) as the Sheriff requires or allows, shall also sign a declaration to the effect that judgment of death has been executed on the offender: see form, *post*, under sec. 124.

Sec. 114.—The duties imposed upon the Sheriff, gaoler, medical officer or surgeon by the four next preceding sections, may and shall, in his absence, be performed by his lawful deputy or assistant, or other officer or person ordinarily acting for him, or conjointly with him, in the performance of his duties.

Sec. 115.—A Coroner of the district, county or place to which the prison belongs, wherein judgment of death is executed on any offender, shall, within twenty-four hours after the execution, hold an inquest on the body of the offender, and the jury at the inquest shall enquire

into and ascertain the identity of the body, and whether judgment of death was duly executed on the offender; and the inquisition shall be in duplicate, and one of the originals shall be delivered to the Sheriff.

Sec. 116.—No officer of the prison or prisoner confined therein shall, in any case, be a juror on the inquest.

Sec. 117.—The body of every offender executed shall be buried within the walls of the prison within which judgment of death is executed on him, unless the Lieutenant-Governor in Council being satisfied that there is not, within the walls of any prison, sufficient space for the convenient burial of offenders executed therein, permits some other place to be used for the purpose.

Sec. 118.—The Governor in Council may, from time to time, make such rules and regulations to be observed on the execution of judgment of death in every prison, as he may from time to time deem expedient for the purpose, as well of guarding against any abuse in such execution, as also of giving greater solemnity to the same, and of making known without the prison walls the fact that such execution is taking place: see the rules made in the matter, *post*, under sec. 124.

Sec. 119.—All such rules and regulations shall be laid upon the tables of both Houses of Parliament within six weeks after the making thereof, or if Parlia-

ment be not then sitting, within fourteen days after the next meeting thereof.

Sec. 120.—If any person knowingly and wilfully signs any false certificate or declaration required with respect to any execution, he shall be guilty of a misdemeanor, and, on conviction thereof, shall be liable, at the discretion of the Court, to imprisonment for any term less than two years, with or without hard labour, and with or without solitary confinement.

Sec. 121.—Every certificate and declaration, and a duplicate of the inquest required by this Act, shall in each case be sent with all convenient speed by the Sheriff to the Secretary of State of Canada, or to such other officer as may from time to time be appointed for the purpose by the Governor in Council, and printed copies of the same several instruments shall as soon as possible, be exhibited, and shall, for twenty-four hours at least, be kept exhibited, on or near the principal entrance of the prison within which judgment of death is executed.

Sec. 122.—The forms given in schedule B to this Act, with such variations or additions as circumstances require, shall be used for the respective purposes in that schedule indicated, and according to the direction therein contained: see forms *infra*, under section 124.

Sec. 123.—The omission to comply with any provision of the next preceding fourteen sections of this Act shall not make the execution of judgment of death

illegal in any case where such execution would otherwise have been legal.

Sec. 124.—Except in so far as is hereby otherwise provided, judgment of death shall be carried into effect in the same manner as if the said fourteen sections had not been passed.

See *ante*, vol. 1, page 161, as to the sentence for murder.

In connection with section 106 may be cited the 97th section of ch. 99, Cons. Stat. Can. (unrepealed) which 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, one thousand eight hundred and thirty-three, and, in Lower Canada, from and after the first day of January, one thousand eight hundred and forty-two, 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 Act passed since that time."

Of course, when possible, it seems better that the sentence of death, and, in fact, any sentence, be passed by the Judge who held the trial; but it is not an absolute necessity, and any Judge of the same Court may pronounce the sentence: 2 *Hale*, P. C. 405; 1

Chitty, Cr. L. 697; *Reg.* vs. *Camplin*, 1 Den. 89; cited in *Reg.* vs. *Fletcher*, Bell, 65.

If a case reserved is undecided, or if a writ of error is still pending, or if the Governor has not yet given his decision upon the case, or if a woman sentenced to death is pregnant, or if the prisoner becomes insane after the sentence, a reprieve may be granted either by the Governor, or any Judge of the Court where the trial was held, in term or in vacation: 1 *Chitty*, Cr. L. 758; 2 *Hale*, P. C. 412.

Sections 109 to 124 are enactments referring to capital punishment and the execution of the sentence, which now, in all cases, is that the criminal be hanged till he be dead: 31 Vic. ch. 69, sec. 4.

It is clear that if from any mistake or collusion, the criminal is cut down before he is really dead, and afterwards revives, he ought to be hanged again, for the judgment being "to be hanged by the neck till he be dead," is satisfied only by the death of the criminal: 1 *Chitty*, Cr. L. 788; 2 *Hale*, P. C. 412.

The nick-name of *Jack Ketch* is generally given to the common hangman in the city of London, which name is from *John Ketch*, a noted hangman in 1682, of whom his wife said that any bungler might put a man to death, but only her husband knew how to make a gentleman die sweetly.

SCHEDULE B—SECTION 122.

Certificate of Surgeon; sec. 112.—I, A.B., Surgeon (*or as the case may be*) of the (*describe the prison*), hereby certify that I, this day, examined the body of C. D., on whom judgment of death was this day executed in the said prison; and that on such examination I found that the said C. D. was dead.

(Signed) A. B.

Dated this day of 18

Declaration of Sheriff and others; sec. 113.—We, the undersigned, hereby declare that judgment of death was this day executed on C. D., in the (*describe the prison*) in our presence.

Dated this day of 18

E. F., Sheriff of

A. M., Justice of the Peace for

R. H., Gaoler of

RULES AND REGULATIONS

Made by His Excellency the Governor-General in Council, on the eighth day of January, 1870, pursuant to the provisions of 32-33 Vic. chap. 29, section 118, to be observed on the execution of the judgment of death in every prison, as well as guarding against any abuse in such execution, as also to give greater solemnity to the same, and of making known, without the prison walls, the fact that such execution is taking place.

1.—For the sake of uniformity it is recommended

that executions should take place at the hour of eight o'clock in the forenoon.

2.—The mode of execution and the ceremony attending it, to be the same as heretofore.

3.—A black flag to be hoisted at the moment of execution, upon a staff placed upon an elevated and conspicuous part of the prison, and to remain displayed for one hour.

4.—The bell of the prison, or, if arrangements can be made for that purpose, the bell of the parish, or other neighbouring church, to be tolled for fifteen minutes before, and fifteen minutes after the execution.

PARDONS, ETC.

Sec. 125.—The Crown may extend the Royal mercy to any person sentenced to imprisonment by virtue of any Statute, although such person be imprisoned for non-payment of money to some party other than the Crown.

Sec. 126.—When the Crown is pleased to extend the Royal mercy to any offender convicted of a felony punishable with death or otherwise, and by warrant under the Royal sign manual, countersigned by one of the principal Secretaries of State, or by warrant under the hand and seal-at-arms of the Governor-General, grants to such offender either a free or a conditional pardon, the discharge of such offender out of custody, in case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the Great Seal,

of such offender, as to the felony for which such pardon has been granted; but no free pardon, nor any discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof, in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced, on a subsequent conviction for any felony or offence other than that for which the pardon was granted.

Sec. 127.—The Crown may commute the sentence of death passed upon any person convicted of a capital crime, to imprisonment in the penitentiary for life, or for any term of years not less than two years, or to imprisonment in any other gaol or place of confinement for any period less than two years with or without hard labour, and with or without solitary confinement; and an instrument under the hand and seal-at-arms of the Governor-General, declaring such commutation of sentence, or a letter or other instrument under the hand of the Secretary of State of Canada or for the Provinces, or the lawful deputy of either, shall be sufficient authority to any of Her Majesty's Judges or Justices having jurisdiction in such cases, or to any Sheriff or officer to whom such letter or instrument is addressed, to give effect to such commutation, and to do all such things, and to make such orders, and to give such directions as may be requisite for the change of custody of such convict, and for his conduct to and delivery at such gaol or place of confinement, or penitentiary, and his detention therein, according to the terms on which his sentence has been commuted.

At common law, the Crown cannot pardon, where private justice is principally concerned: *non potest rex gratiam facere cum injuria et damno aliorum.* But now, by the aforesaid section 125 of the Procedure Act, taken from the 22 Vic. ch. 32 of the Imperial Statutes, the Crown has the power to remit penalties, although payable to private parties. Section 120 of the Larceny Act of 1869 (*ante* vol. 1, page 638), and section 73 of the Act of the same year, concerning malicious injuries, (*ante*, vol. 1, page 712) enact in consequence that, in case any person summarily convicted under the said Acts has received a remission from the Crown of the sum and costs to which he had been condemned, he shall be released from all further or other proceedings for the same cause.

Sec. 126 of the Procedure Act is taken from the 7 & 8 Geo. IV. ch. 28, sec. 13, and 9 Geo. IV, ch. 32, sec. 3, and does away with the necessity of a pardon under the Great Seal for the purpose of restoring the offender to his civil rights.

The Penitentiary Act of 1875 contains enactments relating to section 127 of the Procedure Act, and the transfer of convicts whose sentences are commuted to imprisonment in the Penitentiary.

UNDERGOING SENTENCE, EQUIVALENT TO A PARDON.

Sec. 128.—When any offender has been convicted of a felony not punishable with death, and has endured the punishment to which such offender was adjudged,

or if such felony be punishable with death and the sentence has been commuted, then if such offender has endured the punishment to which his sentence was commuted, the punishment so endured shall, as to the felony whereof the offender was so convicted, have the like effects and consequences as a pardon under the Great Seal; but nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced, on a subsequent conviction for any other felony.

Sec. 129.—Nothing in this Act shall or doth in any manner limit or affect Her Majesty's Royal prerogative of mercy.

Sec. 128 is taken from the 9 Geo. IV. ch. 32, sec. 3 of the Imperial Statutes.—The effect of a pardon is to make the offender a new man (*novus homo*), to acquit him of all corporal penalties and forfeitures annexed to the offence pardoned, and not so much to restore his former as to give him new credit and capacity. A pardon of treason or felony, even after conviction or attainder, will enable a person to maintain an action of slander for calling him a traitor or felon, as though he had never been guilty: 4 *Blackstone* Comm. 402; 1 *Chitty*, Cr. L. 775.

But it is only a pardon granted by Act of Parliament which reverses the attainder, or restores the blood which is corrupted. By sec. 128 of the Procedure Act, a convict who has undergone his sentence is given all

the effects and consequences of a pardon under the Great Seal.

LIMITATION OF ACTIONS AND PROSECUTIONS.

Sec. 130—All actions and prosecutions to be commenced against any person for anything purporting to be done in pursuance of any Act of the Parliament of Canada relating to Criminal Law, shall, unless otherwise provided for, be laid and tried in the district, county or place where the fact was committed, and must be commenced within six months next after the fact committed, and not otherwise.

Sec. 131.—Notice in writing of such action and of the cause thereof, must be given to the defendant, one month at least before the commencement of the action.

Sec. 132—In any such action the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial thereupon.

Sec. 133.—No plaintiff shall recover in any such action, if tender of sufficient amends be made, before such action brought, or if a sufficient sum of money be paid into Court after such action brought, by or on behalf of the defendant.

Sec. 134.—If a verdict passes for the defendant, or the plaintiff becomes non-suit or discontinues any such action after issue joined, or if, upon demurrer or otherwise judgment be given against the plaintiff, the

defendant shall recover his full costs as between attorney and client, and shall have the like remedy for the same as any defendant hath by law in other cases, and though a verdict or judgment be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the Judge, before whom the trial shall be, certifies his approval of the action.

Sec. 135.—Nothing in the five next preceding sections shall prevent the effect of any Act in force in any Province of Canada, for the protection of Justices of the Peace or other officers from vexatious actions for things purporting to be done in the performance of their duty.

In re Whittier vs. *Diblee*, 2 Pugsley's Rep. 245 (New Brunswick), Chief Justice Ritchie said of section 134 of the Procedure Act: "That section of the Dominion Act is clearly *ultra vires*, as it relates to procedure in a civil matter, which is entirely within the jurisdiction of the local legislature."

It seems clear that the same thing may be said of all the above sections, from 130 to 135, both inclusive. They are enactments on limitation of actions, and the procedure on these actions before the civil courts. What right has the Federal Parliament to legislate on these subjects?

GENERAL PROVISIONS.

Sec. 136—When any felony, punishable under the

laws of Canada, has been committed without 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.

Sec. 137.—Nothing contained in this Act shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.

Sec. 138.—This Act shall commence and take effect on the first day of January, one thousand eight hundred and seventy.

32-33 VIC. CHAP. 32.

An Act respecting the prompt and summary Administration of Criminal Justice in certain cases.

[*Assented to 22nd June*, 1869.]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada enacts as follows:—

1. In this Act the expression "a competent Magistrate" shall, as respects the Province of Quebec and the Province of Ontario, mean and include any Recorder, Judge of a County Court, being a Justice of the Peace, Commissioner of Police, Judge of the Sessions of the Peace, Police Magistrate, District Magistrate or other functionary or tribunal invested at the time of the passing of this Act with the powers vested in a Recorder by chapter one hundred and five of the Consolidated Statutes of Canada, entitled "*An Act respecting the prompt and summary administration of Criminal Justice in certain cases*," and acting within the local limits of his or of its jurisdiction, and any functionary or tribunal invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more Justices of the Peace; and as respects the Province of Nova Scotia or the Province of New Brunswick, the said expression shall mean and include a Commissioner

of Police and any functionary, tribunal or person invested or to be invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more Justices of the Peace, and the expression "the magistrate" shall mean a competent magistrate as above defined;

And the expression "the Common Gaol or other place of confinement," shall, in the case of any offender whose age at the time of his conviction does not, in the opinion of the magistrate, exceed sixteen years, include any Reformatory Prison provided for the reception of juvenile offenders in the Province in which the conviction referred to takes place, and to which by the law of that Province the offender can be sent.

2. Where any person is charged before a competent magistrate with having committed—

1. Simple larceny, larceny from the person, embezzlement, or obtaining money or property by false pretences, or feloniously receiving stolen property, and the value of the whole of the property alleged to have been stolen, embezzled, obtained, or received does not, in the judgment of the magistrate, exceed ten dollars; or,

2. With having attempted to commit larceny from the person or simple larceny; or,

3. With having committed an aggravated assault, by unlawfully and maliciously inflicting upon any

other person, either with or without a weapon or instrument, any grievous bodily harm, or by unlawfully and maliciously cutting, stabbing or wounding any other person; or

4. With having committed an assault upon any female whatever, or upon any male child whose age does not, in the opinion of the magistrate exceed fourteen years, such an assault being of a nature which cannot in the opinion of the magistrate be sufficiently punished by a summary conviction before him under any other Act, and such assault, if upon a female, not amounting in his opinion to an assault with intent to commit a rape; or

5. With having assaulted, obstructed, molested or hindered any magistrate, bailiff, or constable or officer of customs or excise or other officer in the lawful performance of his duty, or with intent to prevent the performance thereof; or

6. With keeping or being an inmate, or habitual frequenter of any disorderly house, house of ill-fame or bawdy house;

The magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way.

3. Whenever the magistrate before whom any person is charged as aforesaid proposes to dispose of the case summarily under the provisions of this Act, such

magistrate, after ascertaining the nature and extent of the charge, but before the formal examination of the witnesses for the prosecution, and before calling on the party charged for any statement which he may wish to make, shall state to such person the substance of the charge against him, [and if the charge is not one that can be tried summarily without the consent of the accused] shall then say to him, these words, or words to the like effect: "Do you consent that the charge against you shall be tried by me, or do you desire that it shall be sent for trial by a jury at the [*naming the Court at which it could soonest be tried*];" and if the person charged consents to the charge being summarily tried and determined as aforesaid, or if the power of the magistrate to try it does not depend on the consent of the accused, the magistrate shall reduce the charge into writing, and read the same to such person, and shall then ask him whether he is guilty or not of such charge.

4. If the person charged confesses the charge, the magistrate shall then proceed to pass such sentence upon him as may by law be passed [subject to the provisions of this Act], in respect to such offence; but if the person charged says that he is not guilty the magistrate shall then examine the witnesses for the prosecution, and when the examination has been completed, the magistrate shall inquire of the person charged whether he has any defence to make to such charge, and if he states that he has a defence, the magistrate shall hear such defence, and shall then proceed to dispose of the case summarily.

5. In the case of larceny, feloniously receiving stolen property or attempt to commit larceny from the person, or simple larceny, charged under the first or second sub-sections of the second section of this Act, if the magistrate after hearing the whole case for the prosecution and for the defence, finds the charge proved, then he shall convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any period not exceeding six months.

6. If in any case the magistrate finds the offence not proved, he shall dismiss the charge, and make out and deliver to the person charged a certificate under his hand stating the fact of such dismissal.

7. Every such conviction and certificate respectively may be in the forms A. and B., in this Act, or to the like effect.

8. If (when his consent is necessary), the person charged does not consent to have the case heard and determined by the magistrate, or in any case if it appears to the magistrate that the offence is one which, owing to a previous conviction of the person charged, or from any other circumstance, ought to be made the subject of prosecution by indictment rather than to be disposed of summarily, such magistrate shall deal with the case in all respects as if this Act had not been passed; but a previous conviction shall not prevent the magistrate from trying the offender summarily, if he thinks fit so to do.

9. If upon the hearing of the charge the magistrate is of opinion that there are circumstances in the case which render it inexpedient to inflict any punishment, he may dismiss the person charged without proceeding to a conviction.

10. Where any person is charged before a competent magistrate with simple larceny, or with having obtained property by false pretences, or with having embezzled or having feloniously received stolen property, or with committing larceny from the person, or with larceny as a clerk or servant, and the value of the property stolen, obtained, embezzled, or received exceeds ten dollars, and the evidence in support of the prosecution is in the opinion of the magistrate sufficient to put the person on his trial for the offence charged, such magistrate, if the case appear to him to be one which may properly be disposed of in a summary way, and may be adequately punished by virtue of the powers of this Act, shall reduce the charge into writing and shall read it to the said person, and (unless such person is one who can be tried summarily without his consent) shall then put to him the question mentioned in section three, and shall explain to him that he is not obliged to plead or answer before such magistrate at all, and that if he do not plead or answer before him he will be committed for trial in the usual course.

11. If the person so charged consents to be tried by the magistrate, the magistrate shall then ask him whether he is guilty or not of the charge, and if such person says that he is guilty, the magistrate shall thereupon cause a plea of guilty to be entered upon the proceedings, and shall convict him of the offence, and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any term not exceeding twelve months; and every such conviction may be in the form C., or to the like effect.

12. In every case of summary proceedings under this Act, the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney.

13. The magistrate before whom any person is charged under this Act, may by summons require the attendance of any person as a witness upon the hearing of the case at a time and place to be named in such summons, and such magistrate may bind by recognizance all persons whom he may consider necessary to be examined touching the matter of such charge, to attend at the time and place to be appointed by him, and then and there to give evidence upon the hearing of such charge; And in case any person so summoned or required or bound as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, then upon proof being first made of such person's having been duly summoned as hereinafter mentioned, or bound by recognizance as aforesaid, the magistrate before whom such person ought to have attended may issue a warrant to compel his appearance as a witness.

14. Every summons issued under this Act may be served by delivering a copy of the summons to the party summoned, or by delivering a copy of the summons to some inmate of such party's usual place of abode; and every person so required by any writing under the hand of any competent magistrate to attend and give evidence as aforesaid, shall be deemed to have been duly summoned.

15. The jurisdiction of the magistrate in the case of any person charged within the police limits of any city in Canada, with therein keeping or being an inmate or an habitual frequenter of any disorderly house, house of ill-fame or bawdy house, shall be absolute, and shall not depend on the consent of the party charged to be tried by such magistrate, nor shall such party be asked whether he consents to be so tried; nor shall this Act affect the absolute summary jurisdiction given to any Justice or Justices of the Peace in any case, by any other Act.

16. The jurisdiction of the magistrate shall also be absolute in the case of any person, being a sea-faring person and only transiently in Canada, and having no permanent domicile therein, charged, either within the City of Quebec as limited for the purpose of the police ordinance, or within the City of Montreal as so limited, or in any other seaport, city or town in Canada, where there is a competent magistrate, with the commission therein of any of the offences mentioned in the second section of this Act, and also in the case of any other person charged with any such offence on

the complaint of any such sea-faring person whose testimony is essential to the proof of the offence; and such jurisdiction shall not depend on the consent of any such party to be tried by the magistrate, nor shall such party be asked whether he consents to be so tried.

17. In any case summarily tried under the third, fourth, fifth, or sixth sub-section of the second section of this Act, if the magistrate finds the charge proved, he may convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any period not exceeding six months, or may condemn him to pay a fine not exceeding, with the costs in the case, one hundred dollars, or to both fine and imprisonment, not exceeding the said period and sum; and such fine may be levied by warrant of distress under the hand and seal of the magistrate, or the party convicted may be condemned (in addition to any other imprisonment on the same conviction) to be committed to the common gaol or other place of confinement, for a further period not exceeding six months, unless such fine be sooner paid.

18. Whenever the nature of the case requires it, the forms given at the end of this Act shall be altered by omitting the words stating the consent of the party to be tried before the magistrate, and by adding the requisite words stating the fine imposed [if any] and the imprisonment [if any] to which the party convicted is to be subjected if the fine be not sooner paid.

19. Where any person is charged before any Justice or Justices of the Peace, with any offence mentioned in this Act, and in the opinion of such justice or justices, the case is proper to be disposed of by a competent magistrate, as herein provided, the justice or justices before whom such person is so charged may, if he or they see fit, remand such person for further examination before the nearest competent magistrate, in like manner in all respects as a justice or justices are authorized to remand a party accused for trial at any court, under any general Act respecting the duties of Justices of the Peace out of Sessions, in like cases.

20. No Justice or Justices of the Peace in any Province, shall so remand any person for further examination or trial before any such magistrate in any other Province.

21. Any person so remanded for further examination before a competent magistrate in any city, may be examined and dealt with by any other competent magistrate in the same city.

22. If any person suffered to go at large upon entering into such recognizance as the justice or justices are authorized under any such Act as last mentioned to take, on the remand of a party accused, conditioned for his appearance before a competent magistrate under the preceding sections of this Act, does not afterwards appear pursuant to such recognizance, then the magistrate before whom he ought to have appeared shall certify (under his hand, on the back of the recogni-

zance), to the Clerk of the Peace of the district, county or place (as the case may be) the fact of such non-appearance, and such recognizance shall be proceeded upon in like manner as other recognizances, and such certificate shall be deemed sufficient *prima facie* evidence of such non-appearance.

23. The magistrate adjudicating under this Act shall transmit the conviction, or a duplicate of a certificate of dismissal, with the written charge, the depositions of witnesses for the prosecution and for the defence, and the statement of the accused, to the next Court of General or Quarter Sessions of the Peace, or to the court discharging the functions of a Court of General or Quarter Sessions of the Peace, for the district, county or place, there to be kept by the proper officer among the records of the Court.

24. A copy of such conviction, or of such certificate of dismissal, certified by the proper officer of the Court, or proved to be a true copy, shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein, in any legal proceedings whatever.

25. The magistrate, by whom any person has been convicted under this Act, may order restitution of the property stolen, or taken or obtained by false pretences, in those cases in which the Court before whom the person convicted would have been tried but for this Act, might by law order restitution.

26. Every court, held by a competent magistrate for

the purposes of this Act, shall be an open public court, and a written or printed notice of the day and hour for holding such court, shall be posted or affixed by the Clerk of the Court upon the outside of some conspicuous part of the building or place where the same is held.

27. The provisions of the "*Act respecting the duties of Justices of the Peace out of Sessions, in relation to summary convictions and orders*," and the provisions of the "*Act respecting the duties of Justices of the Peace out of Sessions in relation to persons charged with indictable offences*," shall not be construed as applying to any proceedings under this Act except as mentioned in section nineteen.

28. Every conviction by a competent magistrate under this Act shall have the same effect as a conviction upon indictment for the same offence would have had, save that no conviction under this Act shall be attended with forfeiture beyond the penalty (if any) imposed in the case.

29. Every person who obtains a certificate of dismissal or is convicted under this Act, shall be released from all further or other criminal proceedings for the same cause.

30. No conviction, sentence or proceeding under this Act shall be quashed for want of form; and no warrant of commitment upon a conviction shall be held void by reason of any defect therein, if it be there-

in alleged that the offender has been convicted, and there be a good and valid conviction to sustain the same.

31. Nothing in this Act shall affect the provisions of the "*Act respecting the trial and punishment of juvenile offenders*;" and this Act shall not extend to persons punishable under that Act, so far as regards offences for which such persons may be punished thereunder.

32. Every fine imposed under the authority of this Act shall be paid to the magistrate who has imposed the same, or to the clerk of the court or Clerk of the Peace, as the case may be, and shall be by him paid over to the County Treasurer for county purposes if it has been imposed in the Province of Ontario—and if it has been imposed in any new district in the Province of Quebec, constituted by any Act of the legislature of the late Province of Canada passed in or after the year one thousand eight hundred and fifty-seven, then to the sheriff of such district as treasurer of the building and jury fund for such district to form part of the said fund,—and if it has been imposed in any other district in the said Province, then to the prothonotary of such district, to be by him applied under the direction of the Lieutenant-Governor in Council, towards the keeping in repair of the court house in such district, or to be by him added to the moneys and fees collected by him for the erection of a court house and gaol in such district, so long as such fees shall be collected to defray the cost of such erection; and in the Province of Nova Scotia to the County

Treasurer for county purposes, and in the Province of New Brunswick to the County Treasurer for county purposes.

33. In the interpretation of this Act the word "property" shall be construed to include everything included under the same word or the expression "valuable security," as used in the "*Act respecting larceny and other similar offences*;" and in the case of any "valuable security," the value thereof shall be reckoned in the manner prescribed in the said Act.

34. The Act cited in the first section of this Act chapter one hundred and five of the Consolidated Statutes of Canada is hereby repealed, except as to cases pending under it at the time of the coming into force of this Act and as to all sentences pronounced and punishments awarded under it, as regards all which this Act shall be construed as a re-enactment of the said Act, with amendments, and not as a new law.

35. This Act shall commence and take effect on the first day of January, in the year of our Lord, one thousand eight hundred and seventy.

FORM (A) *See* s. 7.

CONVICTION.

Province of City (*or as the case may be*) of to wit:

Be it remembered, that on the day of

in the year of our Lord , at , A.B., being charged before me the undersigned , of the said (City) (and consenting to my deciding upon the charge summarily), is convicted before me, for that the said A. B., &c., (*stating the offence, and the time and place when and where committed*), and I adjudge the said A. B., for his said offence, to be imprisoned in the (and there kept to hard labour) for the space of

Given under my hand and seal, the day and year first above mentioned, at aforesaid.

J. S. [L.S.]

FORM (B) *See* s. 7.

CERTIFICATE OF DISMISSAL.

Province of City (*or as the case may be*) of to wit:

I, the undersigned , of the City (*or as the case may be*) of , certify that on the day of in the year of our Lord , at aforesaid, A. B. being charged before me (and consenting to my deciding upon the charge summarily) for that he, the said A.B., &c. (*stating the offence charged, and the time and place when and where alleged to have been committed*), I did, after having summarily adjudicated thereon, dismiss the said charge.

Given under my hand and seal, this day of , at aforesaid.

J. S. [L.S.]

FORM (C) *See* s. 11.

CONVICTION UPON A PLEA OF GUILTY.

Province of City (*or as the case may be*) of to wit:

Be it remembered, that on the day of in the year of our Lord , at , A.B., being charged before me the undersigned , of the said (City) (and consenting to my deciding upon the charge summarily) for that he, the said A.B., &c. (*stating the offence and the time and place when and where committed*), and pleading guilty to such charge, he is thereupon convicted before me of the said offence; and I adjudge him the said A.B., for his said offence, to be imprisoned in the (and there kept to hard labour) for the space of

Given under my hand and seal, the day and the year first above mentioned, at aforesaid.

J. S. [L.S.]

32-33 VIC. CHAP. 33.

An Act respecting the trial and punishment of Juvenile Offenders.

[*Assented to 22nd June*, 1869.]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. In this Act, the expression "any two or more justices" shall, as respects the Province of Quebec, include any two or more Justices of the Peace, the sheriff of any district except Montreal and Quebec, the deputy sheriff of Gaspé, and any Recorder, Judge of the Sessions of the Peace, Police Magistrate, District Magistrate or Stipendiary Magistrate acting within the limits of their respective jurisdictions;—and as respects the Province of Ontario, any Judge of the County Court being a Justice of the Peace, Police Magistrate, or Stipendiary Magistrate, or any two Justices of the Peace, acting within their respective jurisdictions;—and as respects the Province of Nova Scotia or the Province of New Brunswick, the said expression shall mean and include any functionary or tribunal invested or to be invested by the proper legislative authority with power to do acts usually required to be done by two or more Justices of the Peace;—and the expression "the justices" shall have the same meaning as the expression "two or more Justices of the Peace" as above defined; and the expression "the common gaol or other place of confinement" shall include any reformatory prison provided for the reception of juvenile offenders in the Province in which the conviction referred to take place, and to which by the law of that Province the offender can be sent.

2. Every person charged with having committed or having attempted to commit, or with having been an aider, abettor, counsellor or procurer in the commission of any offence which is simple larceny, or punishable as simple larceny, and whose age at the period of

the commission or attempted commission of such offence does not, in the opinion of the Justice before whom he is brought or appears, as mentioned in section seven, exceed the age of sixteen years, shall upon conviction thereof, in open court, upon his own confession or upon proof, before any two or more Justices, be committed to the common gaol or other place of confinement within the jurisdiction of such Justices, there to be imprisoned with or without hard labour, for any term not exceeding three months, or, in the discretion of such Justices, shall forfeit and pay such sum, not exceeding twenty dollars, as the said Justices may adjudge.

3. The Justices before whom any person is charged and proceeded against under this Act, before such person is asked whether he has any cause to show why he should not be convicted, shall say to the person so charged, these words, or words to the like effect:

"We shall have to hear what you wish to say in answer to the charge against you; but if you wish to be "tried by a Jury, you must object now to our deciding "upon it at once:"

And if such person, or a parent or guardian of such person, then objects, such person shall be dealt with as if this Act had not been passed; but nothing in this Act shall prevent the summary conviction of any such person before one or more Justices of the Peace, for any offence for which he is liable to be so convicted under any other Act.

4. If the Justices, upon the hearing of any such case, deem the offence not proved, or that it is not expedient to inflict any punishment, they shall dismiss the party charged, in the latter case on his finding sureties for his future good behaviour, and in the former case without sureties, and then make out and deliver to the party charged, a certificate under the hands of such Justices stating the fact of such dismissal.

Such certificate shall be in the form or to the effect set forth in the form following:

, { We , of Her Majesty's Justices of
To wit: { the Peace for the , of , (*or if a Recorder, &c.,*) I, a , of the of . (*as the case may be*) do hereby certify, that on the day of , in the year of our Lord, , at , in the said of , M. N., was brought before us the said Justices (*or* me the said) charged with the following offence, that is to say (*here state briefly the particulars of the charge*), and that we the said Justices (*or* I the said) thereupon dismissed the said charge.

Given under our hands (*or* my hand) this day of

5. If the Justices are of opinion, before the person charged has made his defence, that the charge is from any circumstance a fit subject for prosecution by indictment, or if the person charged, upon being called upon to answer the charge, objects to the case being

summarily disposed of under the provisions of this Act such Justices shall, instead of summarily adjudicating thereupon deal with the case in all respects, as if this Act had not been passed; but this shall not prevent his being afterwards tried summarily by his own consent by a Judge of a County Court in the Province of Ontario, under any Act then in force for that purpose.

6. Every person obtaining such certificate of dismissal as aforesaid, and every person convicted under the authority of this Act, shall be released from all further or other criminal proceedings for the same cause.

7. In case any person whose age is alleged not to exceed sixteen years be charged with any offence mentioned in section two, on the oath of a credible witness before any Justice of the Peace, such justice may issue his summons or warrant, to summon or to apprehend the person so charged, to appear before any two Justices of the Peace, at a time and place to be named in such summons or warrant.

8. Any Justice or Justices of the Peace, if he or they think fit, may remand for further examination or for trial, or suffer to go at large upon his finding sufficient sureties, any such person charged before him or them with any such offence as aforesaid.

9. Every such surety shall be bound by recognizance to be conditioned for the appearance of such person before the same or some other Justice or Justices of the Peace for further examination, or for trial before

two or more Justices of the Peace as aforesaid, or for trial by indictment at the proper Court of Criminal Jurisdiction, as the case may be.

10. Every such recognizance may be enlarged from time to time by any such justice or justices or court to such further time as he or they appoint; and every such recognizance not so enlarged shall be discharged without fee or reward when the party has appeared according to the condition thereof.

11. Any Justice of the Peace may, by summons, require the attendance of any person as a witness upon the hearing of any case before two justices under the authority of this Act, at a time and place to be named in such summons.

12. Any such justice may require and bind by recognizance all persons whom he considers necessary to be examined touching the matter of such charge, to attend at the time and place appointed by him, and then and there to give evidence upon the hearing of such charge.

13. In case any person so summoned or required or bound as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, then upon proof being first given of such person having been duly summoned as hereinafter mentioned, or bound by recognizance as aforesaid, either of the justices before whom any such person ought to have attended,

may issue a warrant to compel his appearance as a witness.

14. Every summons issued under the authority of this Act, may be served by delivering a copy thereof to the party or to some inmate at such party's usual place of abode, and every person so required by any writing under the hand or hands of any justice or justices to attend and give evidence as aforesaid, shall be deemed to have been duly summoned.

15. The justices before whom any person is summarily convicted of any such offence as hereinbefore mentioned, may cause the conviction to be drawn up in the following form, or in any other form of words to the same effect, (varying the wording to suit the case), that is to say:

, } Be it remembered, that on the
To wit: } day of , in the year of our Lord one thousand eight hundred and , at , in the District of , (County *or* United Counties, &c., *or as the case may be*) A. O. is convicted before us, J. P. and J. R., two of Her Majesty's Justices of the Peace for the said District (*or* City, &c.,) (*or* me, S. J., *Recorder*, &c., of the of , *or as the case may be*) for that he, the said A. O., did (*specify the offence and the time and place when and where the same was committed, as the case may be, but without setting forth the evidence*), and we, the said J. P. and J. R., (*or* I, the said S. J.), adjudge the said A. O. for his said offence to be imprisoned in the (*or* to be imprisoned in the and there kept at hard labour) for the space of , (*or* we, *or* I) adjudge the said A. O. for his said offence to forfeit and pay (*here state the penalty actually imposed,*) and in default of immediate payment of the said sum, to be imprisoned in the (*or* to be imprisoned in the , and kept at hard labour) for the space of unless the said sum shall be sooner paid.

Given under our hands and seals, (*or* my hand and seal) the day and year first above mentioned.

And the conviction shall be good and effectual to all intents and purposes.

16. No such conviction shall be quashed for want of form, or be removed by *certiorari* or otherwise into any of Her Majesty's Superior Courts of Record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there is a good and valid conviction to sustain the same.

17. The justices before whom any person is convicted under the provisions of this Act, shall forthwith transmit the conviction and recognizances to the Clerk of the Peace for the district, city, county or union of counties wherein the offence was committed, there to be kept by the proper officer among the records of the Court of General or Quarter Sessions of the Peace, or of any other court discharging the functions of a Court of General or Quarter Sessions of the Peace.

18. Each such Clerk of the Peace shall transmit to

the Secretary of State of Canada, a quarterly return of the names, offences and punishments mentioned in the convictions, with such other particulars as may from time to time be required.

19. No conviction under the authority of this Act shall be attended with any forfeiture, except such penalty as may be imposed by the sentence, but whenever any person is adjudged guilty under the provisions of this Act, the presiding justice may order restitution of the property in respect of which the offence was committed, to the owner thereof or his representatives.

20. If such property be not then forthcoming, the justices, whether they award punishment or dismiss the complaint, may inquire into and ascertain the value thereof in money, and if they think proper, order payment of such sum of money to the true owner, by the person convicted, either at one time or by instalments, at such periods as the Court deems reasonable.

21. The party so ordered to pay may be sued for the same as a debt in any court in which debts of the like amount may be, by law, recovered, with costs of suit, according to the practice of such court.

22. Whenever the justices adjudge any offender to forfeit and pay a pecuniary penalty under the authority of this Act, and such penalty is not forthwith paid, they may, if they deem it expedient, appoint some future day for the payment thereof, and order the offender to be detained in safe custody until the day so to be appointed, unless such offender gives security to the satisfaction of the justices for his appearance on such day; and the justices may take such security by way of recognizance or otherwise at their discretion.

23. If at any time so appointed such penalty has not been paid, the same or any other Justices of the Peace may, by warrant under their hands and seals, commit the offender to the common gaol or other place of confinement within their jurisdiction, there to remain for any time not exceeding three months, reckoned from the day of such adjudication: such imprisonment to cease on the payment of the said penalty.

24. The justices before whom any person is prosecuted or tried for any offence cognizable under this Act, may, in their discretion, at the request of the prosecutor or of any other person who appears on recognizance or summons to prosecute or give evidence against such person, order payment to the prosecutor and witnesses for the prosecution, of such sums of money as to them seem reasonable and sufficient, to reimburse such prosecutor and witnesses for the expenses they have severally incurred in attending before them, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein, and may order payment to the constables and other peace officers for the apprehension and detention of any person so charged.

25. And although no conviction takes place, the said

justices may order all or any of the payments aforesaid, when they are of opinion that the parties or any of them have acted *bona fide*.

26. Every fine imposed under the authority of this Act shall be paid to the justices who impose the same, or to the Clerk of the Recorder's Court, or the Clerk of the County Court, or the Clerk of the Peace, or other proper officer, as the case may be, and shall be by him or them paid over to the County Treasurer for county purposes, if the same was imposed in the Province of Ontario; and if it was imposed in any new district in the Province of Quebec, then to the sheriff of such district as treasurer of the Building and Jury Fund for such district, to form part of the said fund, and if it was imposed in any other district in the Province of Quebec, then to the prothonotary of such district, to be by him applied, under the direction of the Lieutenant-Governor in Council, towards the keeping in repair of the court house in such district, or to be by him added to the moneys or fees collected by him, for the erection of a court house or gaol in such district, so long as such fees are collected to defray the cost of such erection; and if it was imposed in the Province of Nova Scotia it shall be paid over to the County Treasurer, for county purposes; and if it was imposed in the Province of New Brunswick, it shall be paid over to the County Treasurer, for county purposes.

27. The amount of expenses of attending before the justices and the compensation for trouble and loss of

time therein, and the allowances to the constables and other peace officers for the apprehension and detention of the offender, and the allowances to be paid to the prosecutor, witnesses and constables for attending at the trial or examination of the offender, shall be ascertained by and certified under the hands of such justices; but the amount of the costs, charges and expenses attending any such prosecution, to be allowed and paid as aforesaid, shall not in any one case exceed the sum of eight dollars.

28. Every such order of payment to any prosecutor or other person, after the amount thereof has been certified by the proper Justices of the Peace as aforsaid shall be forthwith made out and delivered by the said justices or one of them, or by the Clerk of the Recorder's Court, Clerk of the County Court or Clerk of the Peace, as the case may be, unto such prosecutor or other person, upon such clerk being paid his lawful fee for the same, and shall be made upon the officer to whom fines imposed under the authority of this Act are required to be paid over in the district, city, county or union of counties in which the offence was committed, or was supposed to have been committed, who upon sight of every such order, shall forthwith pay to the person named therein, or to any other person duly authorized to receive the same on his behalf, out of any moneys received by him under this Act, the money in such order mentioned, and shall be allowed the same in his accounts of such moneys.

29. The Act chapter one hundred and six of the

Consolidated Statutes of Canada is hereby repealed, except as to cases pending under it at the time of the coming into force of this Act, and as to all sentences pronounced and punishments awarded under it; as regards all which this Act shall be construed as a re-enactment of the said Act with the amendments hereby made, and not as a new law.

30. This Act shall commence and take effect on the first day of January, in the year of our Lord one thousand eight hundred and seventy.

32-33 VIC. CHAP. 34.

An Act respecting Juvenile Offenders within the Province of Quebec.

[*Assented to 22nd June*, 1869.]

WHEREAS the Legislature of the Province of Quebec, during its now last Session, passed an Act making certain provisions for the establishment of certified reformatory schools, and the law respecting prisons for young offenders requires to be amended so as to meet the provisions of the said Act; Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. In so far as respects the Province of Quebec, the

sections five, six, seven, eight, nine, ten, eleven and twelve of the chapter one hundred and seven of the Consolidated Statutes of Canada, intituled: "*An Act respecting Prisons for young offenders*," are hereby repealed, except as respects persons under sentence when this Act comes into force.

2. Whenever, after the passing of this Act, any person apparently under the age of sixteen years is convicted before any court of criminal jurisdiction or before any Judge of the Sessions of the Peace, Recorder, District or Police Magistrate, of any offence for which he would be liable to imprisonment, he may be sentenced on such conviction, to be detained in a certified reformatory school for any term not less than two years, nor more than five years, or he may be sentenced to be first imprisoned in the common gaol for a period not in any case exceeding three months, and at the expiration of his sentence to be sent to a certified reformatory school, and to be there detained for a period of not less than two years, and not more than five years.

3. The Lieutenant-Governor may at any time, in his discretion, order that any offender detained in such reformatory school under a summary conviction be discharged.

4. The Lieutenant-Governor may at any time, on the report of one of the inspectors of prisons for the Province of Quebec, order any offender undergoing sentence in any certified reformatory school, on a con-

viction for felony, to be removed as incorrigible; and in any such case the offender shall be imprisoned in the penitentiary for the remainder of the term of his sentence.

5. Any person apparently under the age of sixteen years, arrested on a charge of having committed any offence not capital, shall not, while awaiting trial for such offence, be detained in any common gaol, if there be a certified reformatory school within three miles of such gaol, but shall be detained in such reformatory school while awaiting trial; and if there be more than one such school within such distance, the person so charged shall be detained in that one of them which is conducted the most nearly in accordance with the religious belief to which his parents belong, or in which he has been educated.

6. If any offender detained in a certified reformatory school, wilfully neglects or wilfully refuses to conform to the rules thereof, he shall, upon summary conviction before a justice or magistrate having jurisdiction in the place or district where the school is situate, be imprisoned with hard labour, for any term not exceeding three months; and at the expiration of the term of his imprisonment, he shall, by and at the expense of the managers of the school, be brought back to the school from which he was taken, there to be detained during a period equal to so much of his period of detention as remained unexpired at the time of his being sent to the prison.

7. If any offender sentenced to be detained in a certified reformatory school, escapes therefrom, he may at any time before the expiration of his period of detention, be apprehended without warrant, and if the managers of the school think fit, but not otherwise, may, (any other Act to the contrary notwithstanding) be then brought before a justice or magistrate having jurisdiction in the place or district where he is found, or in the place or district where the school from which he escaped is situate; and he shall thereupon be liable, on summary conviction before such a justice or magistrate, to be imprisoned with hard labour, for any term not exceeding three months; and at the expiration of such term he shall, by and at the expense of the managers of the school, be brought back to the school from which he escaped, there to be detained during a period equal to so much of his period of detention as remained unexpired at the time of his escaping.

8. Every person who commits any of the following offences, that is to say:—

First—Knowingly assists, directly or indirectly, any offender detained in a certified reformatory school, to escape from the school;

Second—Directly or indirectly induces such an offender to escape from the school;

Third—Knowingly harbours, conceals or prevents from returning to the school, or assists in harbouring, concealing or preventing from returning to the school

any offender who has escaped from a certified reformatory school, shall, on summary conviction before two justices, or any Judge of the Sessions of the Peace, Recorder, Police or District Magistrate, be liable to a penalty not exceeding eighty dollars, or at the discretion of the justices or other functionary before whom he is convicted, to be imprisoned for any term not exceeding two months, with or without hard labour.

9. The reformatory prison at present in use in the Province of Quebec, shall, so long as it is used for that purpose, be held to be a certified reformatory school for the purposes of this Act.

10. This Act shall apply only to the Province of Quebec, and any Act relating to criminal law or procedure passed during the present or the now last Session of Parliament, shall be construed subject to this Act, and so much thereof as may be inconsistent with this Act, shall have no effect as respects the Province of Quebec.

32-33 VIC. CHAP. 35.

An Act for the more speedy trial, in certain cases, of persons charged with felonies and misdemeanors, in the Provinces of Ontario and Quebec.

[*Assented to* 22*nd June*, 1869.]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Any person committed to a jail for trial on a charge of being guilty of any offence for which he may be tried at a Court of General Sessions of the Peace, may, with his own consent, of which consent an entry shall then be made of record, and subject to the provisions hereinafter made, be tried out of sessions, and if convicted, may be sentenced by the judge.

2. It shall be the duty of every Sheriff within twenty-four hours after any prisoner charged as aforesaid is committed to gaol for trial, to notify the Judge in writing that such prisoner is so confined, stating his name and the nature of the charge preferred against him; whereupon, with as little delay as possible, such Judge shall cause the prisoner to be brought up before him.

3. Having obtained the depositions on which the prisoner was so committed, the Judge shall state to him,—

1. That he is charged with the offence, describing it;

2. That the prisoner has his option to be forthwith tried before such Judge without the intervention of a jury, or to remain untried until the next sittings of such sessions or of a Court of Oyer and Terminer, or, in Quebec, of any Court having criminal jurisdiction;

3. If the prisoner demands trial by jury, the Judge shall remand him to gaol; but if he consents to be

tried by the Judge without a jury, the County Attorney or Clerk of the Peace shall draw up a record of the proceedings as nearly as may be in one of the forms in the Schedules A and B to this Act; if upon being arraigned upon the charge, the prisoner pleads guilty, such plea shall be entered in the record, and the Judge shall pass the sentence of the law on such prisoner, which shall have the same force and effect as if passed at any Court of General Sessions of the Peace.

4. If the prisoner upon being so arraigned and consenting as aforesaid pleads not guilty, the Judge shall appoint an early day, or the same day, for his trial, and it shall be the duty of the County Attorney or Clerk of the Peace to subpœna the witnesses named in the depositions, or such of them, and such other witnesses as he may think requisite to prove the charge, to attend at the time appointed for such trial, and the prisoner being ready, the Judge shall proceed to try him, and if he is found guilty, sentence shall be passed as in the last preceding section mentioned, but if he is found not guilty, the Judge shall immediately discharge him from custody, so far as respects the charge in question.

5. The Judge sitting on any such trial for all the purposes thereof and proceedings connected therewith or relating thereto, is hereby constituted a Court of Record, and the record in any such case shall be filed among the records of the Court of General Sessions of the Peace, as indictments are, and as part of such records.

6. Any witness, whether on behalf of the prisoner or against him, duly summoned or subpœnaed to attend and give evidence before such Judge sitting on any such trial on the day appointed for the same shall be bound to attend, and remain in attendance throughout the whole trial, and in case he fails so to attend he shall be held guilty of contempt of Court, and he may be proceeded against therefor accordingly.

7. Upon proof to the satisfaction of the Judge of the service of subpœna upon any witness who fails to attend before him as required by such subpœna and such Judge being satisfied that the presence of such witness before him is indispensable to the ends of Justice, he may, by his warrant, cause the said witness to be apprehended and forthwith brought before him to give evidence as required by such subpœna, and to answer for his disregard of the same, and such witness may be detained on such warrant before the said Judge or in the common gaol with a view to secure his presence as a witness, or, in the discretion of the Judge, such witness may be released on recognizance with or without sureties conditioned for his appearance to give evidence as therein mentioned, and to answer for his default in not attending upon the said subpœna as for a contempt; the Judge may in a summary manner examine into and dispose of the charge of contempt against the said witness, who if found guilty thereof may be fined or imprisoned, or both,—such fine not to

exceed one hundred dollars, and such imprisonment to be in the common gaol, with or without hard labour, and not to exceed the term of ninety days; the said warrant may be in the form "C," and the conviction for contempt in the form "D" to this Act, and shall be authority to the persons and officers therein required to act, to do as therein they are respectively directed.

8. All the powers and duties hereby conferred and imposed upon the Judge, shall be exercised and performed in the Province of Ontario by any County Judge, Junior or Deputy Judge, authorized to act as Chairman of the General Sessions of the Peace, and in the Province of Quebec, in any district, wherein there is a Judge of the Sessions, by such Judge of Sessions, and in any district wherein there is no Judge of Sessions but wherein there is a District Magistrate, by such District Magistrate, and in any district wherein there is neither a Judge of Sessions, nor a District Magistrate, by the Sheriff of such district.

9. This Act shall apply only to the Provinces of Ontario and Quebec.

SCHEDULE A.

Form of Record when the Prisoner pleads Not Guilty.

Province of , County *or* District of , to wit: } Be it remembered that A. B. being a prisoner in the gaol of the said County *or*

District, committed for trial on a charge of having on day of 186 , feloniously stolen, &c. (*one cow, the property of C. D., or as the case may be, stating briefly the offence*), and being brought before me, , (*describe the Judge*) on the day of 186 , and asked by me if he consented to be tried before me without the intervention of a Jury, consented to be so tried; and that upon the day of 186 , the said A. B. being again brought before me for trial, and declaring himself ready, was arraigned upon the said charge and pleaded not guilty; and after hearing the evidence adduced as well in support of the said charge as for the prisoner's defence (*or as the case may be*) I find him to be guilty of the offence with which he is charged as aforesaid, and I accordingly sentence him to be (*here insert such sentence as the law allows and the Judge thinks right.*) *or* I find him not guilty of the offence with which he is charged, and discharge him accordingly. Witness my hand at in the County (*or* District) of , this day of 186 .

O. K.
Signature of Judge.

SCHEDULE B.

Form of Record when the Prisoner pleads Guilty.

Province of , County *or* District of , To wit: } Be it remembered that A. B. being a prisoner in the gaol of the said County (*or*

District), on a charge of having on the day of 186 , feloniously stolen &c. (*one cow the property of, or as the case may be, stating briefly the offence*), and being brought before me (*describe the Judge*) on the day of 186 , and asked by me if he consented to be tried before me without the intervention of a jury, consented to be so tried; and that the said A. B. being then arraigned upon the said charge, he pleaded guilty thereof, whereupon I sentence the said A. B., to be (*here insert such sentence as the law allows and the Judge thinks right.*) Witness my hand this day of 186 .

O. K.
Signature of Judge.

SCHEDULE C.

(L. S.) Canada, Province of , County (*or* District, *as the case may be*) of , To wit: } To all or any of the Constables or other Peace Officers in the said County, (*or* District, *as the case may be*) of

Whereas it having been made to appear before me, that E.F., in the said County (*or* District) (*or as the case may be,*) was likely to give material evidence on behalf of the prosecution or defence (*as the case may be*) on the trial of a certain charge of (*as larceny, or as the case may be,*) against A. B., and that the said E. F., was duly subpœnaed or bound under recognizances to appear on the day of , 186 , at

in the said (County *or* District, *as the case may be,*) at o'clock (forenoon *or* afternoon, *as the case may be,*) before me to testify what he should know concerning the said charge against the said E. F.

And whereas proof hath this day been made before me upon oath of such subpœna having been duly served upon the said E. F., or of the said E. F. having been duly bound in recognizances to appear before me, (*as the case may be,*); And whereas the said E. F., hath neglected to appear at the trial and place appointed and no just excuse has been offered for such neglect; These are therefore to command you to take the said E. F., and to bring and have him forthwith before me, to testify what he shall know concerning the said charge against the said A. B., and also to answer his contempt for such neglect.

Given under my hand this day of in the year of Our Lord 186 .

J. S.,
Judge.

SCHEDULE D.

(L. S.) Canada, Province of , (County, *or* District) of , To wit: } Be it remembered that on the day of in the year of Our Lord 186 , in the (County *or* District *as the case may be*) of E. F. is convicted before me, for that he the said E. F. did not attend before me to give evi-

dence on the trial of a certain charge against one A. B. of larceny, (*or as the case may be*) although duly subpœnaed or bound by recognizance to appear and give evidence in that behalf (*as the case may be*) but made default therein, and hath not shewn before me any sufficient excuse for such default, and I adjudge the said E. F. for his said offence to be imprisoned in the common gaol of the (County *or* District) of at for the space of there to be kept at hard labour (*and in case a fine is also intended to be imposed, then proceed*). And I also adjudge that the said E. F. do forthwith pay to and for the use of Her Majesty a fine of dollars, and in default of payment that the said fine with the costs of collection be levied by distress and sale of the goods and chattels of the said E. F. (*or in case a fine alone is imposed, then the clause for imprisonment will be omitted.*).

Given under my hand at in the said (County *or* District) of the day and year first above mentioned.

J. S.,
Judge.

32-33 VIC. CHAP. 36.

An Act respecting the Criminal Law, and to repeal certain enactments therein mentioned.

[*Assented to 22nd June*, 1869.]

WHEREAS by the several Acts of the Parliament of Canada, passed in the now last session and

present session thereof respectively, and mentioned in the Schedule A to this Act, divers Acts and parts of Acts and provisions of law, heretofore in force in the late Province of Canada, and in the Provinces of Nova Scotia and New Brunswick, have been assimilated, amended and consolidated, and it is expedient to provide for the repeal thereof, and of so much of any other Acts or provisions of law as may be contrary to or superseded by the said Acts mentioned in Schedule A; Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. The Acts and parts of Acts mentioned in Schedule B hereunto annexed, are hereby repealed, as are also all other Acts and parts of Acts and provisions of law, contrary to or inconsistent with the Acts mentioned in Schedule A or any of them, subject to the following provisions:

Such repeal shall not extend to matters relating solely to subjects as to which the Provincial Legislatures have, under "*The British North America Act*, 1867," exclusive powers of legislation, or to any enactment of any such Legislature for enforcing by fine, penalty or imprisonment any law in relation to any such subject as last aforesaid, or to any municipal By-law relating to any offence within the scope of the powers of the municipality:

Such repeal shall not extend to any provision of any Act of the Parliament of Canada, creating or providing

for the punishment of any offence against such Act, or for the proceedings for enforcing such provision,—or to any other Act or enactment not mentioned as repealed in Schedule B, and not contrary to the Acts mentioned in Schedule A, or any of them, but making special provision for the punishment of any offence, or as to the proceedings for the prosecution and conviction of the offender, other than that made in the Acts in Schedule A or any of them for a like purpose; but in any such case the offender may be indicted or otherwise proceeded against, and convicted (summarily or otherwise as the case may be), and punished, either under any of the Acts mentioned in Schedule A, or any other Act of the Parliament of Canada, or under any such Act or enactment as aforesaid, not mentioned as repealed in Schedule B:

Every offence wholly or partly committed against any Act or enactment hereby repealed, prior to such repeal, shall be dealt with, inquired of, tried, determined and punished, and every penalty in respect of any such offence shall be recovered, in the same manner as if the said Acts and enactments had not been repealed; and every act duly done, and every warrant and other instrument duly made or granted before such repeal, shall continue and be of the same force and effect as if the said Acts and enactments had not been repealed; and every right, liability, privilege and protection in respect of any matter or thing committed or done before such repeal, shall continue and be of the same force and effect as if the said Acts and enactments had not been repealed, and every action,

prosecution or other proceeding commenced before such repeal, or thereafter commenced in respect of any such matter or thing, may be prosecuted, continued and defended as if such Acts and enactments had not been repealed.

2. Nothing in any of the Acts mentioned in Schedule A shall affect the crime of High Treason, except only as respects cases punishable under the provisions of the "*Act for the better security of the Crown and of the Government,*" mentioned in the said Schedule.

3. The provisions in the Act respecting procedure in criminal cases and other matters relating to criminal law, as to the number of peremptory challenges allowed to prisoners in criminal cases, shall not apply to any trial to be had in the Province of New Brunswick, before the first day of January, in the year of our Lord one thousand eight hundred and seventy-one; and until after the said day, a warrant issued by a Justice of the Peace in the said Province, may as heretofore be executed in any part thereof, without being backed.

4. No provision in any of the Acts mentioned in the said Schedule A requiring any warrant or document issued or granted by any Justice of the Peace, to be under seal, shall apply to any such instrument or document issued or granted in the Province of New Brunswick before the day last aforesaid; and if, in any such instrument or document issued in any Province in Canada at any time, it is stated that the same is given

under the hand and seal of any justice signing it, such seal shall be presumed to have been affixed by him, and its absence shall not invalidate the instrument, or such justice may at any time thereafter affix such seal with the same effect as if it had been affixed when such instrument was signed.

5. Notwithstanding any provision in any of the Acts mentioned in Schedule A, that any term of imprisonment less than two years shall be in some gaol or place of confinement other than the penitentiary, any offender sentenced under any such Act before the day last aforesaid in New Brunswick or Nova Scotia, to imprisonment for a term less than two years, may, in the discretion of the Court passing such sentence, be sentenced to undergo such imprisonment in the penitentiary of the Province where the sentence is passed, instead of being sentenced to undergo the same in any other gaol or place of confinement, and any such provision as first aforesaid, shall be construed subject to this section.

6. In all cases when a party who has entered into a recognizance under the Act "*respecting the duties of Justices of the Peace out of Sessions, in relation to summary convictions and orders,*" has failed to appear according to the condition of such recognizance, and his default has been certified by the justice or justices as therein provided, the proper officer to whom the recognizance and certificate of default are to be transmitted in the Province of Ontario, shall be the Clerk of the Peace of the county for which such justice or justices

are appointed or are acting, and the Court of General Sessions of the Peace for such county shall, at its then next sitting, order all such recognizances to be forfeited and estreated, and the same shall be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited before such court; and in the other Provinces of Canada, the "proper officer" to whom any such recognizance and certificate shall be transmitted, shall be the officer to whom like recognizances have been heretofore accustomed to be transmitted under the law in force before the coming into force of the said Act, and such recognizances shall be enforced and collected in the same manner as like recognizances have heretofore been.

7. No return purporting to be made by any Justice of the Peace under the Act last above cited, shall be vitiated by the fact of its including, by mistake, any convictions or orders had or made before him in any matter over which any Provincial Legislature has exclusive jurisdiction, or with respect to which he may have acted under the authority of any provincial law.

8. Any Judge of the Sessions of the Peace or any District Magistrate, in the Province of Quebec, shall in all cases have all the powers vested in two Justices of the Peace by any Act mentioned in Schedule A, or any other Act relating to criminal law, in force in that Province.

9. The foregoing provisions of this Act, and the

repeal of the Acts and enactments therein referred to, shall take effect on and after the first day of January, in the year of our Lord one thousand eight hundred and seventy, and not before, except as to such of the said Acts and enactments as are contrary to or inconsistent with the Acts mentioned in Schedule A, as being passed in the now last Session of the Parliament of Canada, which shall be held to have been repealed from the time when the Act or Acts to or with which they are contrary or inconsistent, came into force.

10. This Act shall be construed as having been passed after the Acts of the present Session mentioned in Schedule A, and as amending and explaining them.

SCHEDULE A.

ACTS OF THE PARLIAMENT OF CANADA.

Acts passed in the Session of 1867–8, 31*st Victoria.*

CHAPTER.	TITLE.
14	An Act to protect the inhabitants of Canada against lawless aggressions from subjects of foreign countries at peace with Her Majesty.
15	An Act to prevent the unlawful training of persons to the use of arms, and the practice of military evolutions; and to authorize Justices of the Peace to seize and detain arms collected or kept for purposes dangerous to the public peace.

SCHEDULE A.—*Continued.*

CHAPTER.	TITLE.
47	An Act respecting the manufacture or importation of copper coins or tokens.
62	An Act respecting Harbour Police.
69	An Act for the better security of the Crown and of the Government.
70	An respecting Riots and Riotous Assemblies.
71	An Act respecting forgery, perjury and intimidation in connection with the Provincial Legislatures and their Acts.
72	An Act respecting accessories to and abettors of indictable offences.
73	An Act respecting Police of Canada.
74	An Act respecting persons in custody charged with high treason or felony.
75	An Act respecting penitentiaries and the directors thereof and for other purposes.

Acts passed in the present Session of the Parliament of Canada.

An Act to remove doubts as to Legislation in Canada, regarding offences not wholly committed within its limits.

An Act respecting offences relating to the Coin.

An Act respecting Forgery.

An Act respecting offences against the Person.

An Act respecting Larceny and other similar offences.

An Act respecting malicious injuries to Property.

An Act respecting Perjury.

An Act for the better preservation of peace in the vicinity of Public Works.

An Act respecting certain offences relative to Her Majesty's Army and Navy.

An Act for the better protection of Her Majesty's Military and Naval Stores.

An Act respecting Cruelty to Animals.

An Act respecting Vagrants.

An Act respecting Procedure in Criminal Cases and other matters relating to Criminal Law.

An Act respecting the duties of Justices of the Peace, out of Sessions, in relation to persons charged with Indictable Offences.

An Act respecting the duties of Justices of the Peace, out of Sessions, in relation to Summary Convictions and Orders.

An Act respecting the prompt and summary administration of criminal justice in certain cases.

An Act respecting the trial and punishment of Juvenile Offenders.

An Act respecting Juvenile Offenders within the Province of Quebec.

An Act for the more speedy trial in certain cases of persons charged with felonies and misdemeanors, in the Provinces of Ontario and Quebec.

SCHEDULE B.

ACTS OF THE LEGISLATURE OF THE LATE PROVINCE OF CANADA.

Consolidated Statutes of Canada.

Reference to Act.	TITLE OF ACT.	Extent of Repeal.
Chapter 30	An Act respecting the Sale of Intoxicating Liquors near Public Works.	The whole.
Chapter 90	An Act respecting Offences against the State.	The whole.
Chapter 91	An Act respecting Offences against the Person.	The whole.
Chapter 92	An Act respecting Offences against Person and Property.	The whole.
Chapter 93	An Act respecting Arson and other Malicious Injuries to Property.	The whole.
Chapter 94	An Act respecting Forgery.	The whole.
Chapter 96	An Act respecting Cruelty to Animals.	The whole.
Chapter 99	An Act respecting the Procedure in Criminal Cases.	The whole, except sections eighty-seven, ninety-seven, one hundred and twenty, and one hundred and twenty-one.
Chapter 102	An Act respecting the Duties of Justices of the Peace, out of Sessions, in relation to persons charged with indictable Offences.	The whole, except section fifty-nine
Chapter 103	An Act respecting the duties of Justices of the Peace, out of Sessions, in relation to Summary Convictions and Orders.	The whole, except sections seventy-four, seventy-five, seventy-six, seventy-seven, seventy-eight, seventy-nine, eighty, eight-one and eighty-five.

SCHEDULE B.—*Continued.*

Reference to Act.	TITLE OF ACT.	Extent of Repeal.
Chapter 105	An Act respecting the prompt and summary administration of Criminal Justice in certain cases.	The whole, except sections thirty, thirty-one, thirty-two, and thirty-three.
Chapter 106	An Act respecting the trial and punishment of Juvenile Offenders.	The whole, except sections six, seven, and eight.

Acts passed since the Consolidation of the Statutes.

23 V. c. 37	An Act for the further protection of Growing Timber.	The whole.
24 V. c. 7.	An Act to Amend the Law relating to the unlawful Administering of poison.	The whole.
24 V., c. 10	An Act to prevent vexatious Indictments for certain Misdemeanors.	The whole.
24 V. c. 11	An Act to amend *the Prison and Asylum Inspection Act.*	The whole.
24 V. c. 12	An Act to amend the one hundred and eleventh chapter of the Consolidated Statutes of Canada, intituled: "An Act respecting the Provincial Penitentiary of Canada."	The whole.
24 V. c. 14	An Act to abolish the right of Courts of Quarter Sessions and Recorders' Courts to try treasons and capital felonies.	The whole.
24 V. c. 15	An Act to amend the one hundred and second chapter of the Consolidated Statutes of Canada, intituled: "An Act respecting the duties of Justices of the Peace out of Sessions in relation to persons charged with indictable offences."	The whole.

SCHEDULE B.—*Continued.*

Reference to Act.	TITLE OF ACT.	Extent of Repeal.
24 V. c. 26	An Act to amend and consolidate the Laws respecting the Recorder's Court of the City of Quebec.	Section thirty-six.
27-28 V. c. 19	An Act to amend and consolidate the Law respecting Accessories to and Abettors of Indictable Offences, and for other purposes relative to the Criminal Law.	The whole.
29 V. c. 13	An Act for abolishing the Punishment of Death in certain cases.	The whole.
29 V. c. 14	An Act to provide more fully for the punishment of offences against the person, in respect to the crime of Kidnapping.	The whole.
29-30 V. c. 5	An Act to prevent the unlawful training of persons to the use of arms, and to practise military evolutions or exercises; and to authorize Justices of the Peace to seize and detain arms collected or kept for purposes dangerous to the public Peace.	The whole.
29-30 V. c. 121	An Act to incorporate the Canada Vine Growers' Association.	Section sixteen.

Consolidated Statutes for Upper Canada

Chapter 13	An Act respecting the Court of Error and Appeal.	So much as is repealed by or inconsistent with the Act of this Session respecting Procedure in Criminal cases, and other matters relating to Criminal law.

SCHEDULE B —*Continued*

Reference to Act.	TITLE OF ACT.	Extent of Repeal.
Chapter 31	An Act respecting Jurors and Juries.	Sections ninety-nine and one hundred.
Chapter 32	An Act respecting Witnesses and Evidence.	Sections three and four, as to Criminal cases only.
Chapter 97	An Act relating to High Treason, to Tumults and Riotous Assemblies and to other offences.	The whole.
Chapter 99	An Act to prevent the unlawful training of persons in military evolutions and the use of fire-arms: and to authorize the seizure of fire-arms collected for purposes dangerous to the public peace.	The whole, except section three.
Chapter 100	An Act for the punishment of any persons who seduce soldiers or sailors to desert from Her Majesty's service.	The whole.
Chapter 101	An Act respecting Forgery and Perjury in certain cases.	The whole, except section two.
Chapter 108	An Act respecting prosecutions in cases of Misdemeanor.	Section three.
Chapter 110	An Act to allow to any person indicted a copy of the indictment.	The whole.
Chapter 111	An Act respecting amendments at trial.	The whole.
Chapter 113	An Act respecting new trials and appeals, and Writs of Error in criminal cases in Upper Canada.	The whole, except sections five, sixteen, and seventeen.
Chapter 115	An Act respecting the punishment of certain offences, and the commuting of sentence of death in certain cases.	The whole.
Chapter 116	An Act respecting corruption of blood.	The whole.

SCHEDULE B.—*Continued.*

Reference to Act.	TITLE OF ACT.	Extent of Repeal.
Chapter 124	An Act respecting the return of Convictions and Fines by Justices of the Peace and of Fines levied by Sheriffs.	The whole, except section seven.

Acts passed since the Consolidation of the said Statutes.

29-30 V. c. 41	An Act to amend the Law of Crown and Criminal Procedure and Evidence at trial in Upper Canada.	The whole, so far as regards criminal procedure only.
29-30 V. c. 44	An Act respecting Persons in custody charged with High Treason or Felony.	The whole.
29-30 V. c. 50	An Act to amend the Law respecting Appeals in cases of Summary Convictions, and Returns thereof by Justices of the Peace in Upper Canada.	The whole.

Consolidated Statutes for Lower Canada.

Chapter 12	An Act respecting the Desertion of Soldiers.	The whole.
Chapter 13	An Act respecting Arms and Munitions of War.	The whole.
Chapter 77	An Act respecting the Court of Queen's Bench.	Section sixty-three.
Chapter 84	An Act respecting the selecting and summoning of Jurors.	Section thirty-three.
Chapter 98	An Act respecting Appeals from the decisions of Justices of the Peace in Summary Convictions.	Sections one and two.
Chapter 105	An Act respecting certain matters connected with the Administration of Justice in Criminal Matters.	Sections one, three, four and five.

SCHEDULE B.—*Continued.*

ACTS OF THE LEGISLATURE OF THE PROVINCE OF NEW BRUNSWICK.

Revised Statutes—Part IV.

Reference to Act.	TITLE OF ACT.	Extent of Repeal.
Chapter 138	Of Summary Convictions before Justices.	The whole, except section twenty-two, which shall apply to the new Summary Convictions Act.
Chapter 147	Of Offences against the Public Peace.	Sections one, two, three, four and five.
Chapter 148	Of Offences against the Administration of Justice.	The whole.
Chapter 149	Of Homicide and other Offences against the Person.	The whole.
Chapter 150	Of Offences against the habitation.	The whole.
Chapter 151	Of Fraudulent Appropriations.	The whole.
Chapter 152	Of Forgery and Offences relating to the Coin.	The whole.
Chapter 153	Of Malicious Injuries to Property.	The whole, except section sixteen.
Chapter 154	Of other Felonies.	The whole.
Chapter 155	Of the Definition of Terms and Explanations.	The whole.
Chapter 156	Of Proceedings before Indictment.	The whole, except sections seventeen, eighteen, twenty and twenty-two.
Chapter 158	Of Proceedings on Indictment.	The whole, except sections three and twenty-three.

SCHEDULE B.—*Continued.*

Reference to Act.	TITLE OF ACT.	Extent of Repeal.
Chapter 159	Of Trial.	The whole, except sections ten, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, and so much of section twenty-seven as respects the appropriation of the fine in cases of common assault.
Chapter 160	Of Error, Punishment and Expenses.	Sections two, three, four, five, six, seven and thirteen.
The Schedules to Part IV.	.....	The whole, except Schedule U.

Acts passed since the revision of the Statutes.

21 V. (1858) c. 22	An Act in amendment of the Criminal Law.	The whole, except sections three and five.
23 V. (1860) c. 32	An Act relating to Procedure in Criminal Cases.	Sections three and five.
23 V. (1860) c. 33	An Act in amendment of the Law relating to Summary Convictions.	The whole.
23 V. (1860) c. 34	An Act to amend the Law relating to False Pretences.	The whole.
24 V. (1861) c. 10	An Act to prevent the carrying of Deadly Weapons about the Person.	The whole.

SCHEDULE B.—*Continued.*

Reference to Act.	TITLE OF ACT.	Extent of Repeal.
25 V. (1862) c. 10	An Act to amend the Law relating to Offences against the Person.	The whole.
25 V. (1862) c. 21	An Act for taking away the Punishment of Death in certain cases, and substituting other Punishments in lieu thereof.	The whole.
27 V. (1864) c. 4	An Act further to amend the Law relating to Offences against the Person.	The whole.
27 V. (1864) c. 6.	An Act relating to Larceny and other similar Offences.	The whole.
27 V. (1864) c. 8	An Act relating to the issuing of Warrants by Justices of the Peace, and in aid of Police Officers and Constables in the execution of their duties.	Section one.
30 V. (1866) c. 9	An Act respecting Offences relating to the Army and Navy.	The whole.

ACTS OF THE LEGISLATURE OF THE PROVINCE OF NOVA SCOTIA.

Revised Statutes—Third Series—Parts III and IV.

Chapter	136	Of Juries.	Section fifty-one, and section fifty-seven so far as regards criminal cases.
Chapter	156	Of Treason.	The whole.
Chapter	157	Of Offences relating to the Army and Navy.	The whole.
Chapter	159	Of Offences against Religion.	Sections one and three.
Chapter	161	Of Offences against the Law of Marriage.	Sections one and two.

SCHEDULE B.—*Continued.*

Reference to Act.	TITLE OF ACT.	Extent of Repeal.
Chapter	162 Of Offences against the Public Peace.	Sections one, two, three and four.
Chapter	163 Of Offences against the Administration of Justice.	The whole.
Chapter	164 Of Offences against the person.	The whole.
Chapter	166 Of Offences against the Habitation	The whole.
Chapter	167 Of Fraudulent Appropriations.	The whole.
Chapter	168 Of Forgery and Offences relating to the Coin.	The whole.
Chapter	169 Of Malicious Injuries to Property.	The whole.
Chapter	170 Of the Definition of Terms in this Title.	The whole.
Chapter	171 Of the Administration of Criminal Justice in the Superior Court.	The whole, except sections fifty-nine, sixty, sixty-one, sixty-two, sixty-three, sixty-four, sixty-five, sixty-six, sixty-seven, seventy-five, eighty-six, eighty-seven, eighty-eight, eighty-nine, ninety, ninety-one, ninety-four, ninety-five, ninety-six, ninety-seven, ninety-eight, ninety-nine, one hundred, one hundred and one, one hundred and two, one hundred and three, and the schedule to the said chapter.
Chapter	172 Of the Duties of Justices of the Peace in Criminal Matters.	The whole.

SCHEDULE B.—*Continued.*

Acts passed since the Revision of the Statutes.

Reference to Act.	TITLE OF ACT.	Extent of Repeal.
27 V. (1864) c. 9	An Act in addition to Chapter 167 of the Bill for Revising and Consolidating the General Statutes of Nova Scotia, "Of Offences against the Person."	The whole.
29 V. (1866) c. 19	An Act in addition to and to amend Chapter 169 of the Revised Statutes, "Of Malicious Injuries to Property."	The whole.
29 V. (1866) c. 37	An Act to provide for the seizure of Arms and Munitions of War.	The whole.
29 V. (1866) c. 38	An Act for the better security of Crown and the Government of Nova Scotia against Treasonable and Seditious Practices and Attempts.	The whole.
30 V. (1867) c. 13	An Act to amend Chapter 157 of the Revised Statutes of Nova Scotia (third series) "Of Offences relating to the Army and Navy."	The whole.

34 VIC. CHAP. 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.

[*Assented to 14th April*, 1871.]

HER MAJESTY, by and with the consent of the Senate and House of Commons of Canada, enacts as follows:—

1. The following Statutes of the Parliament of Canada, passed in the session held in the thirty-second and thirty-third years of the reign of Her Most Gracious Majesty, are and each of them is hereby extended to, and shall henceforth have the force and effect of law within the Province of Manitoba, save and except in so far only as any provision of the said Statutes may therein be declared to be applicable to another Province only, that is to say:—

Chapter eighteen, intituled "*An Act respecting offences relating to the Coin.*"

Chapter nineteen, intituled "*An Act respecting Forgery.*"

Chapter twenty, intituled "*An Act respecting offences against the Person.*"

Chapter twenty-one, intituled "*An Act respecting Larceny and other similar offences.*"

Chapter twenty-two, intituled "*An Act respecting Malicious injuries to property.*"

Chapter twenty-three, intituled, "*An Act respecting Perjury,*" as amended by the Act thirty-three Victoria, Chapter twenty-six.

Chapter twenty-four, intituled "*An Act for the better preservation of the public peace, in the vicinity of Public Works,*" as amended by Act thirty-three Victoria, Chapter twenty-eight

Chapter twenty-five, intituled "*An Act respecting certain Offences relative to Her Majesty's Army and Navy.*"

Chapter twenty-six, intituled "*An Act for the better preservation of Her Majesty's Military and Naval Stores.*"

Chapter twenty-seven, intituled "*An Act respecting Cruelty to Animals,*" as amended by the Act thirty-three Victoria, Chapter twenty-nine.

Chapter twenty-eight, intituled "*An Act respecting Vagrants.*"

Chapter twenty-nine, intituled, "*An Act respecting Procedure in Criminal Cases, and other matters relating to Criminal Law.*"

Chapter thirty, intituled "*An Act respecting the duties of Justices of the Peace out of Sessions in relation to persons charged with indictable offences.*

2. The court known as the General Court now and heretofore existing in the Province of Manitoba, 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.

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.

4. Whenever from the number of challenges, or any other cause, there is in any such case, a deficieney 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 petty jurors.

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.

6. All provisions of law heretofore in force in the country now constituting the Province of Manitoba, inconsistent with, or repugnant to the provisions of this Act, or inconsistent with or repugnant to any of the Statutes enumerated in the first section of this Act, are hereby repealed: Provided always that no person shall, by reason of the passing of this Act, be liable to any punishment or penalty for any act done before the passing thereof, for which he would not have been liable to any punishment or penalty under the laws in force in the said Province or the territory now constituting it at the time such act was done, nor shall any person by reason of the passing of this Act be liable to any greater or other punishment for any offence committed before the passing thereof, than he would have been liable to under the laws then in force as aforesaid; and this Act and the Acts hereby extended to the said

Province shall apply only to the Procedure in any such case, and the penalty or punishment shall be the same as if this Act had not been passed.

7. In the absence of any penitentiary building, any common gaol or other place of confinement in the Province of Manitoba, shall be held to be a penitentiary for the confinement and reformation of persons male and female, lawfully convicted of crime before the Courts of Manitoba, and sentenced to confinement for life or for a term of not less than two years; and whenever any offender is punishable by imprisonment, such imprisonment, whether it be for life or two years, or for any longer term, shall be in any such common gaol, or other place of confinement, according to the judgment of the court.

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37 VIC. CHAP. 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.

[*Assented to 26th May*, 1874.]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. The Statutes of the Parliament of Canada, passed

in the sessions held respectively in the thirty-first and in the thirty-second and thirty-third, and in the thirty-third years of the reign of Her Most Gracious Majesty, and mentioned in the Schedule to this Act, are and each of them is hereby extended to, and shall have the force and effect of law within the Province of British Columbia, save and except in so far only as any provision of any such Statute may therein be declared to be applicable to one or more only of the Provinces composing the Dominion at the time of the passing of such Statute and mentioned therein.

2. In case any of the said Acts, or any enactment or provision therein has force or effect in relation to one of the Provinces composing the Dominion at the time of its passing, in a sense peculiar to that Province, and different from the sense in which it has force and effect in relation to all the said Provinces as a whole, such Act, enactment or provision shall have force and effect within and in relation to the Province of British Columbia, in the last mentioned sense only.

3. Nothing in this Act shall be construed as a declaration that any of the said Acts, or any part thereof had not or has not or would not have without the passing of this Act, force or effect in and in relation to the Province of British Columbia.

4. Nothing in this Act shall be construed to give a retroactive effect to any of the Acts hereby extended, or to any enactment or provision therein, so as to make any act done before it comes into force a crime or of-

fence if it would not be so without this Act, or to alter the punishment for any crime or offence committed before it comes into force, but such crime or offence shall be tried, and all procedure respecting it, after the said time, shall be had under the provisions of the said Act.

5. 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 in due course of law, 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.

6. In the absence of any penitentiary building, any common gaol, or other place of confinement in the Province of British Columbia, shall be held to be a penitentiary for the confinement and reformation of persons, male and female, lawfully convicted of crime before the Courts of British Columbia, and sentenced to confinement for a term of not less than two years; and whenever any offender is punishable by imprisonment, such imprisonment, whether it be for life or two years, or for any longer term, shall be in any such common gaol, or other place of confinement, according to the judgment of the Court.

7. So much of every law in force in the Province of British Columbia, at the time of the passing of this Act, as is inconsistent with or repugnant to any of the en-

actments or provisions of any Act of the Parliament of Canada mentioned in the schedule to this Act, or makes any provision for any matter provided for by any of the said enactments or provisions, is hereby repealed; but this repeal shall not affect the past operation of any such law, or the validity of anything already done, or any right, title, obligation or liability already accrued, or any penalty or forfeiture already incurred thereunder.

8. This Act shall commence and take effect on, from and after the first day of January next after the passing thereof.

SCHEDULE A.

ACTS OF THE PARLIAMENT OF CANADA REFERRED TO IN THE FIRST SECTION OF THIS ACT.

Acts passed in the First Session, 31st Victoria, 1867, 1868.

Chap. 14. An Act to protect the inhabitants of Canada against lawless aggressions from subjects of foreign countries at peace with Her Majesty.

" 15. An Act to prevent the unlawful training of persons to the use of arms, and the practice of military evolutions, and to authorize Justices of the Peace to seize and detain arms collected or kept for purposes dangerous to the public peace

Chap. 69. An Act for the better security of the Crown and of the Government. (As amended by 32-33 Vic. chap. 17.)

" 70. An Act respecting riots and riotous assemblies.

" 71. An Act respecting forgery, perjury, and intimidation in connection with the Provincial Legislatures and their Acts.

" 72. An Act respecting Accessories to and Abettors in indictable offences.

" 73. An Act respecting the Police of Canada.

" 74. An Act respecting persons in custody charged with high treason or felony.

" 94. An Act respecting the Treaty between Her Majesty and the United States of America for the apprehension and surrender of certain offenders. (As amended by 33 Vic. chap. 25.)

Acts passed in the Second Session, 32-33 Victoria, 1869.

Chap. 17. An Act to remove doubts as to legislation in Canada regarding offences not wholly committed within its limits.

" 18. An Act respecting offences relating to the coin.

" 19. An Act respecting forgery.

" 20. An Act respecting offences against the Person. (As amended by 36 Vic. chap. 50.)

" 21. An Act respecting Larceny and other similar offences. (As amended by 35 Vic. chaps 33 and 35.)

Chap. 22. An Act respecting Malicious Injuries to property. (As amended by 35 Vic. chap. 34.)

" 23. An Act respecting Perjury. (As amended by 33 Vic. chap. 26.)

" 24. An Act for the better preservation of the Peace in the vicinity of Public Works. (As amended by 33 Vic. chap. 28.)

" 25. An Act respecting certain offences relative to Her Majesty's Army and Navy.

" 26. An Act for the better protection of Her Majesty's Military and Naval Stores.

" 27. An Act respecting Cruelty to Animals. (As amended by 33 Vic. chap. 29.)

" 28. An Act respecting Vagrants.

" 29. An Act respecting Procedure in Criminal Cases, and other matters relating to Criminal Law. (As amended by 36 Vic. chaps. 3 and 51.)

" 30. An Act respecting the duties of Justices of the Peace out of Sessions in relation to persons charged with indictable offences.

" 31. An Act respecting the duties of Justices of the Peace out of Sessions in relation to Summary Convictions and Orders.

" 32. An Act respecting the prompt and summary administration of criminal justice in certain cases. [In applying this Act to British Columbia, the expression "competent magistrate" shall be construed as meaning any two Justices of the Peace sitting together, as well as any function-

ary or tribunal having the powers of two Justices of the Peace, and the jurisdiction shall be absolute without the consent of the parties charged.]

Chap. 33. An Act respecting the trial and punishment of juvenile offenders. [In applying this Act to British Columbia, the expression "any two or more justices" shall be construed as including any magistrate hav- the powers of two Justices of the Peace. This Act shall not apply to any offence punishable by imprisonment for two years and upwards, and it shall not be necessary that the recognizance be transmitted to any Clerk of the Peace.

Acts passed in the Third Session, 33rd Victoria, 1870.

Chap. 25. An Act to amend the Act respecting the extradition of certain offenders to the United States of America.

" 26. An Act to amend the Act respecting Perjury.

" 27. An Act to amend the Act respecting the duties of Justices of the Peace out of Sessions in relation to Summary Convictions and Orders.

" 28. An Act to amend an Act for the better preservation of the Peace in the vicinity of Public Works.

" 29. An Act to amend an Act respecting cruelty to Animals.

Chap. 31. An Act for the better protection of the Clothing and Property of Seamen in Her Majesty's Navy.

Acts passed in the present Session, 37 Victoria, 1874.

Any Act amending any of the Acts in this Schedule.

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38 VIC. CHAP. 39.

An Act to amend the provisions of "*An Act to amend the Criminal Law relating to Violence, Threats and Molestation.*"

[*Assented to 8th April, 1875*]

WHEREAS it is expedient to amend the provisions of the Act of the thirty-fifth year of Her Majesty's reign, chapter thirty-one, entitled "*An Act to amend the Criminal Law relating to violence, threats and molestation*;" Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. The first section of the Act of the thirty-fifth year of Her Majesty's Reign, chapter thirty-one, entitled "*An Act to amend the Criminal Law relating to violence, threats and molestation,*" is hereby repealed, and instead thereof it is enacted as follows, that is to say:—

"Every person who does any of the following acts with the view as hereinafter mentioned, that is to say, who—

1. Uses violence to any other person, or to the property of any other person; or

2. Threatens or intimidates any other person in such manner as would justify a justice of the peace (on complaint made to such justice) in binding over to keep the peace the person so threatening or intimidating; or

3. Molests or obstructs any other person—

a. By persistently following him about from place to place; or

b. By following him in or through any street or road, with two or more persons, in a disorderly manner; or

c. By hiding or depriving him of, or hindering him in the use of any tools, clothes or property owned or used by him, with a view, in the case of any such act as aforesaid, thereby to coerce such other person,—

1. Being a master, to dismiss or to cease to employ any workman, or being a workman to quit any employment, or to return work before it is finished; or

2. Being a master, not to offer, or being a workman, not to accept, any employment or work; or

3. Being a master or workman, to belong or not to belong to any temporary or permanent association or combination; or

4. Being a master or workman, to pay any fine or penalty imposed by any temporary or permanent association or combination; or

5. Being a master, to alter the mode of carrying on his business, or the number or description of any persons employed by him, with a view to coerce such master or other person;—

Shall be liable to imprisonment, for a term not exceeding three months.

2. A prosecution shall not be maintainable against a person for conspiracy to do any act, or to cause any act to be done for the purposes of a trade combination, unless such act is an offence indictable by statute or is punishable under the provisions of this Act; nor shall any person, who is convicted upon any such prosecution, be liable to any greater punishment than is provided by such statute or by this Act for the act of which he may have been convicted as aforesaid.

3. For the purposes of this Act, "trade combination" means any combination between masters or workmen or other persons, for regulating or altering the relations between any persons being masters or workmen, or the conduct of any master or workman in or in respect of his business or employment, or contract of employment or service, and the word "act" includes a default, breach, or omission.

38 VIC. CHAP. 40.

An Act to amend the Act intituled "*An Act respecting Larceny and other similar offences.*"

[*Assented to 8th April*, 1875.]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Section one hundred and eleven of the Act passed in the Session held in the thirty-second and thirty-third years of Her Majesty's reign, and intituled "*An Act respecting Larceny and other similar offences,*" is hereby repealed, and the following substituted to be read in lieu thereof:

"111. Whosoever without the consent of the owner "thereof, takes, holds or keeps in his possession, or "collects, or conceals, or receives, or appropriates, or "purchases, or sells or causes or procures or assists to "be taken possession of, or collected, or concealed, or "received, or appropriated, or purchased, or sold, any "timber, mast, spar, saw-logs or other description of "lumber which is found adrift in any river, stream or "lake, or cast ashore on the bank or beach of any "river, stream or lake; or whosoever without the con"sent of the owner thereof wholly or partially defaces "or adds, or causes or procures to be defaced or added, "any mark or number on any such timber, mast, spar,

" saw-log or other description of lumber, or whoso-
" ever makes, or causes or procures to be made any
" false or counterfeit mark on any such timber, mast,
" spar, saw-log or other description of lumber, or who-
" soever refuses to deliver up to the proper owner
" thereof, or to the person in charge thereof on behalf
" of such owner, or authorized by such owner to
" receive the same, any such lumber, mast, spar, saw-
" log, or other description of lumber, is guilty of a
" misdemeanor, punishable in like manner as simple
" larceny; and in any prosecution, proceeding or trial,
" for any offence under this section a timber mark,
" duly registered under the provisions of the Act passed
" in the thirty-third year of Her Majesty's reign, in-
" tituled '*An Act respecting the marking of timber*,' on
" any timber, mast, spar, saw-log or other description
" of lumber, shall be *prima facie* evidence that the
" same is the property of the registered owner or
" owners of such timber mark, and possession by any
" such offender, or by others in his employ, or on his
" behalf, of any such timber, masts, spar, saw-log, or
" other description of lumber so marked, shall in all
" cases throw upon the person charged with any such
" offence the burden of proving that such timber, mast,
" spar, saw-log, or other description of lumber, came
" lawfully into his possession, or the possession of such
" others in his employ or on his behalf as aforesaid."

(2). " If any constable or peace officer has reasonable
" cause to suspect that any timber, mast, spar, saw-
" log, or other description of lumber, belonging to any
" lumberman or owner of lumber, and bearing the

" registered trademark of such lumberman or owner
" of lumber, is kept or detained in any saw-mill, mill
" yard, boom or raft without the knowledge or consent
" of the owner,—it shall be lawful for such constable
" or peace officer to enter into or upon the same, and
" search or examine, for the purpose of ascertaining
" whether such timber, mast, spar, saw-log, or other
" description of lumber is detained therein without
" such knowlege and consent."

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38 VIC. CHAP. 43.

An Act to amend the Act respecting Procedure in Criminal Cases and other matters relating to Criminal Law.

[*Assented to 8th April, 1875.*]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Section ninety-eight of the Act passed in the Session held in the 32nd and 33rd years of the reign of Her Majesty, entitled "*An Act to amend the Act respecting Procedure in Criminal Cases and other matters relating to Criminal Law*," is hereby repealed, and the following substituted therefor:—

"98. Provided always that the Court before which

"any offender whose age at the time of his trial does "not, in the opinion of the Court, exceed sixteen years, "is convicted, whether summarily or otherwise, of any "offence punishable by imprisonment, may, in its dis- "cretion, sentence such offender to imprisonment in the "the Reformatory Prison (if any) in the Province in "which such conviction takes place; and such im- "prisonment shall in such case be substituted for the "imprisonment in the Penitentiary or other place of "confinement by which the offender would otherwise "be punishable under any Act or law relating thereto, "which shall be construed subject to this provision: "Provided that in no case shall the sentence be less "than two years or more than five years' confinement "in such Reformatory Prison, and in every case where "the term of imprisonment is fixed by law to be more "than five years, then such imprisonment shall be in "the Penitentiary."

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38 VIC. CHAP. 45.

An Act to amend the Act for the more speedy trial, in certain cases, of persons charged with Felonies and Misdemeanors in the Provinces of Ontario and Quebec.

[*Assented to 8th April.*]

IN amendment of the Act cited in the title to this Act, passed in the Session held in the thirty-second and thirty-third years of Her Majesty's Reign and

chaptered thirty-five; Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Any Judge, Junior Judge or Deputy Judge trying any person under the said Act, in the Province of Ontario, may in his discretion reserve any question of law arising on such trial, for the consideration of the Justices of one of Her Majesty's Superior Courts of Common Law of the said Province, in the same manner and to the same extent as may be done by the Court of General Sessions of the Peace under chapter one hundred and twelve of the Consolidated Statutes for Upper Canada, and the said last named Act shall form and be taken and read as part of the said Act, in the title to this Act mentioned.

2. The powers conferred and imposed upon the Judge, to be exercised and performed under the Act cited in the title to this Act, with and after the consent of the person charged, may be exercised and performed, notwithstanding that the Court before which, but for such consent, the said person would be triable for the offence charged, or the Grand Jury thereof, may then be in Session.

3. If one of two or more prisoners charged with the said offence, demands a trial by Jury, and the other or others consent to be tried by the Judge without a Jury, the Judge in his discretion, may remand the said prisoners to gaol to await trial, in all respects as if the Act cited in the title had not been passed.

38 VIC. CHAP. 47.

An Act for the more speedy trial before Police and Stipendiary Magistrates in the Province of Ontario of persons charged with Felonies or Misdemeanors.

[*Assented to 8th April*, 1875.]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

1. In case any person is charged in Ontario before a Police Magistrate or before a Stipendiary Magistrate in any county, district or provisional county in Ontario, with having committed any offence for which he may be tried at a Court of General Sessions of the Peace, or in case any person is committed to a gaol in the county, district or provisional county under the warrant of any Justice of the Peace for trial on a charge of being guilty of any such offence, such person may with his own consent be tried before such Magistrate, and may, if found guilty, be sentenced by the Magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions.

2. The proceedings upon and subsequent to such trial shall be, as nearly as may be, the same as upon a trial under the Act of the Parliament of Canada passed in the Session held in the thirty-second and thirty-third years of Her Majesty's reign, intituled "*An Act*

respecting the prompt and Summary Administration of Criminal Justice in certain cases."

3. Every conviction under this Act shall have the same effect as a conviction upon indictment for the same offence would have had, save that no conviction under this Act shall be attended with forfeiture beyond the penalty (if any) imposed in the case.

4. Every person who obtains a certificate of dismissal, or is convicted under this Act, shall be released from all further or other criminal proceedings for the same cause.

5. No conviction, sentence or proceeding under this Act shall be quashed for want of form; and no warrant of commitment upon a conviction shall be held void by reason of any defect therein if it be therein alleged that the offender has been convicted, and there be a good and valid conviction to sustain the same.

6. If any person has, under this Act, or under the said Act passed in the session held in the thirty-second and thirty-third years of Her Majesty's reign, chaptered thirty-two, or under any other Act giving such election, been asked to elect whether he should be tried by the Magistrate or before a jury, and has elected to be tried before a jury, then in such case such election is stated in the warrant of committal for trial or upon the depositions, the Sheriff or the County Judge, or Junior or Deputy Judge, shall not be required to take the proceedings directed by the Act passed in the said

Session, and chaptered thirty-five, entitled "*An Act for the more speedy trial in certain cases of persons charged with Felonies and Misdemeanors in the Provinces of Ontario and Quebec;* and in all such cases it shall be the duty of the committing Magistrate to state in the warrant the fact of such election having been made.

7. If the Magistrate is of opinion from any circumstances appearing in the case that the charge cannot be properly disposed of before him, he may at any time before the person charged has made his defence decide not to adjudicate summarily thereon, and may thereupon deal with the same as if this Act had not been passed, and in such case such prisoner may be afterwards tried summarily by his own consent at the County Judge's Criminal Court.

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38 VIC. CHAP. 48.

An Act to repeal certain provisions of an Act of the Legislature of Nova Scotia, respecting petty offences, trespasses and assaults.

[*Assented to 8th April* 1875.]

WHEREAS the sections hereinafter mentioned, of chapter one hundred and forty-seven of the Revised Statutes of Nova Scotia, third series, intituled "*Of petty offences, trespasses and assaults,*" contain pro-

visions which are inconsistent with the Acts of the Parliament of Canada, passed in the session held in the thirty-second and thirty-third years of Her Majesty's reign, respecting the criminal law, or have become unnecessary and inconvenient since the passing of 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:—

1. The first ten sections of the first Act mentioned in the preamble of this Act, are hereby repealed: Provided that the express repeal of the said sections by this Act shall not be construed as declaring that the said sections were, or were not virtually repealed by the passing of the Acts mentioned in the preamble

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