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* v. *Ambrose*, 3 *B. & C.* 746, that if a witness called to prove a fact prove the contrary, his credit could not be impeached by general evidence, but, in *R.* v. *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 new law, by the said case of *R.* v. *Ball*, *ubi supra*. See *R.* v. *Little*, 15 *Cox*, 319.

235. Upon any trial, a witness may be cross-examined as to previous statements made by him in writing, or reduced to 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: Provided, that a deposition of the witness, purporting to have been taken before a justice on the investigation of the charge, and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer, shall be presumed *primâ facie* to have been signed by the witness.—32-33 *V.*, *c.* 29, *s.* 64, 40 *V.*, *c.* 26, *s.* 5.

The words "upon any trial" mean "upon any trial *in any criminal case.*" This enactment is sec. 5 of 28 V., c. 18, of the Imperial statutes, *an Act for amending the law of evidence and practice on criminal trials*: upon which see 2 *Taylor, Ev.*, *pars.* 1301, 1302, 1303; 3 *Russ.* 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, 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.* v. *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. The prosecution cannot use or refer to the depositions without putting them in.—*R.* v. *Muller*, 10 *Cox*, 43.

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 Ev., par.* 1295.

236. 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 shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.—32-33 *V., c.* 29, *s.* 69.

This enactment is taken from s. 4 of the 28 V., c. 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.* v. *Lee*, 2 *Lewin*, 154, held that if a witness denies that he has tampered with the other witnesses, evidence to contradict him cannot be received. 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 has previously cross-examined such witness as to such declarations or acts.

VARIANCES—RECORDS.

237. Whenever, 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 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.—32-33 *V., c.* 29, *s.* 70.

This enactment is taken from the 11-12 V., c. 46, s. 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.* v. *Powell*, 2 *East, P. C.* 976; *see post*, remarks under the next section.

In a case of libel, there was no allegation in the indictment, that the article complained of had been circulated in the district of Montreal, where the offence was laid: *Held*, that an amendment to cure that defect could not be allowed.—*R.* v. *Hickson*, 3 *L. N.* 139.

238. 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 mis-statement 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 is 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.—32-33 *V.*, *c.* 29, *s.* 71.

239. After any such amendment the trial shall proceed, whenever the same is proceeded with, in 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.—32-33 *V.*, *c.* 29, *s.* 72.

240. In such case the order for the amendment shall be indorsed on the record; and all other rolls and proceedings connected therewith shall be amended accordingly by the proper officer and filed with the indictment, among the proper records of the court.—32-33 *V.*, *c.* 29, *s.* 73.

241. 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.—32-33 *V.*, *c.* 29, *s.* 74.

242. 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.—32-33 *V.*, *c.* 29, *s.* 75.

243. If it becomes necessary to draw up a formal record in any case in which 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.—32-33 *V.*, *c.* 29, *s.* 76.

These clauses are taken from the 14-15 V., c. 100, of the Imperial statutes (Lord Campbell's act), in relation to which *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, varying 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 indict-

ment. 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 V., c. 46, s. 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. And the provisions of this act were extended to the sessions, as far as they are applicable to offences within their jurisdiction, by the 12-13 V., c. 45, s. 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 a 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."

(By the interpretation clause of the Procedure Act, 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 account was so delivered, though the plaintiff's case was not closed.—*Cleave* v. *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 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 Winkill, 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 defendant 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* v. *Dutton*, 7 *M. & W.* 157. The amendment was made under the 3 & 4 Wm. IV., c. 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.—*R.* v. *Deeley*, 1 *Moo. C. C.* 303; or as 'Ann Gooding,' where the register described her as 'Sarah Ann Gooding:' *R.* v. *Gooding*, *C. & M.* 297. In an indictment for night poaching describing a wood as 'The Old Walk,' its real name being 'The Long Walk.'—*R.* v. *Owen*, 1 *Moo. C. C.* 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.'—*R.* v. *Loom*, 1 *Moo. C. C.* 160; or 'ewe.'—*R.* v. *Puddifoot*, 1 *Moo. C. C.* 247; 'a filly,' which was a 'mare:' *R.* v. *Jones*, 2 *Russ.* 364; 'a spade,' which turned out to be the iron part, without any handle.—*R.* v. *Stiles*, 2 *Russ.* 316. 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.—*R.* v. *Brookes*, *C. & M.* 543; *R.* v. *Jackson*, 2 *Russ.* 49, 76.

"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 versâ*, 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 rendered 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* v. *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* v. *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* v. *Stratford*, 13 *M. & W.* 379. But if the amendment would substitute a different transaction from that alleged, it ought not to be made: *Perry* v. *Watts*, 3 *M. & G.* 775; *Brashier* v. *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* v. *Watts*, 3 *M. & G.* 775; *Brashier* v. *Jackson*, 6 *M. & W.* 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. c. 15; *R.* v. *Cooke*, 7 *C. & P.* 559; *R.* v. *Hewins*, 9. *C. &. P.* 786. These cases occurred at a time when amendments in criminal cases were looked upon with great disfavor; but the opinion of the Legislature, evidenced by the 11-12 V., c. 46, s. 4, the 12-13 V., c. 45, sec. 10, and the present statute, clearly is in favor 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. c. 15, and the 3 4 Wm. IV. c. 42, sec. 23, *being remedial acts*, have always received a liberal construction; *Smith* v. *Brandram*, 2 *M. & G.* 244;

Smith v. *Knoweldon*, 2 *M. & G.* 561; *Sainsbury* v. *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* v. *Edwards*, 5 *B. & A.* 1065.

"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., *Brashier* v. *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 V., c. 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 term 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 *amend-*

ment 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 *Russ.* 321; and *Greaves'* remarks, *ante*, on the English Statute.

Greaves' MSS note.—" In my Preface to Lord Campbell's Acts, I adverted to the great discussion and great difficulty encountered in obtaining the limited power of amendment there mentioned; it was this that led to the specification of the particulars in which amendments might be made, and to the rejection of general words at the end, by which it was intended that every other variance should be amendable if the defendant could not be prejudiced thereby in his defence *on the merits.* The alteration in the Canada Act, from particulars to generalities, is perfectly right. But the other alterations are much to be regretted. In the original clause it is the *variance* which must be not material; as I read the new clauses it is the matter or circumstance that must be not material. It seems that the words "not material" must refer to the immediately preceding words, and cannot refer to "variance," by correct grammatical construction, and the subsequent words "the misstatement of which" make this perfectly clear; for there cannot be a misstatement (in the indictment) of a variance. Fatal variances only occur where the *matter*, which the evidence negatives or fails to prove, is material, and therefore very serious questions may arise as to the power to amend.

"The words "the defendant cannot be prejudiced thereby (by the amendment) in his defence on such merits" are the very pith of the clause in the original. But, as is extremely well pointed out at p. 332 (Vol. 2, of 1st edition of Taschereau's Crim. Acts,) it is not the defendant, but the prosecutor, who is prejudiced by a misstatement, *ubi supra*.

Another objection to the new clause is that by the original act, the court may amend "*if it shall consider* such variance not material," etc.; whereas the new clause omits this altogether, and makes the question turn upon the very words of the clause; and the insertion of "may" afterwards before "order" is by no means equivalent or a substitution for the omitted words; but is only a change of the word, from before to after "not material," etc.

Section 242 is an enactment *ex majori cautelâ*, and section 243 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, Ev., par.* 205; but, whilst in England, the provision re-enacted in our section 243 applies to all amendments made under the act, including those made in virtue of the enactment reproduced in section 143 of our Procedure Act (see *ante*,) it is clear that the substitution of the words "as aforesaid" in the said section 243 of our 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 143 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 237.

Greaves, in 3 *Russ.* 324, has the following remarks on the English statute:—

"It has been well laid down by a very learned judge (Byles, J., in *R.* v. *Welton*, 9 *Cox*, 297,) that a statute like the 14-15 V., c. 100, should have a wide construction, and should not be interpreted in favor 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 *R.* v. *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.—*R.* v. *Fullarton*, 6 *Cox*, 194.

But it must be made before verdict.—*R.* v. *Frost, Dears.* 474; *R.* v. *Larkin, Dears.* 365; *R.* v. *Oliver*, 13 *Cox*, 588.

"Upon full consideration," says *Greaves*, 3 *Russ.* 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 should 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.—*R.* v. *Barnes, L. R.* 1 *C. C.* 45.

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.—*R.* v. *Pritchard, L. & C.* 34; *R.* v. *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.—*R.* v. *Vincent*, 2 *Den.* 464; *R.* v. *Senecal*, 8 *L. C. J.* 287. See *Cornwall* v. *R.* 33 *U. C. Q. B.* 106, *and R.* v. *Jackson*, 19 *U. C. C. P.* 280.

In *R.* v. *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.—*R.* v. *Sturge*, 3 *E. & B.* 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 barley*, it was held that the words *stack of barley* might be inserted instead of *barn*.—*R.* v. *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."—*R.* v. *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 held that the judge had power so to amend.—*R.* v. *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."—*R.* v. *Marks*, 10 *Cox*, 367; see *R.* v. *Sénécal*, 8 *L. C. J.* 287.

The description of an act of parliament, in an indictment may be amended by the court of criminal appeal.—*R.* v. *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 amend-

ment was right.—*R.* v. *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 forgery, 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.—*R.* v. *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: *R.* v. *Shott*, 3 *C. & K.* 206. The offence as charged in this case was a misdemeanor; the offence as proved, and as desired to be substituted by amendment, was a felony, and a felony cannot, by amendment, be substituted for a misdemeanor; or *vice versâ*.—See *R.* v. *Wright*, 2 *F. & F.* 320.

The words "felonious" or "feloniously," if omitted, can never be allowed to be inserted: 1 *Russ.* 935, *note a* by *Greaves.* An amendment altering the nature or quality of the offence charged cannot be allowed.

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.—*R.* v. *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 *Russ.* 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.—*R.* v. *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 stricking out the word "wife," and inserting the word "widow."—*R.* v. *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., *R.* v. *James*, 12 *Cox*, 127.

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 V., c. 100, sec. 1.—*R.* v. *Gumble*, 12 *Cox*, 248.

The words "with intent to defraud" allowed to be struck out of an indictment. The "merits of the case" in the above sec. 238 means the justice of the case as regards

the guilt or innocence of the prisoner, and "his defence on the merits" means a substantial, and not a formal or technical defect.—*R.* v. *Cronin*, 36 *U. C. Q. B.* 342.

If an indictment for libel contains merely a general allegation that the newspaper in which it appeared circulated in the district of Montreal, an amendment for the purpose of alleging publication in that District of the special article complained of is not allowable.—*R.* v. *Hickson*, 3 *L. N.* 139.

244. 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 are, from time to time, 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 are therein designated.—32-33 *V.*, *c.* 29, *s.* 77.

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 146, *ante*,) that it will be necessary to draw up a formal record, as sections 230 and 231 (see *ante*) of the Procedure Act take away the necessity of so doing in the 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 244.

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*, 165; 1 *Starkie, Cr. Pl.* 233; 2 *Hawkins*, 349; 1 *Chit.* 325; *Archbold*, 37; 1 *Bishop, Cr. Proc.* 655.

The form of the caption is as follows:

Dominion of Canada.
Province of Quebec. } In the Court of Queen's Bench,
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, etc., as follows, and by sec. 244 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 *Chit.* 338; *Archbold*, 78.

Then the record, when made up, instead of the words "whereupon the sheriff of the aforesaid district is commanded," etc., 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)," etc.

In the report of the case of *Mansell* v. *R.*, *Dears. & B.* 375, may be seen a lengthy form of a record with all the proceedings on the challenges of jurors; also in *R.* v. *Fox*, 10 *Cox*, 502; *Whelan* v. *R.*, 28 *U. C. Q. B.* 2; *Holloway* v. *R.*, 2 *Den.* 287; and 4 *Blackstone, Appendix.*

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* v. *R.*, cited *supra*, it was held in Upper Canada, that if, notwithstanding sec. 244 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.

In *R.* v. *Aylett*, 6 *A. & E.* 247, and *R.* v. *Marsh*, 6 *A. & E.* 236, it was held that it is not necessary to name the grand jurors in the caption.

FORMAL DEFECTS CURED AFTER VERDICT.

245. No judgment upon any indictment for any felony or misde meanor, 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 and 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 "agains the form of the statutes," or *vice versâ, or the omission of such words or words of like import,*—nor because any person mentioned in the indictment is designated by a name of office or other descriptive appellation, instead of his proper name, *nor for 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.—32-33 *V.*, c. 29, s. 78.

This clause is taken from the 7 Geo. IV. c. 64, s. 20 of the Imperial Statutes; the words given in *italics* are not in the Imperial Act.

See *Heymann* v. *R.*, 12 *Cox*, 383 and *R.* v. *Knight*, 14 *Cox*, 31 as to aider by verdict and what defects are cured by verdict.

Verdict will only cure defective statements. An absolute and total omission in the indictment is not cured by verdict.—*R.* v. *Bradlaugh*, 14 *Cox*, 68.

No amendment allowed after verdict.—*R.* v. *Oliver*, 13 *Cox*, 588.

In an indictment for perjury, alleged to have been committed in a certain cause, "wherein one Adrien Girardin,

" of the Township of Kingsey, in the district of Arthabaska, " trader, and Thomas Ling, of the same place, farmer, *was* "*defendant.*" The omission of the words *was plaintiff* in the description of the plaintiff held fatal, and conviction quashed.—*R.* v. *Ling,* 5 *Q. L. R.* 359; 2 *L. N.* 410.

In an indictment for obstructing an officer of excise under 27-38 V., c. 3; *Held*—that the omission in the indictment of the averment that at the time of the obstruction the officer was acting in the discharge of his duty under the authority of the said statute was not a defect of substance, but a formal error, which was cured by the verdict.—*Spelman* v. *R.*, 13 *L. C. J.* 154.

The defendant was indicted in the District of Beauharnois for perjury committed in the District of Montreal, but there was no averment in the indictment that he had been apprehended or that he was in custody in the District of Beauharnois at the time of finding the indictment.—*Held* bad, even after verdict.—*R.* v. *Lynch,* 20 *L. C. J.* 187; 7 *R. L.* 553.

A defect such as the omission of the word "company" in an indictment for embezzling money from the Grand Trunk Railway Company of Canada, is cured by verdict. —*R.* v. *Foreman,* 1 *L. C. L. J.* 70.

Defect in an indictment cured after verdict.—*R.* v. *Stansfield,* 8 *L. N.* 123; also in *R.* v. *Stroulger,* 16 *Cox,* 85.

An indictment too vague and too general in its language is not cured by verdict.—*White* v. *R.*, 13 *Cox* 318.

246. 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 are disjunctively stated or appear to include more than one offence, or otherwise.*—32-33 *V., c.* 29, *s.* 79.

This clause is taken from 7 Geo. IV. c. 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 similiter is the joinder in issue, contained, in the record (see, *ante,* under section 244 for form of a record) in these words: "And .... who prosecutes for our said Lady the Queen in this behalf, doth the like."

The second 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, coroners,* 54; 1 *Chit.* 514; *Wharton, Law Lexicon, Verbo* "elisors;" *Archbold,* 154. By the above clause, these formalities 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.—See s. 247, *post.*

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 jur or by the sheriff or other officer.—See *Dovey* v. *Hobson*, 2 *Marsh.* 154.

The fourth and most important part of this section 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.*"

What is the meaning of these two last words "*or otherwise,*" is not clear. "Although *they* be disjunctively stated" means "although *the 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 *R.* v. *Ferguson,* 1 *Dears.* 427; *R.* v. *Heywood, L. & C.* 451; *Archbold,* 69; and, remarks under section 105, p. 715, *ante;* also *R.* v. *Davies,* 5 *Cox,* 328.

The words "subjected to a greater degree of punishment" mean greater than it was at common law, as for instance, in s. 38 of c. 162, p. 197, *ante.*

The following decisions on the interpretation of the part of this 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 *R.* v. *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 V., c. 100, s. 49, 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* v. *R.*, 10 *Cox,* 54.

In *R.* v. *Warshaner,* 1 *Moo. C. C.* 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.—*R.* v. *Waverton,* 2 *Den.* 340.

If, before s. 112 of the Procedure Act, 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 246 of the Procedure Act, in such a case, a conviction, upon a writ of error, would have been quashed.—*R.* v. *Bullock, Dears.* 653; *Sill* v. *R. Dears.* 132; *R.* v. *Martin,* 8 *A. & E.* 481.

In *R.* v. *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.—See *Hamilton* v. *R.*, 9 *Q. B.* 271.

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.—*R.* v. *Gray*, *L. & C.* 365.

If an indictment under sec. 83 of *the Larceny Act*, c. 164, p. 444, *ante*, 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 *R.* v. *Wilson*, 2 *Moo. C. C.* 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.—*R.* v. *Goldsmith*, 12 *Cox*, 479.

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

In *R.* v. *Goldsmith*, 12 *Cox*, 483, Chief Justice Bovill said: "I am not aware whether the question has been raised after verdict since the passing of the Statute of 7-8 Geo. IV., c. 64." (sec. 246 of our Procedure Act.)

Section 278, *post*, 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. It is, however, 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 246 of the Procedure Act, by the remarks of the judges in *R.* v. *Goldsmith*, 12 *Cox*, 482; *R.* v. *Watkinson*, 12 *Cox*, 271; *and Heymann* v. *R.*, 12 *Cox*, 383. *Howard* v. *R.*, 10 *Cox*, 54, cited *ante*, is on another statute.

In *R.* v. *Carr*, 26 L. C. J. 61, the court 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 *R.* v. *Deery*, 26 *L. C. J.* 129, the jury found the prisoner guilty on the following count of the indictment, under sec. 10, c. 20, 32-33 Vic. (s. 8, c. 162, p. 147, *ante*). "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 held that, under sec. 246 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. Is it sufficient in an indictment, under the said section 10, of c. 20, 32-33 V., (s. 8. c. 162 p. 147, *ante*,) 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 *R.* v. *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*, 1 *Russ.* 1003, *note g*, and 1004, *note h*, says that it is questionable whether such an indictment is sufficient, even after verdict, relying on *R.* v. *Martin*, 8 *A. & E.* 481, to say that in many cases it is not sufficient, even after verdict, to follow the words of the statute. Against this opinion, the case of *R.* v. *Ryan*, 2 *M. & Rob.* 213, 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 V., c. 100, and the following sections, all contain a count, averring "with intent to commit murder." The question seems unsettled so far, and it will be prudent, in all such indictments, to avoid such a count as much as possible.

In *R.* v. *Carr*, 26 *L. C. J.* 61, 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 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 *R.* v. *Deery*, cited *ante.* In *R.* v. *Deery*, the indictment averred "with intent to commit murder" generally, and was in the express words of the statute, whilst in *R.* v. *Carr* the aver ment 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. Proc.* 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."

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.—*R.* v. *Waters*, 1 *Den.*, 356. See also, *ante*, remarks under section 143 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; *R.* v. *Turner*, 1 *Moo. C. C.* 239.—See Greaves' note in 3 *Russ*, 321; *ante*, under sec. 238-243.

In *R.* v. *Vandercomb*, 2 *Leach* 708, 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 *R.* v. *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 *Chit.* 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 *Chit.* 442.

In *R.* v. *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 prefering another and better indictment against him. See, also, *R.* v. *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 *Chit.* 649, *and R.* v. *Knewland*, 2 *Leach*, 721.

An indictment having been held bad on demurrer, it was quashed so that another indictment might be preferred, not that defendants be discharged.—*R.* v. *Tierney*, 29 *U. C. Q. B.* 181.

In *R.* v. *Bulmer*, *Montreal*, *Nov.*, 1881, though the

indictment had been quashed on demurrer, the court refused to liberate the prisoner, and ordered his detention till the following term.

In *R.* v. *Woodhall*, 12 *Cox*, 240, the verdict was held to be illegal, but the prisoners were bound over to appear at a future session.

247. No omission to observe the directions contained in any Act as respects the qualification, selection, ballotting or distribution of jurors, the preparation of the jurors book, the selecting of jury lists, the drafting panels from the jury lists or the striking of special juries, shall be a ground for impeaching any verdict, or shall be allowed for error upon any writ of error or appeal to be brought upon any judgment rendered in any criminal case.—*C. S. U. C., c.* 31, *s.* 139.

This is a statute of Upper Canada extended to all the Dominion. This clause does not take away the right of challenging the array.

A conviction, not by a special jury, in cases where the statute enacts that an offence shall be tried by a special jury, is a nullity.—*R.* v. *Kerr*, 26 *U. C. C. P.* 214.

COSTS.

248. When any person is convicted on any indictment of any assault, whether with or without battery and wounding, or either of them, such person may, if the court thinks fit, in addition to any sentence which the court deems proper for the offence, be adjudged to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for loss of time as the court, by affidavit or other inquiry and examination, ascertains to be reasonable; and unless the sums so awarded are sooner paid, the offender shall be liable to imprisonment for any term not exceeding three months, in addition to the term of imprisonment, if any, to which the offender is sentenced for the offence.—32-33 *V., c.* 20, *s.* 78, 24-25 *V., c.* 100, *s.* 74.

Greaves' Note.—This and the following clause are new in England; they are taken from the 10 Geo. 4, c. 34, ss. 33, 34 (I.). It had long been the practice in England in

such cases for the courts, after a conviction for an assault, to allow compromises to be made between the parties, and such compromises were legal.—*Beeley* v. *Wingfield*, 11 *East*, 46; *Kerr* v. *Leeman*, 6 *Q. B.* 308; 9 *Q. B.* 371. Such compromises were usually made by the defendant paying a sum of money to the prosecutor to idemnify him for his expenses; but where there was an obstinate defendant, it frequently happened that no compromise could be effected, and the court was sometimes placed in an invidious position. These clauses place it in the power of the court to do full justice, without regard to the wishes or consent of either party.

See next section.

249. The court may, by warrant in writing, order such sum as is so awarded, to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and the surplus, if any, arising from such sale, to the owner; and if such sum is so levied, the offender shall be released from such imprisonment.—32-33 *V.*, *c.* 20, *s.* 79. 24-25 *V.*, *c.* 100, *s.* 75, *Imp.*

See remarks under preceding section. These two sections apply, it seems, to convictions under sections 14, 35, 36 of c. 162, *offences against the person*, and generally to any conviction for assault, including those *under sec.* 191 *of the Procedure Act.*

RESTITUTION OF STOLEN PROPERTY.

250. If any person who is guilty of any felony or misdemeanor, in stealing, taking, obtaining, extorting, embezzling, appropriating, converting or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, is indicted for such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, the property shall be restored to the owner or his representative:

2. In every such case, the court before whom such person is tried for any such felony or misdemeanor shall have power to award, from time to time, writs of restitution for the said property, or to order the

restitution thereof in a summary manner; *and the court may also, if it sees fit, award restitution of the property taken from the prosecutor, or any witness for the prosecution, by such felony or misdemeanor, although the person indicted is not convicted thereof, if the jury declares, as it may do, that such property belongs to such prosecutor or witness, and that he was unlawfully deprived of it by such felony or misdemeanor*:

3. If it appears before any award or order is made, that any valuable security has been *bonâ fide* paid or discharged by any person liable to the payment thereof, or being a negotiable instrument, has been *bonâ fide* taken or received by transfer or delivery, by any person, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by any felony or misdemeanor, been stolen, taken, obtained, extorted, embezzled, converted or disposed of, the court shall not award or order the restitution of such security:

4. Nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods, for any misdemeanor under "*The Larceny Act*."—32-33 *V.*, *c.* 21, *s.* 113. 24-25 *V.*, *c.* 96, *s.* 100, *Imp.*

"It is to be observed that the proviso as to trustees, bankers, &c., only excepts cases of misdemeanors from the operation of this section, and leaves all cases of felony within it."—2 *Russ.* 355, note. The words in *italics* are not in the English Act; they were in the bill as passed in the House of Lords, but were struck out by the select committee of the Commons.—*Greaves' Cons. Acts.*

The prisoners were convicted of feloniously stealing certain property. The judge who presided at the trial made an order, directing that property found in the possession of one of the prisoners, not part of the property stolen, should be disposed of in a particular manner. *Held*, that the order was illegal, and that a judge has no power, either by common law or by statute, to direct the disposal of chattels in the possession of a convicted felon, not belonging to the prosecutor.—*R.* v. *Pierce, Bell C. C.* 235. *R.* v. *Corpor. of London, E. B. & E.* 509.

The case of *Walker* v. *Mayor of London*, 11 *Cox*, 280, has no application in Canada. In *R.* v. *Stancliffe*, 11 *Cox*, 318, it was held that the present section applies to cases of false pretences as well as felony, and that the fact that the prisoner parted with the goods to a *bonâ fide* pawnee did not disentitle the original owner to the restitution of the goods.—See 2 *Russ.* 355.

The court is bound by the statute to order restitution of property obtained by false pretences and the subject of the prosecution, in whose hands soever it is found; and so likewise of property received by a person knowing it to have been stolen or obtained by false pretences; but the order is strictly limited to property identified at the trial as being the subject of the charge, therefore it does not extend to property in the possession of innocent third persons which was not produced and identified at the trial as being the subject of the indictment.—*R.* v. *Goldsmith*, 12 *Cox*, 594.

An order of restitution of property stolen will extend only to such property as is produced and identified in the course of the trial, and not to all the articles named in the indictment, unless so produced and identified and in the possession of the court.—*R.* v. *Smith*, 12 *Cox*, 597.

It was held, on this clause, (*R.* v. *Atkin*, 18 *L. C. J.* 23,) that the court will not give an order for the restitution of stolen goods, where the ownership is the subject of a dispute in the civil courts. See *R.* v. *Macklin*, 5 *Cox*, 216.

Restitution can be ordered to the owner only.—*R.* v. *Jones*, 14 *Cox*, 528.

See 1 *Hale*, 543, 4 *Blackstone*, 363.

A. Blenkarn took premises at 37 Wood street, and wrote to the plaintiffs at Belfast ordering goods of them. The

letters were dated 37 Wood street, and signed A. Blenkarn & Co. in such a way as to look like "A. Blenkiron & Co." there being an old established firm of Blenkiron & Sons, at 123 Wood street. One of the plaintiffs knew something of that firm, and the plaintiffs entered into a correspondence with Blenkarn, and ultimately supplied the goods ordered, addressing them to "A. Blenkiron & Co., 37 Wood street."

The fraud having been discovered, Blenkarn was indicted and convicted for obtaining goods by falsely pretending that he was Blenkiron & Sons.

Before the conviction the defendant had purchased some of the goods bonâ fide of Blenkarn without notice of the fraud, and resold them to other persons. The plaintiffs having brought an action for the conversion of the goods: *Held*, that the plaintiffs intended to deal with Blenkiron & Sons, and therefore there was no contract with Blenkarn: that the property of the goods never passed from the plaintiffs; and that they were accordingly entitled to recover in the action.—*Lindsay* v. *Cundy*, 2 *Q. B. D.* 976; 13 *Cox*, 583.

The plaintiff had stolen money of the defendant, and had been prosecuted for it, but acquitted on a technical ground. The plaintiff had, previously to the prosecution, converted the money into goods, which were now in the possession of the defendant as being the proceeds of the money stolen from him by the plaintiff. The plaintiff brought an action to claim the said goods. Held, that he had no right of action.—*Cattley* v. *Loundes*, 34 *W. R.* 139.

A thief's money in the hands of the police after his conviction is not a debt of the police to the thief, and cannot be attached under garnishee proceedings.—*Bice* v. *Jarvis*, 49 *J. P.* 264.

Under this section the court can order the restitution

of the proceeds of the goods, as well as of the goods themselves, if such proceeds are in the hands of the criminal or of an agent who holds them for him.—*R.* v. *The Justices*, 16 *Cox*, 143, 196. (Quære? by the interpretation clause of the Procedure Act, the word "property" has not the extensive meaning given by the interpretation clause of the *Larceny Act.)*

A man was convicted of stealing cattle, which he had sold since in market overt, and had been resold immediately also in market overt, the purchasers being in good faith. Restitution ordered to the person from whom they had been stolen.—*R.* v. *Horan*, 6 *Ir. R. C. L.* 293.

M. was indicted for stealing $95 in bank notes, and acquitted. He applied to have $37 in notes, found on his person when arrested, returned to him, which the prosecutor resisted. The statute of P. E. I., 6 W. 4, c. 22, s. 38, enacts that "when a prisoner is not convicted, the court may, if it sees fit, order restitution of the property where it clearly appears to have been stolen from the owner. When arrested prisoner had the money sewed up in his trousers, and among the notes was a $5 note, bank of N. B., $5 note, bank of Halifax, and a $5 note, bank of Montreal. Prisoner said he put the money there to hide it from the police. Prosecutor had sworn that he had carefully counted the money before the robbery, and that it included a $5 bank of N. B. note, and a $5 bank of Halifax note.

Held, that the evidence was not sufficient to identify the notes as the prosecutor's, and the application must be granted.—*The Queen* v. *McIntyre*, 2 *P. E. I. Rep.* 154.

251. When any prisoner has been convicted, either summarily or otherwise, of any larceny or other offence, including the stealing or unlawfully obtaining any property, and it appears to the court, by the evidence, that the prisoner sold such property or part of it to any person who had no knowledge that it was stolen or unlawfully obtained,

and that money has been taken from the prisoner on his apprehension, the court may, on the application of such purchaser and on restitution of the property to its owner, order that out of the money so taken from the prisoner, a sum not exceeding the amount of the proceeds of the sale be delivered to such purchaser.—32-33 *V.*, *c.* 21, *s.* 114. 30-31 *V.*, *c.* 35, *s.* 9, *Imp.*

The English Act does not, expressly, provide by the corresponding clause, for cases of obtaining by false pretences.

The section provides for the *sale* only of the stolen property. *R.* v. *Stancliffe*, 11 *Cox*, 318, *supra*, would not be affected by it.

See *R.* v. *Roberts*, 12 *Cox*, 574.

INSANE PRISONERS.

252. Whenever it is given in evidence upon the trial of any person charged with any offence, whether the same is 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 it on account of such insanity; and if it finds that such person was insane at the time of committing such offence, the court before which 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 is known.—32-33 *V.*, *c.* 29, *s.* 99.

253. The Lieutenant Governor of the Province in which the case arises may, thereupon, make such order for the safe custody of such person during his pleasure, in such place and in such manner as to him seems fit.—32-33 *V.*, *c.* 29, *s.* 100.

254. If any person, before the passing of this Act, whether before or after the first day of July, one thousand eight hundred and sixty-seven, was 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 which such person was tried, and still remains in custody, the Lieutenant Governor may make a like order for the safe custody of such person during pleasure. —32-33 *V.*, *c.* 29, *s.* 101. 40 *V.*, *c.* 26, *s.* 7.

255. If any person indicted for any offence is insane, and upon arraignment is so found by a jury empanelled for that purpose, so

that such person cannot be tried upon such indictment, or if, upon the trial of any person so indicted, such person appears to the jury charged with the indictment to be insane, the court, before which 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 is known.—32-33 *V.*, *c.* 29, *s.* 102.

256. If any person charged with an offence is 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 empanelled to try the sanity of such person; and if the jury so empanelled finds him 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 is known.—32-33 *V.*, *c.* 29, *s.* 103.

257. In all cases of insanity so found, the Lieutenant Governor may make 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.—32-33 *V.*, *c.* 29, *s.* 104.

258. 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 behavior or to keep the peace, as the Lieutenant Governor considers 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 from time to time orders, until his complete or partial recovery is 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.—36 *V.*, *c.* 51, *s.* 1.

It is said in 1 *Russ.*, 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., c. 28, sec. 2:" sec. 145 of the Procedure Act.

The above sections of the Procedure Act, on the procedure in the case of insane prisoners, are taken from the 39-40 Geo. III., c. 94, and the 3-4 V., c. 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.—*R.* v. *Turton*, 6 *Cox*, 385.

It has been seen, *ante*, under sec. 163, that no peremptory challenges are allowed on collateral issues.

The jury may judge of the sanity or insanity of the prisoner from his demeanor in their presence without any evidence.—*R.* v. *Goode*, 7 *A. & 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 understand 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.* v. *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.—*R.* v. *Hodges*, 8 *C. & P.* 195; 1 *Russ.* 32; *Dickinson's Quarter Sessions*, 476.

If at any stage of the trial it is found that the prisoner has not sufficient intelligence to understand the nature of the proceedings, the jury should be discharged and the prisoner detained under the above section 255.—*R.* v. *Berry*, 13 *Cox*, 189.

CROWN CASES RESERVED.

259. Every court before which any person is convicted on indictment of any treason, felony or misdemeanor, and every judge within the meaning of "*The Speedy Trials Act*," trying any person under such Act, may, in its or his discretion, reserve any question of law which arises on the trial, for the consideration of the justices of the court for crown cases reserved, and thereupon may respite execution of the judgment on such conviction, or postpone the judgment, until such question has been considered and decided; and in either case the court before which the person is convicted may, in its discretion, commit the person convicted to prison, or take a recognizance of bail, with one or two sufficient sureties, in such sum as such court thinks fit, conditioned for his appearance at such time as such court directs, to receive judgment or to render himself in execution, as the case may be.—38 *V.*, *c.* 45, *s.* 1. 46 *V.*, *c.* 10, *s.* 5, *part.* 49 *V.*, *c.* 47, *s.* 1. *C. S. U. C.*, *c.* 112, *s.* 1. *C. S. L. C.*, *c.* 77, *s.* 57. *R. S. N. S.* 3rd. S, *c.* 171, *s.* 99, *part.* 1 *R. S. N. B.*, *c.* 159, *s.* 22, *part.*

260. The judge or other person presiding at the court, before which the person is convicted, shall thereupon state in a case, to be signed by such judge or other person, any question of law so reserved, with the special circumstances upon which the same arose; and such case shall be transmitted by such judge, or other person, to the court for Crown cases reserved, on or before the last day of the first week of the term of such court next after the time when such trial was had. —*C. S. U. C.*, *c.* 112, *s.* 2. *C. S. L. C.*, *c.* 77, *s.* 58, *part. R. S. N. S.* (3rd S.), *c.* 171, *s.* 100. 1 *R. S. N. B.*, *c.* 159, *s.* 23, *part.*

261. The justices of the court for Crown cases reserved, to which the case is transmitted, shall hear and finally determine such question, and reverse, affirm or amend any judgment given on the trial wherein such question arose, or shall avoid such judgment or order an entry to be made on the record, that in the judgment of such justices the person convicted ought not to have been convicted, or shall arrest the judgment, or if no judgment has been given, shall order judgment to be given thereon at some future session of the court before which the person was convicted, or shall make such other order as justice requires —*C. S. U. C.*, *c.* 112, *s.* 3. *C. S. L. C.*, *c.* 77, *s.* 58, *part. R. S. N. S.* (3rd *S.*), *c.* 171, *s.* 101. 1 *R. S. N. B.*, *c.* 159, *s* 23, *part.*

262. The judgment and order of such justices shall be certified under the hand of the chief justice, president or senior judge of the court for Crown cases reserved, to the clerk of the court before which the person was convicted, who shall enter the same on the original record in proper form, and a certificate of such entry, under the hand of such clerk, in the form as near as may be, or to the effect mentioned in the third schedule to this Act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted is; and the said certificate shall be sufficient warrant to such sheriff or gaoler, and all other persons, for the execution of the judgment, as so certified to have been affirmed or amended, and execution shall thereupon be carried out on such judgment, or if the judgment has been reversed, avoided or arrested, the person convicted shall be discharged from further imprisonment, and the court before which the person was convicted shall, at its next session, vacate the recognizance of bail, if any; or if the court before which the person was convicted is directed to give judgment, such court shall proceed to give judgment at the next session thereof.—46 *V.*, *c.* 10, *s.* 5, *part. C. S. U. C.*, *c.* 112, *s.* 4. *C. S. L. C.*, *c.* 77, *s.* 59. *R. S. N. S.* (3rd *S.* *c.* 171, *s.* 102. 1 *R. S. N. B.*, *c.* 159, *s.* 23, *part.*

263. The judgment of the justices of the court for Crown cases reserved shall be delivered in open court, after hearing counsel or the parties, in case the prosecutor or person convicted thinks it fit that the case should be argued, in like manner as other judgments of such court are delivered, but no notice, appearance or other form of procedure, except such only as such justices in such case see fit to direct, shall be requisite.—*C. S. U. C., c.* 112, *s.* 5; *C. S. L. C., c.* 77, *s.* 60; *R. S. N. S.* (*3rd S.*), *c.*171, *s.* 103.

264. The justices of the court for Crown cases reserved, when any question has been so reserved for their consideration, may cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment may be delivered after it has been amended. *C. S. U. C., c.* 112, *s.* 6; *C. S. L. C., c.* 77, *s.* 61; 1 *R. S. N. B., c.* 159, *s.* 24.

See, s. 2, interpretation clause, p. 640, *ante*, for meaning of the words *Court of Crown cases reserved.*

The Imperial corresponding statute is 11-12 V., c. 78.

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.—*R.* v. *Faderman Den.* 565; *R.* v. *Paxton*, 2 *L. C. L. J.* 162.

If a prisoner pleads guilty to the charge alleged in the indictment, no question of law can be reserved, as none can be said to have arisen on the trial.—*R.* v. *Clark*, 10 *Cox*, 338.

In *R.* v. *Daoust*, 9 *L. C. J.* 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 held that the question was properly reserved, and that the statute gave them jurisdiction to

decide it.—10 *L. C. J.* 221. 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.—*R.* v. *Martin,* 1 *Den.* 398; 3 *Cox,* 447; *R.* v. *Carr,* 26 *L. C. J.* 61; *R.* v. *Deery,* 26 *L. C J.* 129; *R.* v. *Corcoran,* 26 *U. C. C. P.* 134.

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.—*R.* v. *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.—*R.* v. *Trebilcock, Dears. & B.* 453.

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.—*R.* v. *Mellor, Dears. & B.* 468. The judges were divided on the question whether the court of crown cases reserved had jurisdiction over the case.

The court expects cases reserved to be submitted in a complete form, and will ordinarily refuse to send back a case for amendment.—*R.* v. *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.—*R.* v. *Smith, Temple & Mews' Crim. App. 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.—*R.* v. *Smith*, 1 *Den.* 510. See *R.* v. *Winsor*, 10 *Cox*, 276.

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.—*R.* v. *Hilton, Bell, C. C.* 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 interfere compulsorily with the judge's exercise of his discretion.—*R.* v. *Studd*, 10 *Cox*, 258.

The court must deal with the case as it is stated, and upon the evidence returned by the judge.—*R.* v. *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.—*R.* v. *Tyree, L. R.*, 1 *C. C.* 177; *R.* v. *Blakemore*, 2 *Den.* 410; *R.* v. *Smith, Temple and Mews' Cr. App. Cases* 214.

So, in *R.* v. *Overton, C. & 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.—*R.* v. *Stubbs, Dears.* 555. Contra, *R.* v. *Smith,* 38 *U. C. Q. B.* 218. But see later case of *R.* v. *Andrews,* 12 *O. R.* 184.

The court of crown cases reserved cannot amend the indictment.—*R.* v. *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.—*R.* v. *Larkin, Dears.* 365.

On the argument of a case reserved, the counsel for the defendant must begin.—*R.* v. *Gate Fulford, Dears. & B.* 74.

Post, under the sub-title *venire de novo,* s. 268, will be found the cases where the court of crown cases reserved, ordered or refused a *venire de novo.*

Sec. 266, *post,* enacts that no writ of error shall be allowed, unless it is founded on some question of law which could not have been reserved, or which the judge presiding at the trial refused to reserve. So that where any party wishes to save his recourse to a writ of error on a question that can be reserved, the proper course is to put in writing his demand to have it reserved, so that the judge's refusal, when it occurs, should appear on the record.

On a motion for a new trial from a conviction for perjury: *Held,* that the trial (under sec. 259 of the Procedure Act) is not terminated until sentence is rendered, and a "question which has arisen on the trial" (which arises on the trial) does not necessarily mean a question that was raised at the trial, but extends to one that took its rise at

the trial, and therefore a point not raised by the defence may be reserved by the court.—*R.* v. *Bain*, 23 *L. C. J.* 327.

Where no new trial is asked for in a reserved case, the court will not order a new trial.—*R.* v. *Hincks*, 24 *L. C. J.* 116. *(Quære?)*

No reserved case can be had, where no conviction.—*R.* v. *Lalanne*, 3 *L. N.* 16.

It is not necessary that the prisoner be present at the hearing of a reserved case.—*R.* v. *Glass*, 21 *L. C. J.* 245. *See re Sproule*, 12 *S. C. R.* 140.

Where the prisoner has been put on his trial on an indictment containing six counts, charging him with shooting with intent to murder, and was found guilty on the first count, which verdict was afterwards set aside on a reserved case for insufficiency of that first count: *Held*, that he could not be tried again on the other counts, as they all referred to the same act of shooting; prisoner discharged on plea of *autrefois acquit.*—*R.* v. *Bulmer*, 5 *L. N.* 92.

Held, that when a case reserved for the consideration of the full court does not contain a question which, in the opinion of the full court, it is essential to decide in connection with such case, it may be sent back for amendment.—*R.* v. *Provost*, 1 *M. L. R. Q. B.* 473.

A reserved case may be amended at the request of the defendant during the argument thereon before the full court, by adding the evidence taken at the trial.—*R.* v. *Ross*, 1 *M. L. R. Q. B.* 227.

If illegal evidence has been allowed to go to the jury, though without objection from the prisoner, the verdict must be quashed, if that evidence *might* have affected the verdict, though apart from it, there is sufficient evidence

to support the verdict. The law on this in criminal cases is what it was in civil cases before the Judicature Act. The case of *R.* v. *Ball, R. & R.* 132, reviewed. *R.* v. *Gibson*, 16 *Cox*, 181.

Challenging the array of the jury panel is not a matter which can be reserved under C. S. U. C., c. 112.—*R.* v. *O'Rourke*, 32 *U. C. C. P.* 388.

But otherwise, if the question is one relating to the proper constitution of the petit jury.—*R.* v. *Kerr*, 26 *U. C. C. P.* 214.

Quære, whether, when such a question has been reserved by a judge at the trial, it can afterwards be made the subject of a writ of error.—*R.* v. *O'Rourke*, 32 *U. C. C. P.* 388.

The decision of the judge in directing certain jurors to stand aside is a question of law arising at the trial which he can reserve.—*R.* v. *Patteson*, 36 *U. C. Q. B.* 129. But see *R.* v. *Smith*, 38 *U. C. Q. B.* 218. See *R.* v. *Mellor*, *Dears. & B.* 468, *cited ante.*

A police magistrate cannot reserve a case for the opinion of a superior court, under C. S. U. C., c. 112, as he is not within the terms of that act.—*R.* v. *Richardson*, 8 *O. R.* 651.

Now, under sec. 259 of the Procedure Act, every judge acting under the *Speedy Trials Act* can reserve a case.

WRITS OF ERROR.

265. Writs of error shall run in the name of the Queen, and shall be tested and returnable according to the practice of the court granting such writ, and shall operate a stay of execution of the judgment of the court below.—*C. S. U. C., c.* 113, *s.* 16, *part. C. S. L. C., c.* 77, *s.* 56, *part.*

As amended by c. 50, 50-51 *V.*

266. No writ of error shall be allowed in any criminal case, unless

it is founded on some question of law which could not have bee reserved, or which the judge presiding at the trial refused to reserve for the consideration of the court having jurisdiction in such cases.—32-33 *V.*, *c.* 29, *s.* 80, *part.*

267. Whenever in a criminal case any writ of error has been brought upon any judgment or any indictment, information, presentment or inquisition, and the court of error reverses the judgment, the court of error may either pronounce the proper judgment, or remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment or inquisition.—*C. S. U. C.*, *c.* 113, *s.* 17. *C. S. L. C.*, *c.* 77, *s.* 62. 1 *R. S. N. B.*, *c.* 160, *s.* 1. 11-12 *V. c.* 78, *s.* 5, *Imp.*

Writ of error.—When once judgment is given, the writ of error is the only remedy for any defect in the proceedings; 1 *Chit.* 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. 266 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 *R.* v. *Faderman*, 1 *Den.* 565.

The "questions of law which could not have been reserved by the judge presiding at the trial" in that clause have no meaning, for *all* questions of law can be reserved.

In *R.* v. *Mason*, 22 *U. C. C. P.* 246, Gwynne, J., said, citing sects. 32 and 80 of the Procedure Act then in force "Our law as to what may or may not be objected on error essentially differs from that of England."

A writ of error in England in the proper remedy after judgment for every defect in substance in an indictment, where a question of law has not been reserved, for irregu-

larity 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 on the defendant why the court should not proceed to judgment against him, has been omitted.—*Archbold*, 173; *Chit.* 699, 747; *Whelan* v. *R.*, 28 *U. C. Q. B.* 2; 8*th Cr. L. Com. Rep.* 170; 3 *Burn*, 60; 5 *Burn*, 359; 4 *Blackstone*, 375.

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 may 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.—*R.* v. *Fox*, 10 *Cox*, 502.

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* v. *R.*, 11 *L. C. J.* 186, 271; *Notman* v. *R.*, 13 *L. C. J.* 255.

By section 103, p. 708, of the Procedure Act, *ante*, 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 and makes the return to the court. This return must be signed by the judge. See *Archbold* for forms of fiat, præcipe, writ, return, assignment of error, etc.

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* v. *R.*, 14 *L. C. R.* 52.

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* v. *R.*, 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.* v. *Carlile*, 2 *B. & A.* 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* v. *R.*, 7 *A. & E.* 58. But now, by sec. 267, *ante*, 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 for a technical

error in the proceedings is no bar to a second indictment.—*R.* v. *Drury*, 3 *C & K.* 193; 1 *Chit.* 756 4 *Blackstone*, 393.

In *Ramsay* v. *R.*, 11 *L. C. J.* 158, the Court of Queen's bench, 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* v. *R.*, 28 *U. C. Q. B.* 2.

In *Spelman* v. *R.*, 13 *L. C. J.* 154, *and* 14 *L. C. J.* 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 *R.* v. *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 V., c. 68, and 16-17 V., c. 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, it was 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.

See, *ante*, under s. 146, *Greaves' MSS. note.*

On the hearing of a writ of error, the plaintiff in error must be personally before the court, and, if he is confined, should be brought up on *habeas corpus*.—*Laurent* v. *R.*, 1 *Q. B. R.* 302.

On a writ of error being maintained and a conviction set aside for irregularities in the indictment, the court held that whether they would remand or liberatethe prisoner was discretionary.—*Kelly* v. *R.*, 3 *Stephens' Dig., Quebec*, 218.

The court cannot look beyond the record for what took place at the trial, and affidavits purporting to contradict the record are inadmissible. The notes taken by the judge at the trial do not form part of the record.—*Dougall* v. *R.* 22 *L. C. J.* 133; *in re Sproule*, 12 *S. C. R.* 140; *R.* v. *Winsor*, 10 *Cox*, 276; *R.* v. *Carlile*, *ubi supra.*

Where it was alleged on a writ of error that, in the course of the trial, which was for murder, and in which the prisoner was found guilty, a medical witness was ordered to make an analysis for the information of the jury, and that he had done so and made a report, but that the report so made was not placed before the jury, as it ought to have been, and that thereby the prisoner was deprived of the advantage of important evidence in her favor: *Held*, that as the report could not have been submitted to the jury except as part of the evidence, and as neither the evidence nor the ruling of the judge in relation to it could be brought under the consideration of the court of error by means of a writ of error, that the plaintiff in error had no right to have the record amended so as to place before the court the said report; nor could the plaintiff cause the said record to be amended so as to show whether the judge who presided at the trial wrote the notes of evidence himself or caused them to be written by a clerk; nor as to show what precautions were taken for the safe keeping of the jury while deliberating upon their verdict.—*Duval* v. *R.*, 14 *L. C. R.* 52.

Whether the police court is a court of justice within 32-33 V., c. 21, s. 18, or not, is a question of law which may

be reserved by the judge at the trial under C. S. U. C., c. 112, s. 1; and where it does not appear by the record in error that the judge refused to reserve such question it cannot be considered upon a writ of error.—*R.* v. *Mason* 22 *U. C. C. P.* 246.

The judge may discharge the jury, after they are sworn, in consequence of the disappearance of a witness for the crown. The prisoner may then be tried again, and a court of error cannot review the judge's decision.—*Jones* v. *R.* 3 *L. N.* 309.

Error only lies for matter of record. The charge of the judge is not matter of record.—*Defoy* v. *R.*, *Ramsay's App. Cas.* 200.

In Quebec, the judge who presided at the trial cannot sit in the court of error.—*R.* v. *Dougall, Ramsay's App. Cas.* 200.

The judgment of a court of record cannot be inquired of on *habeas corpus, Exp. O'Kane, Ramsay's App. Cas.* 188.

And the judgment of a superior court of law cannot be interfered with on *habeas corpus*, even if the sentence is illegal. *Exp. McGrath, Ramsay's App. Cas.* 188. The writ of error is the only remedy, but otherwise, if it is the sentence of an inferior tribunal. *Exp. Burns, Ramsay's App. Cas.* 188.

See in re *Sproule,* 12 *S. C. R.* 140, and cases there cited. —Also *R.* v. *Mount, L. R.* 6 *P. C.* 283.

APPEALS AND NEW TRIALS.

1. Section two hundred and sixty-eight of "*The Criminal Procedure Act*" is hereby repealed, and the following substituted therefor.—50-51 *V.*, *c.* 50.

268. "Any person convicted of any indictable offence, or whose conviction has been affirmed 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 having 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, may appeal to the supreme court against the affirmance of such conviction; and the supreme court shall make such ru e 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: Provided that no such appeal shall be allowed if 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:

"2. Unless such appeal is brought on for hearing by the appellant at the session of the supreme court during which such affirmance takes place, or the session next thereafter, if the said court is not then in session, the appeal shall be held to have been abandoned, unless otherwise ordered by the supreme court:

"3. The judgment of the supreme court shall, in all cases, be final and conclusive:

"4. Except as hereinbefore provided, a new trial shall not be granted in any criminal case, unless the conviction is declared bad for a cause which makes the former trial a nullity, so that there was no lawful trial in the case; but a new trial may be granted in cases of misdemeanor in which, by law, new trials may now be granted:

"5. Notwithstanding any royal prerogative, or anything contained in "*The Interpretation Act*" or in "*The Supreme and Exchequer Courts Act*," no appeal shall be brought in any criminal case from any judgment or order of any court in Canada 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."

2. Sections sixty-eight and sixty-nine of "*The Supreme and Exchequer Courts Act*" are hereby repealed.

3. The foregoing provisions of this Act shall not come into force until a day to be named by the Governor General, by his proclamation to that effect.

Per Ritchie, C. J.—Only the grounds upon which the court of crown cases reserved are not unanimous are

open to the appellant on a criminal case before the supreme court.—*R.* v. *Cunningham, Cassels' Dig.* 107.

Since the passing of 32-33 V., c. 29, s. 80, repealing so much of c. 77 of Cons. Stat. L. C., as would authorize any court of the Province of Quebec to order or grant a new trial in any criminal case; and of 32-33 V., c. 36, repealing s. 63 of c. 77, Cons. Stat. L. C., the Court of Queen's Bench of the Province of Quebec has no power to grant a new trial.—*Laliberté* v. *R.,* 1 *S. C. R.* 117.

But a *venire de novo* could always be granted.

A new trial will not be granted to the crown in a criminal case; neither has the crown an appeal to the supreme court of Canada from a judgment quashing a conviction. —*The Queen* v. *Tower,* 4 *P. & B. (N.* B.*)* 168.

A new trial may be ordered on a reserved case, in misdemeanors, where it appears to the court on the evidence that an injustice may have been done to the defendant.—*R.* v. *Ross,* 1 *M. L. R. Q. B.* 227, *following R.* v. *Bain,* 23 *L. C. J.* 327.

In misdemeanors there is no doubt that the superior courts may grant a new trial, in order to fill the purpose of substantial justice.—1 *Chit.* 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.—8*th Cr L. Com. Report,* p. 159. If the defendant has been acquitted, the prosecutor is, in general, not entitled to a new trial.—*R.*

v. *Silvester*, 1 *Wils.* 298; *R.* v. *Reynett*, 6 *East*, 315; *R.* v. *Wandsworth*, 1 *B.* v. *Ald.* 63; *R.* v. *Duncan*, 14 *Cox*, 571, 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. 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. 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.—*R.* v. *Caudwell, Note a*, 2 *Den.* 372, 1 *Chit.* 658; unless some special ground be laid for dispensing with the rule.—*R.* v. *Parkinson*, 2 *Den.* 459. See *R.* v. *Fraser*, 14 *L. C. J.* 252. 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 *Chit.* 659; *R.* v. *Teal*, 11 *East*, 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 *Chit.* 658; *R.* v. *Rowlands*, 2 *Den.* 364.

Mr. Justice Aylwin, in *R.* v. *Bruce*, 10 *L. C. R.* 117, held that in Lower Canada, where the court is held before one judge and never before more than two, the motion for a new trial in cases of supposed misdirection becomes impracticable. And in *R.* v. *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; but these cases are not now law.

It has been said that no new trial can be granted in a case of felony. In *R.* v. *Scaife, et al.*, 2 *Den.* 281, how-

ever, a new trial was granted, in such a case, but it was since said by Sir J. T. Coleridge, in *R.* v. *Bertrand*, 10 *Cox*, 618, that the attention of the court, in *R.* v. *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 *R.* v. *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 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. See *R.* v. *Duncan*, 14 *Cox*, 571.

The same doctrine was upheld by the privy council, upon another appeal from New South Wales in *R.* v. *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 considered 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. But see Greaves' remarks, *post*, on these cases.

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* v. *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.—*R.* v. *Fowler*, 4 *B. & Ald.* 273.

In *Campbell* v. *R.*, 2 *Cox*, 463; *Gray* v. *R.*, 11 *C. & Fin.* 427; *R.* v. *Yeadon, L. & C.* 81; and *R.* v. *Winsor*, 10 *Cox*, 276, the award of a *venire de novo*, in felony as well as in misdemeanor, was held legal and right, in all cases where, from any reason, the first trial has proved abortive.

In the case of *R.* v. *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 trial. The privy council, in *Levinger* v. *R.*, 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 *R.* v. *Martin*, 12 *Cox*, 204.

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. In *R.* v. *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* v. *R.*, cited *supra.*

In *R.* v. *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, J. J., 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, J. J., 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, J. J., 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* may be ordered by the court of crown cases reserved in a case of felony.

In that *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 granted where improper evidence has been received. See *R.* v. *Gibson*, 16 *Cox*, 181.

The Court of Queen's Bench, in the Province of Quebec, in two instances, on setting aside the convictions, has awarded a *venire de novo*, for admission of illegal evidence.

The first case is *R.* v. *Pelletier*, 15 *L. C. J.* 146.

The second case is *R.* v. *Coote*, 12 *Cox*, 557; *L. R.* 4 *P. C.* 599. This last case was brought in appeal before the privy council, and 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 determined.

In *R.* v. *Guay*, 18 *L. C. J.*, 306, 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 the report does not show whether the court ordered either the discharge of the prisoner or a *venire de novo*. In *R.* v. *Chamaillard*, 18 *L. C. J.* 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 *R.* v. *Daoust*, 10 *L. C. J.* 221, though the report does not show that the court's attention was called to this last case. See note to 1 *Bishop, Crim. Proc.* 1047, on the subject.

In *R.* v. *Feore*, 3 *Q. L. R.* 219, the first trial being declared null the prisoner was ordered to be re-tried.

The cases of *R.* v. *Yeadon*, *R.* v. *Mellor*, and *Levinger* v. *R.*, 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* or avoid such judgment, *and* 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 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 *R.* v. *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, then, as in *R.* v. *Yeadon*, the court declares it to have so been, and orders a *venire de novo*, or such other order as justice requires.

The enactment contained in the aforesaid section of the Procedure Act 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.* v. *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 *Chit.* 461, and he was not lawfully liable to suffer judgment for the offence charged against him.—*R.* v. *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.

In *R.* v. *Kerr*, 26 *U. C. C. P.* 214, the court held that the first trial being a nullity, the defendant could be tried again without the necessity of ordering a *venire de novo*.

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* v. *R.*, 28, *U. C. Q. B.* 2 and 137. It is not law 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 *R.* v. *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"......... And Blackburn, J., said: "For the reasons given by Crampton, J., in *Conway and Lynch* v. *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, and the indictment has not been disposed of, 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.

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. If a substantial ingredient of the offence does not appear on the face of the indictment, the court will arrest the judgment.—*R.* v. *Carr*, 26 *L. C. J.*, 61. Judgment will also be arrested if the court does not appear by the indictment to have had jurisdiction over the offence charged.—8*th Crim. L. Com. Report*, 162; *R.* v. *Fraser*, 1 *Moo. C. C.* 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.—1 *Chit.* 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; 8*th Cr. L. Com. Rep.* 163; 3 *Burn*, 58.

Greaves' MSS. note on new trials and venire de novo.

Greaves' MSS. note.—The question put to me by Mr. Justice Taschereau is:

In cases where the court of crown cases reserved quashes the conviction because illegal evidence has been received against the prisoner, or because legal evidence offered by the prisoner has been refused, say *Holt's case*, for instance, *Bell*, *C. C.* 280, can the court order a *venire de novo ?*

"The statute authorizes the court of crown cases reserved:

I.—To reverse, affirm or amend any judgment.

II.—To avoid such judgment and to order an entry to be made on the record "that the defendant" ought not to have been convicted.

III.—"To arrest the judgment."

IV.—"To order judgment to be given thereon at some other session," "if no judgment shall have been before that time given, as they shall be advised."

V.—"Or to make such other order as justice may require."

Nos. I & II relate to cases where a judgment has been given; Nos. III and IV to cases where no judgment has been given; and V to all cases where justice requires something to be done, either in addition to, or wholly independent of, any of the things that are previously specified.

The act creates an entirely new court, and runs wholly in the affirmative. Every question of law may be reserved; and, if reserved, must be finally determined; and when so determined, the subsequent proceedings are to be in accordance with that determination. The act leaves it quite open as to their form, and does not require them to be in any existing form. It introduces new forms, e. g.,

the avoiding judgments and ordering entries on the record and adds general words, which clearly proves that the forms might be varied to meet the particular case. In some cases it is clear the judgment must be complete, e. g., where the judgment is affirmed, and it cannot be doubted that it was intended to be so in all cases; otherwise a judgment on error would be complete, whilst a judgment under this remedial act would not be so, e. g., a *venire de novo* on error; a mere reversal under this act.

Although the section is very badly worded, it is, perfectly clear that the court not only may, but ought to award any and everything that justice requires to carry out to the fullest extent their decision. The clause not only applies to judgments, but also to a judgment *and* order to make an entry on the record; and to an order to give judgment, and to such other orders as justice may require; and then "such judgment and order, if any," are to be certified in the manner pointed out.

It is quite clear, therefore, that there may be an order in addition to a judgment; and as the record of the indictment is not before the judges, and the decision must in all cases be certified to the officer, who has the custody of the indictment, and who is to enter it on the record, and send a certificate to the sheriff or gaoler, it is difficult to see how any case can arise where the judges must not give some order in addition to their judgment.

In order to determine whether a *venire de novo* can be granted, it is best to point out what that proceeding really is, and we can have no better form than that in *Campbell* v. *R.*, 11 *Q. B.* 814, the year before the act passed. It ran thus: "It is considered by the court here that the verdict and judgment upon the said indictment be, for

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the errors aforesaid, set aside and annulled; and that the Recorder, etc., in and for, etc., do award a writ of *venire facias de novo* upon the said indictment; and that the keeper of Millbank do deliver the prisoner to the gaoler of the City of Chester." Now, it appears to me that the whole of this or, at all events, all down to and including the words "the said indictment" where lastly mentioned, is comprised in the judgment. It is all governed by the formal words of the judgment, "it is considered by the court." The English form simply is that "you cause to come anew;" the last word being the only difference from the *venire facias.—Chit. forms, p.* 73. Then, assuming that all I have pointed out is the judgment, can the court so reverse the judgment and award such a *venire de novo?* And I think it clear that they can, and, when the case shows that justice requires it, they ought. The case of *Davies* v. *Pierce*, 2 *T. R.* 53, is an express authority for the latter proposition.

As to the objection that the act gives no authority to set a verdict aside, the answer is clear. The judgment on the question reserved will show that the verdict is a nullity, and this must appear on the face of the proceedings, and a nullity in law is exactly the same as if it did not in fact exist.

Before this act, when the Court of Queen's Bench had an erroneous judgment before them on a writ of error, and the indictment was good, they could only reverse the judgment, and neither pass the proper sentence, nor send the record back to the court below, in order that the proper sentence might be passed,—*R.* v. *Bourne*, 7 *A. & E.* 58. But sec. 5, which was passed to remedy this, provides that whenever a "court of error shall reverse the judgment," it may either pronounce the proper judgment, or remit the record to the

court below, in order that it may pronounce the proper judgment. Now a case might occur where this clause would, enable the court of error to grant a *venire de novo;* if that be so, the act would be inconsistent in the most material parts, unless the judges could do the same under sec. 2. But supposing the sentence set out consists of a judgment of reversal *and* an order for a *venire de novo,* it can admit of no doubt that it is *ejusdem generis* with an avoidance of a judgment and an order of an entry that the prisoner ought not to have been convicted. Indeed, it is quite clear that whether the sentence be a judgment alone, or a judgment and order, it is *ejusdem generis* with the things especially named. It cannot be anything other than a judgment or a judgment and order. Again, if under this act no *venire de novo* can be awarded, the anomaly will arise that whether a *venire de novo* can issue will depend on whether the question be raised under the act or upon a writ of error; and the act will have provided a worse instead of "a better mode of deciding difficult questions," if under it a *venire de novo* cannot issue.

Where the judges affirm or amend any judgment, or direct a judgment to be given, they order the conviction to be carried out to its full extent. So, if they avoid a judgment because the facts do not prove the alleged offence they direct the prisoner to be discharged. In these instances the whole case comes to its legitimate conclusion. But, if they cannot award a *venire de novo,* the ends of justice will be retarded, and may be defeated. There may occur a case of as brutal a murder as can be, where judgment must be arrested for some formal defect, and if the judge ordered the prisoner to be discharged, he might at once be arrested, indicted and tried again; for the former record

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would not support a plea either of *autrefois acquit* or *convict*. In such a case the effect of not granting a *venire de novo* would be to make it necessary to institute a new prosecution, and to give the criminal another chance of escape.

It is immaterial that the words of the clause are in the alternative. Two or more alternatives may clearly be joined in a judgment, if necessary.

I will now turn to the cases, and first to those independent of the act.

It is clearly settled that a *venire de novo* can be awarded in a criminal case upon a writ of error.—*Gray* v. *R.*, 11 *C. & F.* 427. *Campbell* v. *R.*, 11 *Q. B.* 838. *Levinger* v. *R.*, 11 *Cox*, 613. *Winsor* v. *R.*, 6 *B. & S.* 143; 7 *B. & S.* 490. In *Campbell* v. *R.*, the Queen's Bench ordered the Recorder of Chester to issue a *venire de novo*, and the Exchequer Chamber affirmed this judgment. *R.* v. *Fowler*, 4 *B. & Ald.* 273 shows that a court of quarter sessions can grant a new trial, and this case was approved and acted upon in *Campbell* v. *R.*, (11 *Q. B.* 814) on the ground that that court is not a court of inferior jurisdiction. See also *R.* v. *Smith*, 8 *B. & C.* 342.

I now come to the cases on this act.

In *R.* v. *Mellor*, *Dears. & B.* 468, there was a great difference of opinion whether a *venire de novo* could be awarded under the act. The question was only started by Lord Campbell, C. J., after the argument was over; and, as far as I can discover, from the judgments, Lord Campbell, C. J. Cockburn, C. J., Wightman, J. and Watson, B., held that a *venire de novo* might be awarded; and Coleridge, J. and Martin, B., thought that a new trial might be directed, but that a *venire de novo* was not the proper form. Pollock, C.

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B., Erle, J., Crompton, J., Willes, J. and Channell, B., held that a *venire de novo* could not be granted. Crowder, J. and Byles, J. doubted; Williams, J., thought the case was reserved too late. The majority, therefore, thought that a new trial could be granted; and it seems not to be very material whether the new trial be granted by the usual form of a *venire de novo*, or by some other; for in substance both would be the same; and a simpler form could hardly be invented than the old form. It seems to me that the reasons in favor of a new trial are simply overwhelming, especially those of Wightman, J. and Martin, B.

In the subsequent case of *R.* v. *Yeadon, L. & C.* 81, the indictment charged the prisoners in different counts with inflicting grievous bodily harm, wounding, and an assault occasioning bodily harm. The jury found them guilty of a common assault. The chairman held that they could not find them guilty of that, on that indictment; and directed them to reconsider their verdict; and they then found them guilty. It was held that the first verdict was perfectly legal, and ought to have been received; that there had been a mistrial, and there must accordingly be a *venire de novo*. Now this judgment was delivered, after time taken to consider, by Pollock, C. B., and Wightman, J., Williams, J., Martin, B., and Channell, B. concurred in it. Either, therefore, they considered *R.* v. *Mellor* to have settled the question, or they were satisfied now that a *venire de novo* was right; and in this latter view Pollock, C. B. and Channell, B. must have changed their opinions and Williams, J., must have held that, where a case was properly reserved, a *venire de novo* might issue. The case is a *very strong* authority; as the offence was so trifling, and so much deliberation was devoted to it; and the more

so, as it placed the prisoners in jeopardy of being convicted of the aggravated offence, after having been lawfully acquitted of the aggravation. It, perhaps, deserved consideration whether the sessions might not have been ordered to enter a verdict of guilty of a common assault, which was held to be the lawful finding. It is obvious that that would have been the course exactly in accordance with justice. *R.* v. *Virrier,* 12 *A. & E.* 317, shows that a verdict in a case of misdemeanor may be amended by a judge's notes; and the case reserved is even more legal evidence to amend by. My opinion is that the order just suggested might properly be made.

However, there can be no doubt that this case is a *conclusive authority* that the judges have power to issue a *venire de novo* under the act.

The next question is, can a *venire de novo* issue, because it appears on the case that illegal evidence has been admitted or lawful evidence excluded; and I am very clear that it can. The question seems to arise in consequence of *R.* v. *Oldroyd, R. & R.* 88; *R.* v. *Ball, R. & R.* 132; *R.* v. *Treble, R. & R.* 164; *Tinckler's Case,* 1 *East P. C.* 354, which seem to prove that if there be ample evidence to support an indictment after rejecting the improper evidence, the conviction will not be set aside. But much doubt is thrown on this doctrine, as stated in *R.* v. *Ball,* by Lord Denman's note in 1 *Den.* p. V. preface, as to the real facts of *Tinckler's Case,* on which *R.* v. *Ball* was founded, and *R.* v. *Harling,* 1 *Moo. C. C.* 39, is *contra.* And it seems to me perfectly unconstitutional for judges to take upon themselves to decide, in a criminal case, upon the effect of the admission or rejection of any evidence on the mind of a jury; and the later cases of *Crease* v. *Barrett,* 5 *Tyr.*

458, *Wright* v. *Doe d. Tatham*, 7 *A. & E.* 313, *De Rützen* v. *Farr*, 4 *A. & E.* 53, *and Bessey* v. *Windham*, 6 *Q. B.* 166, show that where inadmissible evidence is received in a *civil* suit a new trial is a *matter of right;* as it is impossible to say what weight it may have had on a jury; and no doubt they would be followed in any criminal case, where the question could arise on a record in the Queen's Bench. And under this act, if the question be whether any evidence has been improperly received or rejected, the judges can *only* decide that question; and if they decide in favor of the prisoner, they *must* adjudge accordingly. They cannot decide that any of the evidence was inadmissible, and affirm the conviction. Formerly, in civil cases, the courts exercised a *discretion* whether a new trial should be granted for the erroneous admission or rejection of evidence, and that accounts for *R.* v. *Ball*, etc. But, under the act, a question of law *only* is to be decided, and, when that has been done, the further proceedings *must* follow the result.

In *Davies* v. *Pierce*, 2 *T. R.* 53, the declarations of occupiers of lands, that they rented the lands and paid rent to Mr. Evans, being rejected, a bill of exceptions was tendered, and the record removed into the King's Bench, who held that the evidence ought to have been received; and, after time to consider what was next to be done, the court granted a *venire de novo*, and Buller, J., said "unless some extraordinary reasons be urged to the contrary, I have not the least doubt but that a *venire de novo must* be granted." As no distinction can be drawn between the admission and rejection of evidence, and as this case has never been questioned, it is a conclusive authority on both points, and, equally so, in criminal as in civil cases.

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I do not enter into the cases as to where a *venire de novo* can or cannot be granted according to the decisions independent of this act; the act creates an entirely new mode of procedure; and I am clear that the only true test of whether or not a *venire de novo* ought to issue under it is, whether justice requires it or not; or, more widely, whether the case ought to be submitted to another jury.

In all other cases, it is clear to me that, whether the question be decided for or against a prisoner, the court ought to carry out the decision either exactly as it would have been, if the question had been decided in the same way on the trial, or as near thereto as may be practicable.

I will next proceed to consider *R.* v. *Scaife*, 2 *Den.* 281, *and* 17 *Q. B.* 238; *R.* v. *Bertrand*, 10 *Cox*, 618, and *A. G.* v. *Murphy*, 11 *Cox*, 372, and it will be clearly shown, unless I am much in error, that *R.* v. *Scaife* was well decided, and that the other cases are altogether erroneous.

In order to a correct understanding of these cases, the procedure in our courts in criminal cases should be clearly known. The Court of Queen's Bench has two different criminal jurisdictions; it may deal with all cases where an information is filed or an indictment is found, in that court, and it may also deal with all indictments that are removed before trial by certiorari into that court from the courts of oyer and terminer or gaol delivery (which I will call the assizes hereafter), or quarter sessions. It seems that, originally, the trial in all these cases was before all the judges of this court, and that trials at bar, such as *R.* v. *Orton*, in the *Tichborne case*, are the original mode of trial. It is obvious that such a proceeding must have been extremely inconvenient, and by the 27 Edw. 1, St., 1, s. c. 4., intitled "nisi prius shall be granted before one of the

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justices of the court where the suit is commenced," it is enacted that inquests "shall be taken in the time of vacation before any of the justices before whom the plea is brought;" but it adds "unless it be an inquest that requires great examination;" which supports the opinion that trials at bar were the mode of trial originally. This act only authorized nisi prius before a judge of the same court, in which the suit began. But by the 14 Edw. 111, St. 1, c. 16, nisi prius may be granted before a judge of another court, and the verdict is to be returned into the court where the record is, and there judgment is to be given. The effect of these statutes is to make the judge, whether he be a judge of the court where the record is or not, a representative of the other judges of that court, and to make the trial exactly the same as if it had taken place before the full court, and hence it is that the report of the judge who tried the case, whether written or verbal, is always acted upon by the court. The following is a striking case. In *R.* v. *Wooler*, 6 *M. & S.* 367, an information was filed by the attorney general for a blasphemous libel, and the defendant was found guilty before Abbott, J., at the London sittings, and the next day he reported verbally to the full court that the jury retired to consider their verdict, and on their return into court the foreman gave a verdict of guilty and said they all agreed, and the verdict was recorded; Abbott, J., then summed up the course he had taken when the jury retired, and said that then a barrister informed him that some of the jury had not agreed in *Wooler's case;* and it appearing to him, Abbott, J., to be doubtful whether from the particular situation of some of the jury, they might not exactly hear what had passed, he made this statement to the court; and a new

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trial was ordered at the suggestion ofthe court itself. This is a very important case on several grounds. It was an information filed by the attorney general and tried at nisi prius in London. The court acted on the verbal report of Abbott, J., exactly as if they had all been present at the trial. It shows that the court will grant a new trial in a criminal case when there is *any reason to doubt* the correctness of the verdict.

The jurisdiction of the Court of Queen's Bench in criminal cases arises from its being the Sovereign court of oyer and terminer and gaol delivery. The Privy Council in the first case *ubi supra* took no notice of the nature of the court; but in the second, they say "the supreme court sitting in banco in term, could (not) take cognizance as a court of appeal of the judgment pronounced by Fawcett, J., at the session of oyer and terminer, which had come to an end before the session in banco began." This is altogether erroneous; the trial was at nisi prius *in* the supreme court, and just was exactly like *R.* v. *Wooler*, the only difference is that prosecutions for felony in that court are by information at the suit of the attorney general. The court in banco was neither a court of appeal, nor was the session of oyer and terminer ended. It was the same supreme court, and the trial was in contemplation of law exactly as if it had taken place before all the judges, and the new trial had been granted by them. A graver mistake could not have been made, for there is no doubt that our Queen's Bench cannot grant a new trial, where the case has been tried at the assizes or the crown side; for it cannot have the facts before it; and it is because the facts are before it when a case is tried on a record of the Queen's Bench that that court can grant a new trial in any case. This mistake com-

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pletely destroys the authority of both *R.* v. *Bertrand* and *A. G.* v. *Murphy;* for in neither, was the true nature of the case seen, and all that these decisions amount to is simply this, that the supreme court cannot grant a new trial in felony, where the case has not been tried before it, but under a commission of oyer and terminer or gaol delivery.

And here, I cannot help questioning the decision in *R.* v. *Bertrand* that the Privy Council could hear the case. In *R.* v. *Wooler* the court acted on the verbal statement of the judge; how could an appellate court deal with such a case? Although there are written notes of what may have occurred at a trial, it is difficult to see how they could be dealt with in an appellate court; and in such cases, it is clear in England that no appellate court can notice them. Yet no notice seems to have been taken of these points.—In that case of *R.* v. *Bertrand*, an information for murder filed by the attorney general in the supreme court of N. S. Wales was tried before the Chief Justice, but the jury could not agree and were discharged; and the prisoner was afterwards tried by another jury, and a verdict of guilty given, and a new trial granted by the supreme court, on the ground that the judge's notes of the evidence of witnesses on the previous trial had been improperly admitted in evidence. On appeal to the Privy Council, this decision was reversed. The grounds of the reversal are open to much observation. The first was that no new trial could be granted in any case of felony. This position is clearly erroneous in many cases as will be shown. The second was that *R.* v. *Scaife* was the only case where an application for a new trial in felony had ever been made. It will hereafter be shown that *R.* v. *Ellis*, 6 *B. & C.* 145, completely refutes this statement. *R.* v. *Scaife* was misunderstood. The court said that,

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in that case, Cresswell, J., "admitted a deposition subject to the objection; the meaning of which probably was that he might upon consideration have referred his ruling to the court of criminal appeal." This is a strange mistake; a judge at nisi prius has no power so to do; and that great judge knew the right course perfectly well. He "thought that as the record came from the Queen's Bench, that was the proper tribunal to deal with the case," and he informed the prisoner's counsel that "he thought the admissibility of the deposition should be raised in that court."—2 *Den.* 286. And it was so raised accordingly.

The court relied very much on there having been no application for a new trial before that case, and that since that decision no attempt had been made to press that, case as an authority. If it had been considered how extremely rarely indictments for felony are tried in the Queen's Bench or on Queen's Bench records, it would have been seen how extremely weak such a point is. In my long experience on the Oxford Circuit I only remember one; and I never heard of another; and I much doubt whether any except the cases reported have come before the court *after verdict.* The reasons are clear; it requires *special grounds* to remove a case into the Queen's Bench; and where removal takes place, the same proportional number of acquittals and convictions will occur as in cases tried at the assizes; and in acquittals, there can be no new trials, and in convictions, it is not in one case in twenty that there can be any ground for a new trial. It was anything rather than reasonable to rely on the absence of such cases. (Since the preceding was written careful search has been made in the crown office, and in the last 33 years there

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have been only 55 cases of felony and only about 11 convictions, which may be reduced to about six actually *separate* cases; and *R.* v. *Scaife* seems to be one of them. Nothing could more strongly confirm my views; and I have no doubt now that the reason why other cases of applications for new trials have not been found is that there have been no cases in which there was any ground for making them, even if there were any cases where an application was capable of being made.)

Again, no mention is ever made on the record of the application for or of the grant of a new trial. And in *Bright* v. *Eynon,* 1 *Burr.* 394, Lord Mansfield, C. J., said "the reason why this matter cannot be traced further back is that the old report books do not give any accounts of the determinations made by the court upon motions." Neither this case nor *R.* v. *Mawbey,* 6 *T. R.* 619, were cited. In the latter, the court held, for the first time, that a new trial in a criminal case might be granted as to the defendants that had been found guilty only, on the ground that justice required that should be done; although no precedent could be found.

The evidence of some of the witnesses on the former trial, in this Bertrand case, was read from the judge's notes, at the instance of the prisoner personally and on the application of his counsel; and this course was disapproved by the Privy Council, who said: "It is a mistake to consider the question only with reference to the prisoner. The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be, not the interests of either party." This remark very much lessens the importance of a prisoner's consent even when he is advised by

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counsel, and substantially, not of course literally, affirms the wisdom of the common understanding in the profession that a prisoner can consent to nothing. This supposed common understanding seems to be as unfounded in law as it is in reason. A man may plead guilty, if he likes, though the court advises him not to do so. What is that but consenting to a verdict against himself? The very question "are you guilty or not guilty" assumes that he may so consent. It is every day's practice for it to be openly stated in court that a prisoner pleads guilty by the advice of his counsel; and it would be difficult to suggest a reason why he should not do so. Can anything be more absurd than to hold that this prisoner could not consent to the evidence being read, and yet that he might plead guilty, and thereby consent to be hung? Our ancient lawyers were more sensible men. In *Mansel's Case*, 1 *And.* 104, after stating an imperfect verdict, the record alleges that he was asked whether he wished to be freed from that verdict, and he answered that he did, and so he, of his own consent, was freed from the verdict; all the judges at Serjeant's Inn held that this course was right. It is true that in this case there was no verdict in point of law; as Foster, J., pointed out in *Kinloch's Case, Fost.* 31; but that does not invalidate the ruling of all the judges that a prisoner may consent even in a case of murder. So in *Kinloch's Case, Fost.* 16, after the jury had been charged, they were discharged "at the request and by the consent" of the prisoners, and this was held right. In this case Foster, J., said "in capital cases I think the court is so far of counsel with the prisoner that it should not suffer him to consent to anything manifestly wrong and to his own prejudice." Even this great criminal lawyer omitted to perceive that

the judge cannot prevent a prisoner from stating in court what he may think fit. All that the judge can, or ought to do, is to explain to the prisoner the position in which he is, and the consequences of what he is going to do, and then the prisoner is clearly entitled to act as he likes. In *R.* v. *Edward, R. & R.* 224, where a juror was taken ill and another sworn in his place, the judge said the witness must be examined over again; but the counsel said if the judge read his notes over that would be sufficient; accordingly he read his notes over to the witness, asking him at the end of every sentence if it was right, to which he answered in the affirmative, and was then cross-examined; and the conviction was affirmed. This case was not cited in *R.* v. *Bertrand.*

In *A. G.* v. *Murphy*, 11 *Cox*, 373, an information for murder filed by the attorney general in the supreme court of N. S. Wales was tried at a "session of the said supreme court as a court of oyer and terminer and general gaol delivery" before one of the judges of the same court, and the prisoner was convicted, and a rule was granted by the said supreme court why a *venire de novo* should not issue on the ground that, during adjournments of the trial, the jurors were permitted to see newspapers containing reports of the trial as far as it had gone. One report was headed "The South Creek Murder Case," and another stated that a "witness was cross-examined, but was not shaken in his evidence." That rule was made absolute; but on appeal to the Privy Council that judgment was reversed. The first ground stated for the reversal was that "the law is clear that the discretional power vested in certain courts and cases to grant new trials does not extend to cases of felony." Now in this case the

question was altogether different from that in *R.* v. *Bertrand.* There the question was whether a new trial could be granted *on the merits;* here it was whether a new trial could be granted for misconduct, bias, and want of impartiality of the jury, or (as the court put it) by reason of some irregularity in the trial." Yet the court held that the rule so laid down in *R.* v. *Bertrand* governed the case.

The court next say that "each of these cases falls within the rule that no person ought to be put in peril twice on the same charge." A stranger misapplication of a rule was never made. The rule was made for a prisoner's benefit; and here it is used to prevent him obtaining a fair trial, and a chance of saving his life. It is almost needless to say that the rule only applies where there has been a lawful conviction or acquittal, and not where the question is whether it be lawful or not.

The court then rely upon the *dictum* of Blackburn, J., in *R.* v. *Winsor,* 14 *L. T.* 195; 10 *Cox,* 276 that "where the jury have once found a verdict of conviction or acquittal, the matter has become *res-judicata,* and after that there can be no further trial." Whether that *dictum,* when strictly tied down to the question on which it was uttered, was correct or not, need not be discussed. It is immeasurably too wide as a general proposition; for it would preclude new trials in all misdemeanors, all reversals on error, and all arrests of judgment; and it is plainly no authority, where the question is whether the verdict is right.

Then the court seems to have become at last aware that, in some cases, there might be a new trial in felony, though this was unknown to them in *R.* v. *Bertrand,* and is inconsistent with the general proposition at the beginning of this

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judgment. They say "the cases, in which a verdict upon a charge of felony has been held to be a nullity and a *venire de novo* awarded, have not been classified in the digests; there are cases of defect of jurisdiction, in respect of time, place or person—cases of verdicts so insufficiently expressed, or so ambiguous that a judgment could not be founded thereon; but we have not discovered any valid authority for holding a verdict, of conviction or acquittal in a case of felony delivered by a competent jury before a competent tribunal, in due form of law, to be a nullity by reason of some conduct on the part of the jury which the court considers unsatisfactory." We think the search must have been very superficial, or (we much regret to add) the cases very little understood. At all events it would have been very much more satisfactory, if the court, instead of looking merely for cases in point, had taken pains to ascertain the principles upon which verdicts had been set aside, and then considered whether this case was not within those principles. The right under Magna Charta is that every prisoner shall be tried *per legale judicium parium suorum;* (see the remarkable record in 1 *Hale*, 345); and, in our humble judgment it needed no case to prove that no jury that is improperly biassed or prejudiced can be a *lawful* jury, and consequently if *that be shown, or even if a real* doubt be raised as to that being the case, the verdict cannot stand.

Again the court say "none of the authorities cited for the defendant appear to us to sanction the notion that a verdict, even in a civil case, could be set aside upon an imagination of some wrong without any *proof of reality.* The suggestions, upon which verdicts have been so set aside in civil cases have alleged traversable facts, material and relevant, to show that *the verdict had actually*

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resulted from improper influence; and we refer to the *special verdict* reported in 11 *H.* 4 *f.* 17, as affording an example of such facts as would, if stated in a suggestion on the record, have had the effect of setting aside the verdict."

Now no case was ever more thoroughly misunderstood, or more completely perverted into the very opposite of what it decided, than this case.

In order properly to understand the case, it is better to state what the practice was under similar circumstances at the time when it occurred. In ancient times, when any charge of misconduct, partiality, etc., was made against a jury, the practice was for the judge to examine the jurors as to it, and if they admitted it, their admission was entered on the record. Thus where a charge was made that some of a jury had separated, drunk, and been biassed by a stranger, the judges at nisi prius examined the jurors, who confessed it, and their confession was entered as parcel of the record, and nevertheless the judges took their verdict, 14 *H. VII;* 29, 15 *H. VII,* 1. So, where a witness was examined by a jury after they had retired to consider their verdict, and complaint was made to the judge, he examined the inquest, who confessed all the matter, and it was entered on the postea.—*Metcalfe* v. *Deane, Cro. El.* 189. And see *Vicary* v. *Farthing, Cro. El.* 411; *Graves* v. *Short, Cro. El.* 616.

The case in 11 *H. IV.* 17, is this: "The plaintiff in an assize had delivered a scroll in writing to a juryman on the panel for evidence of his matter, and after the same juror, with others, was sworn, and put in a house to agree on their verdict, he showed the same writing to his companions; and the officer, who kept the inquest, showed this matter to the court; wherefor the justices took the writing

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from the jurors, and took their verdict, and by the examination of the jurors, the time of the delivery of the writing was inquired into, and it was found *(i.e.* by the judges, and not "by the jurors" as the Privy Council supposed) *ut supra;* and because the verdict had passed for the plaintiff, he now prayed his judgment. *Gascoigne and Hulls*, judges of the K. B., said that the jury after they were sworn ought not to see or carry with them any other evidence except that which was delivered to them by the court, and by the party put in court upon the evidence shown; and because they did the contrary, this was suspicious *(which words are omitted by the Privy Council.)* Wherefore he ought not to have judgment. (And afterwards the plaintiff said that the writing proved the same evidence as he himself gave to them at the bar; wherefore it was not so bad as if it had not been read in evidence, but it was not allowed.) *The Privy Council omitted this last passage between brackets.*

Now it is quite clear that the same course of examining the jury, etc., was followed here as in the cases above referred to. Yet the P. C. call this "a special verdict;" and say "the result of the examination, viz., that the verdict was not according to the evidence, but upon evidence taken out of court, without the assent of the other party, appeared by the *finding of the jury;*" and, again, that the court "ascertained the fact of the misconduct of the plaintiff by examination of the jurors, while acting as jurors, and *by their verdict.*"

Whereas nothing is clearer than that the only verdict the jury gave was for the plaintiff upon the issue joined; and it is very difficult to understand how the Privy Council could imagine that a jury could find any verdict as to

anything else; and still more so, a verdict that would have convicted themselves of irregularity, if not more. But it is still more surprising that the Privy Council whilst professing to translate the case should have omitted all version of *ceo fuit suspicious;* for that is the very ground of the judgment; for what was said by the judges was the judgment of the court. *Rolle* (trial verdict, D. pl. 9., p. 714) well puts this case on the ground that the delivery of a writing to the jury will avoid a verdict for the party who delivered it, although he give the same evidence to the jury at the bar; and neither in this nor in any other case did the court enter into any inquiry whether *in fact* the jury was biassed. This case is a distinct authority that if a party give a paper to a jury, which may possibly bias them, and they find a verdict for him, this makes the *verdict so suspicious* that it can not stand; and this case has always been followed in later cases.

In a trial between the Bishop of R. and the Earl of Kent, during a tempest some of the jurors separated themselves, and some person said to one of them, "Beware how you act; for the matter of the Earl is better than the matter of the Bishop," and induced him to drink; and afterwards the jury found a verdict for the Bishop. It was held that the verdict was good; for it was contrary to the inducement which was made for the defendant; but, if the verdict had been the other way, it would not have stood; for it would be suspicious, *(car il est suspeceoneux.) Y. B.* 14 *H. VII,* 29 and 15 *H. VII,* 1. This case was repeatedly argued before all the judges of both benches; and it was held that the distinction between a verdict for the party, in whose favor the influence

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was used, and a verdict against him, was that the verdict for him showed that there was a bias in his favor; but the verdict against him showed that there was no favor towards him; and it was said to have been held that, if a man gave money to a juror, who found a verdict against him, the verdict was good; but it would have been otherwise if the verdict had been for him. Lord Hale infers from this case that if the jury eat and drink "at the charge of the prisoner, and the verdict find him guilty, the verdict is good; but if they find him not guilty, and this appears by examination, the judge before whom the verdict is given, may record the special matter, and thereupon the verdict shall be set aside, and a new trial awarded."—2 *Hale*, 306. See also *Graves* v. *Short*, *Cro. El.* 616.

The jury having heard all the evidence in a case of murder, withdrew to consider their verdict, and being returned, delivered their verdict into court in writing; and being examined by the court how they came by that writing, confessed it was delivered into their hands by the prisoner as they passed him. The court thereupon discharged the jury of the prisoner and a new venire was awarded. *Anon. Fost.* 27. This record was produced in court.

In *Metcalfe* v. *Deane*, *Cro. El.* 189, a witness for the defendant was called by the jury after they had retired, and they caused him to repeat his evidence, which was the same in effect that was given before in court, and not different, and they found a verdict for the defendant, and the court held that the verdict was not good, because (according to Rolle) "it is *not certainly known* to the court whether this was the same evidence as was given at bar."—2 *Rolle Abr.* 715, *pl.* 13, who says he had seen this record.

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Now these cases clearly show that if there be any reasonable ground to suppose that the jury may have been improperly influenced, the verdict will be set aside; and the influence need not be created by the party in whose favor the verdict is given; for where handbills reflecting on the plaintiff's character had been distributed in court and shown to the jury on the day of the trial, a new trial was granted against the defendant, though he denied all knowledge of the handbills.—*Coster* v. *Merest*, 3 *B. & B.* 272. *R.* v. *Wooler* also is a distinct authority that a reasonable doubt of the correctness of a verdict is a sufficient ground for a new trial in a criminal case.

Now let us see what the *Murphy* case is. It is distinctly stated that the jurors were allowed the use of newspapers containing the heading "The South Creek murder" and stating that a witness was cross-examined and not shaken. This clearly was matter that ought not to have been seen by the jury; as its tendency was against the prisoner; and the verdict was against him. It is impossible to conceive that any judge would have allowed the jury to see these papers. The case clearly comes directly within the principle established by all the authorities. The decision on this point, therefore, was undoubtedly, erroneous.

The supreme court had ordered a proper entry on the record (in accordance with the authorities) that the jury were improperly allowed the use of the newspapers. Yet the Privy Council entered into a consideration of the documents, on which the supreme court acted. This is directly contrary to *Graves* v. *Short*, and in subversion of the rule that nothing but the record itself can be considered. The ground on which the Privy Council considered these docu-

ments was that they were referred to them with the case by the crown; but it can hardly be maintained that that could make that lawful to be acted upon, which would otherwise be unlawful.

Then the court proceeded to show that the sheriff and his bailiffs are not like a party in a cause; but that really was not the point. The true question was, had the jury access to papers which might improperly bias their minds.

I now pass from *A. G.* v. *Murphy*. It is well next to consider the supposed authorities for saying that there can be no new trial in felony.—In *R.* v. *Mawbey*, 6 *T. R.* 619, four defendants were indicted for a conspiracy, and two of them acquitted and two convicted; and one question was whether a new trial could be granted as to the two that were convicted without the others; and it was contended for these defendants that a new trial ought to be granted wherever there would be a palpable defect of justice if it were not granted. On the part of the crown, cases were put to show that a new trial could not be granted in many cases, in which there might be a palpable failure of justice. Thus if a defendant, unquestionably guilty, were acquitted, the court could not grant a new trial. So also if a defendant be convicted of treason or felony, though against the weight of evidence, there is no instance of a motion for a new trial in such a case; but the judge passses sentence and respites execution till application can be made to the mercy of the crown. It is clear that this passage refers to cases of conviction on the crown side at the assizes, and not to cases tried at nisi prius on King's Bench records; for until the 11 G. 4 & 1 Wm. 4, c. 70, s. 9, sentence could not be passed on a conviction at nisi prius; and the hardship in so large a number of such cases was quite sufficient

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for the argument on the part of the crown. Again the *dictum* merely asserts that no case of a new trial had been found where it had been moved for on the ground of the verdict being against the weight of evidence; which is a far narrower assertion than that no new trial could be granted in any case of felony; and very nearly amounts to an admission that, in some cases of felony, a new trial might be granted. Then Lord Kenyon, C. J., plainly referring to this *dictum*, said "in one class of offences indeed, those greater than misdemeanors, no new trial can be granted at all." This *dictum* must in all fairness be limited to the point put by the counsel for the crown; otherwise it is clearly too wide. This *dictum*, entirely separated from the context, has been cited in *Corner's C. P.* 161, and elsewhere as warranting the general proposition; and I will apply the *dictum* of Cockburn, C. J., in *Winsor* v. *R.*, 14 *L. T.* 189, 10 Cox, 276, to it. "This loose *dictum* has been copied servilely by text writers into their books until it has come to be regarded as an authority." The only other case cited by Corner is *Bright* v. *Eynon*, 1 *Burr.* 390; but there is not a word as to a new trial in felony in that case. But this case and *R.* v. *Mawbey* are as strong authorities as possible that the court will not yield to the mere absence of precedent in opposition to the claims of justice; but will grant a new trial where the ends of justice cannot be attained without it. In a note, 13 *East*, 416, it is said "in capital cases at the assizes if a conviction take place upon insufficient evidence, the common course is to apply to the crown for a pardon"; but "I am not aware of any instance of a new trial granted in a capital case." The context shows that this means a case tried at the assizes.

In the same note, it is said that in *Tinckler's Case*, 1 *East*

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P. C. 354, it seemed to be the opinion of the judges that a new trial could not be granted in felony. Neither in *East* nor in 1 *Den.* p. *V.* (preface) is anything of the sort mentioned; and it is difficult to see how such a point could have arisen. The prisoner was tried at Durham for murder; and a case was reserved as to the admissibility of certain dying declarations, and the judges held the conviction right. It is clear the judges could not grant a new trial; and, if any thing as to a new trial was mentioned, it was wholly extra-judicial, and all it could amount to was that where a case was tried on the crown side at the assizes, no new trial could be granted by any other court. The truth is that all that has been said on this subject refers to cases tried at the assizes or quarter sessions; and, as there are no means of bringing the facts before the Queen's Bench on error or by certiorari, of course that court cannot grant a new trial. The supposed general rule doubtless, originated with these ordinary cases at assizes and sessions; but, like other general rules, it is subject to the exception of the very rare cases in the Queen's Bench. The following cases of misdemeanor well illustrate the matter. In *R.* v. *Oxfordshire*, 13 *East* 411, the defendants were found guilty of the non-repair of a bridge at the assizes, and a motion was made for a certiorari to remove the indictment into the Queen's Bench in order to move for a new trial; but it was held that it could not be done, as the court could have no information as to the merits. *R.* v. *Nichols, Ibid, note p.* 412. So where the defendants were convicted at the quarter sessions for the non-repair of a bridge, the court at once refused to notice a case which had been reserved for their opinion. *R.* v. *Salop*, 13 *East* 95. Again, in *R.* v. *Winsor*, 14 *L. T.* 201, 10 *Cox*, 276, Blackburn, J.,

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said "a verdict may have been founded on circumstances against evidence; but that cannot be reviewed in a court of error, because the evidence upon which the jury decided the question of fact cannot be brought up to a court of error."

This remark was made with reference to a case of felony, and it is quite inconsistent with the supposition that there can be no new trial in any case of felony; for it was useless to draw such a distinction as to the facts being or not being before the court, if in no case could the court decide upon them.

But where a case is tried on a Queen's Bench record, the evidence is brought before the court in banco, and it can deal with it as it can in other cases tried on records of that court. The distinction, therefore, is that the Court of Queen's Bench cannot grant a new trial either in misdemeanor or felony where the case has been tried on the crown side at the assizes or quarter sessions, because it cannot have the facts before it. But that it can grant a new trial in all cases of misdemeanor (whether on the merits or otherwise) where the trial is on a record of that court; and also, in all cases of felony so tried, for any formal defects; and it is maintained that it can do so also on the merits.

I now turn to a case which excited considerable notice at the time. The prisoner was charged with stealing the money of his mistress at Exeter, convicted and sentenced to 14 years' transportation; but this judgment was reversed on error. *R.* v. *Ellis,* 5 *B. & C.* 395. He was again indicted, and in consequence of the prejudice that existed against him, the indictment was removed into the King's Bench, and he was tried at nisi prius by a jury of the County of Devon, and again convicted; and within the

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four first days of the next term a rule was applied for on the ground that evidence of other stealings besides those charged in the indictment had been improperly admitted; but the reports differ as to what the rule was. In 6 *B. & C.* 145, it is said to have been a "rule for staying the judgment." In 9 *D. & R.* 176, it is said to have been "a rule for a new trial;" and this is right; for I have ascertained, from the crown office, that that is the entry in the master's book. Lord Tenterden was present when the application was made, and heard the grounds of it stated, for he remarked upon them; but as no motion can be made in felony, unless the prisoner be present, the application was postponed until he was brought up for judgment on a subsequent day, when it was renewed and fully argued before Bayley, J. and Holroyd, J., on the part of the prisoner, but the counsel for the crown was not heard. Here then we have a case of felony, in which a rule for a new trial was applied for, argued, and decided on the merits, and not a doubt suggested as to a new trial being grantable in felony; and it is clear that all these three great judges had no doubt on the subject, otherwise they never would have listened to the application or heard it solemnly argued; but would have instantly stopped the motion, as was done at once in *R.* v. *Oxfordshire* and *R.* v. *Salop.* This case occurred in 1826, when Lord Campbell and Cresswell, J., very probably were in court; the one then being in great business in that court, and the other, being joint reporter with Barnwall. This case clearly was a good precedent for *R.* v. *Scaife,* and it proves how unfounded is the statement in the judgment in *R.* v. *Bertrand* that no such application had ever been made before that case; and, as that erroneous supposition was the foundation of that

judgment, it shakes that decision to the greatest extent. It equally negatives the doctrine that no new trial can be granted in felony; for the more that doctrine is supposed to have prevailed, the more unaccountable is it that the application should have been entertained, unless all the judges were clear that the doctrine was erroneous.

In *R.* v. *Scaife*, the indictment had been removed into the Queen's Bench and was tried by Cresswell, J., at York, when two of the prisoners were convicted, and one acquitted. Cresswell, J., had admitted the deposition of an absent witness, subject to the objection that it could not be evidence against two of the prisoners, and he pointed out that the question ought to be raised in the Queen's Bench, as the record came from that court.—(2 *Den.* 286.) Now it is quite impossible to suppose that Cresswell, J., would have taken this course, unless he was of opinion that that court could set the matter right, and the only way in which it could do so was by granting a new trial; and the only reasonable inference is that that great judge had no doubt that a new trial might be granted in felony, and I have little doubt that the similar course in *R.* v. *Ellis*, as to the admissibility of evidence, was in the mind of Cresswell, J., when he reserved the question.

Accordingly, a rule nisi for a new trial was obtained, argued on both sides, and the rule made absolute by Lord Campbell, C. J., Patteson, J., Erle, J., and Coleridge J. Not a doubt was suggested as to a new trial being grantable in felony. But after the judgment had been delivered it was suggested (according to the Queen's Bench report) that there was a difficulty as to what rule should be drawn up, no precedent for a new trial in felony having been found, on which Lord Campbell said "that

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might have been an argument against our hearing the motion." The court, after conferring with the master, made the rule absolute. So that, having the question directly brought to their notice, the court clearly thought there was nothing in it. Probably the report is inaccurate as to the difficulty about the rule. There could be no difficulty in an ordinary rule absolute, as it would follow the regular course; but here, there was the difficulty of making the rule absolute as to those prisoners only who had been convicted, which was so much discussed in *R.* v. *Mawbey*, in which it was decided that it might be done, but no rule drawn up; and probably this was the difficulty. See the rule in 2 *Den.* 287. The result of the examination of these cases is that Lord Tenderden, C. J., Bayley, J., Holroyd, J., Lord Campbell, C. J., Coleridge, J., Patteson, J., Erle, J., and Cresswell, J., must have been of opinion that a new trial in felony might be granted at the time, when these cases were before them, and the fact that neither in the one case nor in the other did the counsel for the crown venture to raise the question, strongly tends to show that, on all hands, it was considered perfectly clear at that time that a new trial might be granted in felony.

It may be well also to consider the cases as to a *venire de novo* after a special verdict in felony, as the only material difference between it and a new trial seems to be that a *venire de novo* is only grantable for something that appears on the face of the record, but a new trial may be granted for a variety of causes in addition, which never appear on the record. — 1 *Chit.* 654. It is clearly settled that a *venire de novo* may be granted for error in the proceedings, which is not upon the merits. As to a *venire de novo* on the merits, in *Trafford* v. *R.*, 8.

Bing. 204, a *venire de novo* was granted, because the special verdict did not contain a sufficient finding of facts to warrant the application of the rule that, at common law, the land holders would have the right to raise the banks of a river, from time to time, so as to confine the flood-water within the banks. The court, therefore, must have considered the facts, and decided upon them. In *R.* v. *Keite,* 1 *L. Raym.* 138, the question was whether a special verdict showed that the prisoner was guilty of murder or manslaughter. On the first argument Holt, C. J., said, "if the verdict is imperfect, no judgment can be given, but a *venire de novo* ought to issue"; and Eyre, J., and Rokeby, J., held the same. At the end of the second argument, no judgment was given on the matter of law raised on the special verdict; but Holt, C. J., took several exceptions to the indictments, and they were quashed. In *R.* v. *Burridge,* 3 *P. Wm.* 499, Lord Hardwicke, C. J., said that "a doubt seems to have arisen whether a *venire de novo* could be awarded in a capital case; to avoid this question, Lord Holt took exceptions to the indictments." This seems to be a misapprehension both as to their having been any such doubt, and as to Lord Holt having tried to avoid it; there is not a word in the report to lead to either supposition, and it should be remembered that, in former times, the judges quashed indictments for any objection apparent to themselves; and hence it was that any barrister, as *amicus curiæ,* had a right to point out any defect "to inform the justices, that they do not err."—14 *H. VII.* 29. The *dicta,* therefore, of Lord Holt, C. J., and the other two justices are unshaken; and *Trafford* v. *R.,* is in accordance with them; so also in *Campbell* v. *R.* "there is a solemn decision of the Court of Queen's Bench, not reversed or

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questioned, that a *venire de novo* will lie upon an imperfect verdict" in felony: per Blackburn, J., *R.* v. *Winsor*, 14 *L. T.* 203; 10 *Cox*, 276. It is clear that in every case of a special verdict, the merits of the case are considered, and if they are sufficiently stated, judgment on the one side or the other is given, but if they are insufficiently stated, a *venire de novo* must issue. In *R.* v. *Sykes*, *T. Raym.* 202, in an information for perjury the record of the trial, on which the perjury was committed, varied from the statement of it in the information, and at the assizes, it was found specially. It was held that the judges at the trial ought to have determined it, and that a *venire de novo* ought to issue. This case is a clear decision that a *venire de novo* ought to issue upon the merits. It is just like the case of admitting or rejecting evidence improperly, which in civil cases is a ground for a *venire de novo*: *Davies* v. *Pierce*, 2 *T. R.* 125. And in *Campbell* v. *R.*, 11 *Q. B.* 824, it was asserted that there is no distinction on this point between criminal and civil cases. If then a *venire de novo* can be granted on the merits in felony, it strongly supports the powers of granting a new trial on the merits, for the difference between the two really consists merely in the form in which the question is brought before the court.

A sort of vague notion seems to have existed that there was some distinction between felony and misdemeanor on these questions; and the *dictum* of Lord Kenyon, C. J., in *R.* v. *Mawbey*, referring to "a class of offences" "greater than misdemeanors" may have given countenance to this supposition. But any such distinction is clearly unfounded, for there is no doubt, whatsoever, that in every case of felony where there is any fatal formal defect, a new

trial or a *venire de novo* (as the case may be) may be granted exactly in the same way as in misdemeanors, and it was well observed by Cockburn, C. J., in *R.* v. *Winsor* with reference to *R.* v. *Davison*, 2 *F. & F.* 250, that "it is very true that that was a case of misdemeanor, and this is a case of felony; but I can see no real distinction whatever between the two classes of cases. The trial by jury is the same, and the principles on which it is to be administered are the same, whether the case is one of felony or misdemeanor; and I am utterly at a loss to see any distinction that can exist in point of principle between the two cases."

There is, however, one very important distinction in favor of a prisoner charged with felony—the right to challenge jurymen peremptorily—which does not exist in misdemeanor, and this affords a strong argument for there being at least as large a power to correct the errors of jurors, on the merits, in cases of felony as in misdemeanors.

I have dealt thus fully with this question, because it does seem to me most unreasonable that there should be power to grant a new trial in misdemeanors, both on the merits and for matters of form, and in felony also, for matters of form, but not on the merits; in other words that there should be no such power on the most momentous questions on which the guilt or innocence of the prisoner may turn, although it exists in the less important matters, which in no way whatever bear on his guilt or innocence."

SPECIAL PROVISIONS.

269. Any judge, retired judge, or Queen's counsel, presiding at any sittings of the High Court of Justice of Ontario, may reserve the giving of his final decision on questions raised at the trial; and his decision, whenever given, shall be considered as if given at the time of the trial.—46 *V.*, *c.* 10, *s.* 1.

270. The practice and procedure in all criminal cases and matters whatsoever in the said High Court of Justice shall be the same as the practice and procedure in similar cases and matters, before the establishment of the said High Court.—46 *V.*, *c.* 10, *s.* 2.

271. If any general commission for the holding of a court of assize and nisi prius, oyer and terminer or general gaol delivery, is issued by the Governor General for any county or district in the Province of Ontario, such commission shall contain the names of the justices of the supreme court of judicature for Ontario, and may also contain the names of the judges of any of the county courts in Ontario, and of any of Her Majesty's counsel learned in the law, appointed for the Province of Upper Canada, or for the Province of Ontario, and if any any such commission is for a provisional judicial district such commission may contain the name of the judge of the district court of the said district:

2. The said courts shall be presided over by one of the justices of the said supreme court, or in their absence by one of such county court judges or by one of such counsel, or in the case of the said district by the judge of the said district court.—46 *V.*, *c.* 10, *s.* 4.

272. It shall not be necessary for any court of General Sessions in the Province of Ontario to deliver the gaol of all prisoners who are confined upon charges of simple larceny, but the court may leave any such cases to be tried at the next court of oyer and terminer and general gaol delivery, if, by reason of the difficulty or importance of the case, or for any other cause, it appears to it proper so to do.—*C. S. U. C.*, *c.* 17, *s.* 8.

273. If any person is prosecuted in either division of the high Court of Justice for Ontario, for any misdemeanor, by information there filed or by indictment there found, or removed into such court and appears therein in term time, in person, or in case of a corporation, by attorney, to answer to such information or indictment, such defendant, upon being charged therewith, shall not imparl to a following term, but shall plead or demur thereto, within four days from the time of his appearance; and in default of his pleading or demurring within four days as aforesaid, judgment may be entered against such defendant for want of a plea.—*C. S. U. C.*, *c.* 108, *s.* 1.

274. If such defendant appears to such information or indictment by attorney, such defendant shall not imparl to a following term; but a rule, requiring him to plead, may forthwith be given and served, and a plea to such information or indictment may be enforced, or

judgment in default may be entered, in the same manner as might have been done formerly in cases in which the defendant had appeared to such information or indictment by attorney in a previous term; but the court, or any judge thereof, upon sufficient cause shown for that purpose, may allow further time for such defendant to plead or demur to such information or indictment.—*C. S. U. C.*, *c.* 108, *s.* 2.

275. If any prosecution for misdemeanor instituted by the Attorney General for Ontario in the said court, is not brought to trial within twelve months next after the plea of not guilty has been pleaded thereto, the court in which such prosecution is depending, upon application made on behalf of any defendant in such prosecution, of which application twenty days previous notice shall be given to such Attorney General, may make an order, authorizing such defendant to bring on the trial of such prosecution; and thereupon such defendant may bring on such trial accordingly, unless a *nolle prosequi* is entered to such prosecution.—*C. S. U. C.*, *c.*108, *s.* 4.

276. In the Province of Nova Scotia a calendar of the criminal cases shall be sent by the clerk of the Crown to the grand jury in each term, together with the depositions taken in each case and the names of the different witnesses, and the indictments shall not be made out, except in Halifax, until the grand jury so directs.—*R. S. N. S.* (3rd S.), *c.* 123, *s.* 17.

277. A judge of the supreme court of Nova Scotia may sentence convicted criminals on any day of the sittings at Halifax, as well as in term time.—*R. S. N. S.* (3rd S.), *c.*171, *s.* 75.

GENERAL PROVISIONS.

278. The several forms in the schedules to this Act, or forms to the like effect, shall be good, valid and sufficient in law, and the forms of indictment contained in the second schedule to this Act may be used, and shall be sufficient as respects the several offences to which they respectively relate; and as respects offences not mentioned in such second schedule, the said forms shall serve as a guide to show the manner in which offences are to be charged, so as to avoid surplusage and verbiage, and the averment of matters not necessary to be proved, and the indictment shall be good if, in the opinion of the court, the prisoner will sustain no injury from its being held to be so,

and the offence or offences intended to be charged by it can be understood from it.—32-33 *V., c.* 29, *s.* 27; *and c.* 30, *s.* 66.

279. Nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.—32-33 *V., c.* 29, *s.* 137.

The enactment in section 278, so far as it relates to the forms contained in the first schedule, is taken from the 11-12 V., c. 42, s. 28, *Imp.* The cases of *Barnes* v. *White*, 1 *C. B.* 192, in *re Allison*, 10 *Ex.* 561, *R.* v. *Johnson*, 8 *Q. B.* 102, and *R.* v. *Sansome*, 1 *Den.* 545, seem to support the contention that where a statute gives a form it is sufficient to follow it. In *R* v. *Johnson, ubi supra*, however, it was said, by the judges, that a statutory form is insufficient, if it does not give a complete description of the offence.

In *R.* v. *Kimber*, 3 *Cox*, 223, the judges doubted if a certain document under the Jervis act was sufficient though it had been drawn exactly in the form given by the statute. In *Egginton's Case*, 5 *E. & B.* 100, it was held that if a form is given by a statute, it can be followed.—So, in *R.* v. *Bain*, *Ramsay's App. Cases* 191, for perjury; and *R.* v. *Davis*, 18 *U. C. Q. B.* 180, for false pretences.

REMARKS ON FORMS IN THE SECOND SCHEDULE.

Murder and Manslaughter.—Venue in the body of the indictment unnecessary. S. 104, Procedure Act.

Bodily harm.—Venue unnecessary.—Indictment under sec. 8, c. 162 need not aver "and did thereby cause bodily harm."—But if it does "*grievous* bodily harm" are the words of the section.—Then "with intent to *commit* murder," or "with intent feloniously, wilfully and of his malice aforethought to kill and murder" are necessary.

See *R.* v. *Carr*, 26 *L. C. J.* 61.

Rape.—Venue unnecessary.—Allegation that the woman ravished was above twelve years of age, unnecessary.

Robbery.—This is a form under sec. 34 of the *Larceny Act*, page 331, *ante*. It is entirely defective, even after verdict.

Burglary.—Word "*burglariously*" omitted.—The particular felony intended must also be specified. This form bad, even after verdict. See remarks under sec. 38 of *the Larceny Act*, p. 353, *ante*.

Stealing money.—Stealing money is simple larceny under sec. 5 of the *Larceny Act*, p. 290, *ante*, and the form given for simple larceny in this schedule covers it. Stealing from the person is covered by sec. 32 of the *Larceny Act*, p. 315, *ante*, and this form does not cover it. Stealing any property or any money the value of which is over $200 is covered by sec. 86 of the *Larceny Act*, p. 457, *ante*, and this form, if intended to fall under that section, should allege that the sum of money stolen was of more than $200.

Embezzlement.—See proper form, p. 386, *ante*, under sec. 52 of the *Larceny Act*.

False pretences.—What are the false pretences should be set at full length.

See, p. 420, *ante*, remarks under sec. 77 of the *Larceny Act*.

After verdict, an indictment was quashed for not stating what the false pretences were. *R.* v. *Mason*, 2 *T. R.* 581. This decision was before the statute which enacts that, *after verdict*, an indictment in the words of the statute is sufficient.

In *R.* v. *Goldsmith*, 12 *Cox*, 479, it is said that the question whether such an indictment, not stating what are the false pretences, would be sufficient now, after verdict, has not been raised. See *R.* v. *Kelleher*, 14 *Cox*, 48.

In Ontario and Quebec, before the Consolidation Acts of 1869, sec. 35 of ch. 99, C. S. C. expressly dispensed with the necessity of setting out the false pretences in all indictments for obtaining by false pretences; but this clause has been repealed by the General Repeal Act of 1869.

Offences against the habitation.—See proper form under sec. 2 of c. 168, p. 558, *ante.*—The word "unlawfully" is wanting. The statutory offence is therefore not covered by this form.

In *R.* v. *Davis*, 1 *Leach*, 493, the indictment averred that the defendent *unlawfully, maliciously* and *feloniously* did shoot, etc. The words of the statute creating the offence charged were. "That if any person shall *wilfully* and *maliciously* shoot .... he shall be guilty of felony." As the word "wilfully" was not in the indictment, it was held bad.

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

So in *R.* v. *Turner*, 1 *Moo. C. C.* 239, it was held that if a statute makes it criminal to do an act *unlawfully* and *maliciously*, an indictment must state that it was done unlawfully; stating that it was done feloniously, voluntarily and maliciously is not enough. So an indictment charging the prisoner with "feloniously, wilfully and

maliciously" cutting, is defective, and judgment will be arrested upon a verdict thereon, if the statute creating the offence uses the word "unlawfully."—*R.* v. *Ryan*, 2 *Moo. C. C.* 15; *R.* v. *Lewis*, 2 *Russ.* 1067.

Malicious injuries to property.—This form is under sec. 4. of ch. 168 p. 562, *ante.*—The word "unlawfully" is wanting. Also the words "with intent to defraud" or "injure."—Bad, even after verdict.

Forgery.—See general form, *ante*, p. 484, *ante*, for forgery under statute, and p. 486, *ante*, for forgery at common law, and under sec. 28 of Forgery Act, p. 512, *ante*, for forgery of a promissory note.

Coining.—The words "intent to defraud" are a surplusage in the count for counterfeiting under sec. 3. c. 167, p. 537, *ante.*—The last part of this form is for a misdemeanor under sec. 12 of c. 167, p. 544, *ante*, and is not in the words of the statute.

Subornation of perjury.—The words "aforesaid upon their oath aforesaid" should be inserted after the words "and the jurors." Each count is a separate presentment, and every presentment must appear to be upon oath.—1 *Chit.* 249; *Archbold*, 73.

Offences against the publicpeace.—This form is entirely defective. It is under sec. 9 of c. 147, p. 35, *ante*, and the words *unlawfully* and *feloniously* are omitted. See proper form with that act, p. 36, *ante.*

Offences against the administration of justice.—This form is presumed to cover the offence created by sec. 89 of the *Larceny Act*, under which, p. 459, *ante*, see a proper form.

The present one has not the word "feloniously." Then it does not allege that the defendant has not used all due diligence to cause the offender to be brought to trial.

This is an exception, and a well established rule of pleading directs that if there be an exception contained in the same clause of an act creating an offence, the indictment must show, negatively, that the defendant does not come within the exception.—*Archbold*, 62.

Bigamy.—See form, p. 76, *ante*, under c. 161.

The two last counts in this form of the second schedule are for offences under secs. 1 and 3 of that act.

Offences relating to the army.—This form is to cover the offence created by sec. 1 of c. 169.—It is entirely defective.—It should allege that the accused was not an enlisted soldier in Her Majesty's service or a seaman in Her Majesty's naval service. Then procuring *a soldier* to desert is too general. His name must be given, if known, or if unknown covered by the usual allegation in such instances.

Offences against public morals.—Defective.—Under c. 157, s. 8, p. 71, *ante*.—See *form* in *Archbold*, 935. Sec. 140, Procedure Act, applies.

FIRST SCHEDULE.

(Not printed. The forms it contains apply to ss. 30 to 96 of the Procedure Act, relating to the procedure before the magistrates.)

SECOND SCHEDULE.

FORMS OF INDICTMENT.

Murder.

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

Manslaughter.

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

Bodily Harm.

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

Rape.

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

Simple Larceny.

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

Robbery.

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

Burglary.

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

Stealing Money.

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

Embezzlement.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the day of , at , being a servant (*or* clerk) then employed in that capacity by one C. D., did then and there, in virtue thereof, receive a certain sum of money, to wit, the amount of , for and on account of the said C. D., and the said money did feloniously embezzle.

False Pretences.

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

Offences against the Habitation.

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

Malicious Injuries to Property.

County (*or* district) } The Jurors for our Lady the Queen,
of , to wit: } upon their oath, present that A. B., on
the day of , at , did feloniously and maliciously set fire, or attempt to set fire, to a certain building or erection, that is to say (a house *or* barn *or* bridge, *or as the case may be*,) the property of one C. D. (*or as the case may be*).

Forgery.

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

Coining,

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

Perjury.

County (*or* district) } The Jurors for our Lady the Queen,
of , to wit: } upon their oath, present that heretofore,

to wit, at the (*assizes*) holden for the county (*or* district) of , on the day of , before (*one of the judges of our Lady the Queen*), a certain issue between one E. F. and one J. H., in a certain action of *covenant*, was tried, upon which trial A. B. appeared as a witness for and on behalf of the said E. F., and was then and there duly *sworn* before the said and did then and there, upon his *oath*, aforesaid, falsely, wilfully and corruptly depose and *swear* in substance and to the effect following, "*that he saw the said G. H. duly execute the deed on which the said action was brought*," whereas, in truth, the said A. B. did not see the said G. H. execute the said deed, and the said deed was not executed by the said G. H., and the said A. B. did thereby commit wilful and corrupt perjury.

Subornation of Perjury.

County (*or* district) of , to wit: } *Same as last form to the end, and then proceed:*—And the jurors further present, that before the committing of the said offence by the said A. B., to wit, on the day of , at , C. D., unlawfully, wilfully and corruptly did cause and procure the said A. B. to do and commit the said offence in manner and form aforesaid.

Offences against the Public Peace.

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

Offences against the Administration of Justice.

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

Bigamy or offences against the Law for the Solemnization of Marriage.

County (*or* district) } The Jurors for our Lady the Queen, of , to wit: } upon their oath, present that A. B., on the day of , at , being then married, did feloniously marry C. D. during the lifetime of the wife of the said A. B.—(*or* not being duly authorized, did solemnize *or* assist in the solemnization of) a marriage between C. D. and E. F., *or* being duly authorized to marry, did solemnize marriage between C. D. and E. F. before proclamation of banns according to law, or without a license for such marriage under the hand and seal of the Governor.)

Offences relating to the Army.

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

Offences against Public Morals and Decency.

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

General Form.

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

THIRD SCHEDULE.

Whereas at (*stating the session of the court before which the person was convicted,*) held for the county (*or* united counties) of , on before A. B., late of , having been found guilty of felony, and judgment thereon given, that (*state the substance,*) the court before whom he was tried reserved a certain question of law for the consideration of the justices of (*name of court*), and execution was thereupon respited in the meantime (*as the case may be*): This is to certify that the justices of (*name of court*) having met at in term (*or as the case may be*), it was considered by the said justices there, that the judgment aforesaid should be annulled, and an entry made on the record, that the said A. B. ought not, in the judgment of the said justices, to have been convicted of the felony aforesaid; and you are therefore, hereby required forthwith to discharge the said A. B. from your custody.

(Signed), E. F.
Clerk of (*as the case may be.*)

To the sheriff of , and the gaoler of , and all others whom it may concern.

32-33 *V.*, *c.* 29, *sch. A, and c.* 30, *sch.*;—*C. S. U. C.*, *c.* 112, *sch.*; —*C. S. L. C.*, *c.* 77, *sch. A.*; —*R. S. N. S.* (3*rd S.*), *c.* 171, *sch.*;—1 *R. S. N. B.*, *Title XL*, *and sch.*, *Form* (*U.*)

CHAPTER 179.

AN ACT RESPECTING RECOGNIZANCES.

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

1. Any surety for any person charged with any indictable offence may, upon affidavit showing the grounds therefor, with a certified copy of the recognizance, obtain from a judge of a superior court or from a judge of a county court having criminal jurisdiction, an order in writing under his hand, to render such person to the common gaol of the county where the offence is to be tried.—1 *R. S. N. B.*, *c.* 157, *s.* 1.

2. The sureties, under such order, may arrest such person, and deliver him, with the order, to the gaoler named therein, who shall receive and imprison him in the said gaol, and shall be charged with the keeping of such person until he is discharged by due course of law.—1 *R. S. N. B.*, *c.* 157, *s.* 2.

3. The person rendered may apply to a judge of a superior court, or in cases in which a judge of a county court may admit to bail, to a judge of a county court, to be again admitted to bail, who may on examination allow or refuse the same, and make such order as to the number of the sureties and the amount of recognizance as he deems meet,—which order shall be dealt with in the same manner as the first order for bail, and so on, as often as the case requires.—1 *R. S. N. B.*, *c.* 157, *s.* 3.

4. On due proof of such render, and certificate of the sheriff, proved by the affidavit of a subscribing witness, that such person has been so rendered, a judge of the superior or county court, as the case may be, shall order an entry of such render to be made on the recognizance by the officer in charge thereof, which shall vacate the recognizance, and may be pleaded or alleged in discharge thereof.—1 *R. S. N. B.*, *c.* 157, *s.* 4.

5. The sureties may bring the person charged as aforesaid into the court at which he is bound to appear, during the sitting thereof, and then, by leave of the court, render him in discharge of such recognizance at any time before trial, and such person shall be committed to

gaol, there to remain until discharged by due course of law; but such court may admit such person to bail for his appearance at any time it deems meet.—1 *R. S. N. B.*, *c.* 157, *s.* 5.

6. The arraignment or conviction of any person charged and bound as aforesaid shall not discharge the recognizance, but the same shall be effectual for his appearance for trial or sentence, as the case may be; and the court may commit such person to gaol upon his arraignment or trial, or may require new or additional sureties for his appearance for trial or sentence, as the case may be, notwithstanding such recognizance; and such commitment shall be a discharge of the sureties.—1 *R. S. N. B.*, *c.* 157, *s.* 6.

7. Nothing in the foregoing provisions shall limit or restrict any right which a surety now has of taking and rendering to custody any person charged with any such offence, and for whom he is such surety,

8. Unless otherwise provided, all fines, issues, amercements and forfeited recognizances, the disposal of which is within the legislative authority of the Parliament of Canada, set, imposed, lost or forfeited before any court of criminal jurisdiction, shall, within twenty-one days after the adjournment of such court be fairly entered and extracted of a roll by the clerk of the court, or in case of his death or absence by any other person, under the direction of the judge who presided at such court, which roll shall be made in duplicate and signed by the clerk of the court, or in case of his death or absence, by such judge:

2. If such court is a superior court of criminal jurisdiction, one of such rolls shall be filed with the clerk, prothonotary, registrar or other proper officer,—

(*a.*) In the Province of Ontario, of a division of the high court of justice,—

(*b.*) In the Provinces of Nova Scotia, New Brunswick and British Columbia, of the supreme court of the Province,—

(*c.*) In the Province of Prince Edward Island, of the supreme court of judicature of that Province,—

(*d.*) In the Province of Manitoba, of the Court of Queen's Bench of that Province and,—

(*e.*) In the North-West Territories, of the supreme court of the said Territories,—

On or before the first day of the term next succeeding the court by or before which such fines or forfeitures were imposed or forfeited:

3. If such court is a court of General Sessions of the Peace, or a county court, one of such rolls shall remain deposited in the office of the clerk of such court.—*C. S. U. C.*, *c.* 117, *ss.* 1 *and* 2, *part*, 3 *and* 4, *part.* 49 *V.*, *c.* 25, *s.* 14. 3 *Geo.* 4, *c.* 46, *s.* 2, *Imp.*

9. The other of such rolls shall, as soon as the same is prepared, be sent by the clerk of the court making the same, or in case of his death or absence, by such judge as aforesaid with a writ of *fieri facias* and *capias*, according to the form in the schedule to this Act, to the sheriff of the county in and for which such court was holden; and such writ shall be authority to the sheriff for proceeding to the immediate levying and recovering of such fines, issues, amercements and forfeited recognizances, on the goods and chattels, lands and tenements of the several persons named therein, or for taking into custody the bodies of such persons respectively, in case sufficient goods and chattels, lands or tenements cannot be found, whereof the sums required can be made; and every person so taken shall be lodged in the common gaol of the county, until satisfaction is made, or until the court into which such writ is returnable, upon cause shown by the party, as hereinafter mentioned, makes an order in the case, and until such order has been fully complied with.—*C. S. U. C.*, *c.* 117, *ss.* 2, *part*, 4 *part*, *and* 5. 3 *Geo.* 4, *c.* 46, *s.* 2, *Imp.*

10. If any person bound by recognizance for his appearance (or for whose appearance any other person has become so bound) to prosecute or give evidence in any case of felony or misdemeanor, or to answer for any common assault, or to articles of the peace, makes default, the officer of the court by whom the estreats are made out shall prepare a list in writing, specifying the name of every person so making default, and the nature of the offence in respect of which such person, or his surety, was so bound, together with the residence, trade, profession or calling of every such person and surety, and shall, in such list, distinguish the principals from the sureties, and shall state the cause, if known, why each such person did not appear, and whether, by reason of the non-appearance of such person, the ends of justice have been defeated or delayed.—*C. S. C.*, *c.* 99, *s.* 120. 7 *Geo.* 4, *c.* 64, *s.* 31, *Imp.*

11. Every such officer shall, before any such recognizance is estreated, lay such list before the judge or one of the judges who presided at the court, or if such court was not presided over by a judge, before two justices of the peace who attended at such court, and such judge or justice shall examine such list, and make such order touching the estreating or putting in process any such recognizance as appears just, subject, in the Province of Quebec, to the provisions hereinafter contained; and no officer of any such court shall estreat or put in process any such recognizance without the written order of the judge

or justices of the peace before whom respectively such list has been laid.—*C. S. C.*, *c.* 99, *s.* 121. 7 *Geo.* 4, *c.* 64, *s.* 31, *Imp.*

12. Except in the cases of persons bound by recognizance for their appearance, or for whose appearance any other person has become bound to prosecute or give evidence in any case of felony or misdemeanor, or to answer for any common assault, or to articles of the peace, in every case of default whereby a recognizance becomes forfeited, if the cause of absence is made known to the court in which the person was bound to appear, the court, on consideration of such cause, and considering also, whether, by the non-appearance of such person the ends of justice have been defeated or delayed, may forbear to order the recognizance to be estreated; and, with respect to all recognizances estreated, if it appears to the satisfaction of the judge who presided at such court that the absence of any person for whose appearance any recognizance was entered into, was owing to circumstances which rendered such absence justifiable, such judge may make an order directing that the sum forfeited upon such estreated recognizance shall not be levied.—*C. S. U. C.*, *c.* 117, *s.* 6, *part.*

13. The clerk of the court shall, for such purpose, before sending to the sheriff any roll, with a writ of *fieri facias* and *capias*, as directed by this act, submit the same to the judge who presided at the court, and such judge may make a minute on the said roll and writ of any such forfeited recognizances and fines as he thinks fit to direct not to be levied; and the sheriff shall observe the direction in such minute written upon such roll and writ, or indorsed thereon, and shall forbear accordingly to levy any such forfeited recognizance or fine.—*C. S. U. C.*, *c.* 117, *s.* 7.

14. If upon any writ issued under this act, the sheriff takes lands or tenements in execution, he shall advertise the same in like manner as he is required to do before the sale of lands in execution in other cases; and no sale shall take place in less than twelve months from the time the writ came to the hands of the sheriff.—*C. S. U. C.*, *c.* 117, *s.* 8.

15. The clerk of the court shall, at the foot of each roll made out as herein directed, make and take an affidavit in the following form, that is to say:—

"I. A. B. (*describing his office*), make oath that this roll is truly "and carefully made up and examined, and that all fines, issues, "amercements, recognizances and forfeitures which were set, lost. "imposed or forfeited, at or by the court therein mentioned, and which,

"in right and due course of law, ought to be levied and paid, are, to "the best of my knowledge and understanding, inserted in the said "roll; and that in the said roll are also contained and expressed all "such fines as have been paid to or received by me, either in court or "otherwise, without any wilful discharge, omission, misnomer or defect "whatsoever So help me God;"

Which oath any justice of the peace for the county is hereby authorized to administer.—*C. S. U. C.*, *c.* 117, *s.* 9. 3 *Geo.* 4, *c.* 46, *s.* 3, *Imp.*

16. If any person on whose goods and chattels a sheriff, bailiff or other officer is authorized to levy any such forfeited recognizance, gives security to the said sheriff or other officer for his appearance at the return day mentioned in the writ, in the court into which such writ is returnable, then and there to abide the decision of such court and also to pay such forfeited recognizance, or sum of money to be paid in lieu or satisfaction thereof, together with all such expenses as are adjudged and ordered by the court, such sheriff or officer shall discharge such person out of custody; and if such person does not appear in pursuance of his untertaking, the court may forthwith issue a writ of *fieri facias* and *capias* against the surety or sureties of the person so bound as aforesaid.—*C. S. U. C.*, *c.* 117, *s.* 10; 3 *Geo.* 4, *c.* 46, *s.* 5, *Imp.*

17. The court into which any writ of *fieri facias* and *capias*, issued under this act, is returnable, may inquire into the circumstances of the case, and may, in its discretion, order the discharge of the whole of the forfeited recognizance, or sum of money paid or to be paid in lieu or satisfaction thereof, and make such order thereon as to such court appears just; and such order shall accordingly be a discharge to the sheriff, or to the party, according to the circumstances of the case. —*C. S. U. C.*, *c.* 117, *s.* 11; 3 *Geo.* 4, *c.* 46, 6, *Imp.*

18. The sheriff, to whom any writ is directed under this act, shall return the same on the day on which the same is made returnable and shall state, on the back of the roll attached to such writ, what has been done in the execution thereof; and such return shall be filed in the court into which such return is made.—*C. S. U. C.*, *c.* 117, *s.* 12; 3 *Geo.* 4, *c.* 46, *s.* 8, *Imp.*

19. A copy of such roll and return, certified by the clerk of the court into which such return is made, shall be forthwith transmitted to the Minister of Finance and Receiver General, with a minute thereon

of any of the sums therein mentioned, which have been remitted by order of the court, in whole or in part, or directed to be forborne, under the authority of this act.—*C. S. U. C.*, *c.* 117, *s.* 13.

20. The sheriff or other officer shall, without delay, pay over all moneys collected under this act by him to the Minister of Finance and Receiver General, or other person entitled to receive the same. —*C. S. U. C.*, *c.* 117, *s.* 14.

QUEBEC.

21. The provisions of sections eight and nine and of twelve to nineteen, both inclusive, shall not apply to the Province of Quebec, and the following provisions shall apply to that Province only.

22. Whenever default is made in the condition of any recognizance lawfully entered into or taken in any criminal case, proceeding or matter, in the Province of Quebec, within the legislative authority of the Parliament of Canada, so that the penal sum therein mentioned becomes forfeited and due to the Crown, such recognizance shall thereupon be estreated or withdrawn from any record or proceeding in which it then is or a certificate or minute of such recognizance, under the seal of the court, shall be made from the records of such court where the recognizance has been entered into orally in open court:

2. Such recognizance, certificate or minute, as the case may be, shall be transmitted by the court, recorder, justice of the peace, magistrate or other functionary before whom the cognizor, or the principal cognizor, where there is a surety or sureties, was bound to appear, or to do that, by his default to do which the condition of the recognizance is broken, to the superior court in the district in which the place where such default was made is included for civil purposes, with the certificate of the court, recorder, justice of the peace, magistrate or other functionary as aforesaid, of the breach of the condition of such recognizance, of which and of the forfeiture to the crown of the penal sum therein mentioned, such certificate shall be conclusive evidence:

3. The date of the receipt of such recognizance or minute and certificate by the prothonotary of the said court shall be indorsed thereon by him, and he shall enter judgment in favor of the crown against the cognizor for the penal sum mentioned in such recognizance, and execution may issue therefor after the same delay as in other cases, which shall be reckoned from the time when the judgment is entered by the prothonotary of the said court:

4. Such execution shall issue upon fiat or *præcipe* of the Attorney General, or of any person thereunto authorized in writing by him; and the crown shall be entitled to the costs of execution and to costs on all proceedings in the case subsequent to execution, and to such costs for the entry of the judgment, as are fixed by any tariff:

5. Nothing in this section contained shall prevent the recovery of the sum forfeited by the breach of any recognizance from being recovered by suit in the manner provided by law, whenever the same cannot, for any reason, be recovered in the manner provided in this section:

6. In such case, the sum forfeited by the non-performance of the conditions of such recognizance shall be recoverable, with costs, by action in any court having jurisdiction in civil cases to the amount, at the suit of the Attorney General of Canada or of Quebec, or other person or officer authorized to sue for the crown; and in any such action it shall be held that the person suing for the crown is duly empowered so to do, and that the conditions of the recognizance were not performed, and that the sum therein mentioned is, therefore, due to the crown, unless the defendant proves the contrary:

7. In this section, unless the context otherwise requires, the expression "cognizor" includes any number of cognizors in the same recognizance, whether as principals or sureties.—*C. S. L. C.*, c. 106, s. 2.

23. When a person has been arrested in any district for a crime or offence committed within the limits of the Province of Quebec, and a justice of the peace has taken recognizances from the witnesses heard before him or another justice of the peace, for their appearance at the next session or term of the court of competent criminal jurisdiction, before which such person is to undergo his trial, there to testify and give evidence on such trial, and such recognizances have been transmitted to the office of the clerk of such court, the said court may proceed on the said recognizances in the same manner as if they had been taken in the district in which such court is held.—*C. S. L. C.*, c. 106, s. 1.

SCHEDULE.

FORM.

Victoria, by the Grace of God, etc.

To the sheriff of , Greeting:

You are hereby commanded to levy of the goods and chattels, lands and tenements, of all and singular, the persons mentioned in the roll or extract to this writ annexed, all and singular the debts and sums of money upon them severally imposed and charged, as therein is specified; and if any of the said several debts cannot be levied, by reason that no goods or chattels, lands or tenements can be found belonging to the said persons, respectively, then, and in all such cases, that you take the bodies of such persons, and keep them safely in the gaol of your county, there to abide the judgment of our court (*as the case may be*), upon any matter to be shown by them, respectively, or otherwise to remain in your custody as aforesaid, until such debt is satisfied, unless any of such persons respectively gives sufficient security for his appearance at the said court, on the return day hereof, for which you will be held answerable, and what you do in the premises make appear before us in our court (*as the case may be*), on the day of term next, and have then and there this writ. Witness, etc., A. B., clerk (*as the case may be*). —*C. S. U. C.*, c. 117, *sch.*

The mere failure of the party to answer, when called, in the term subsequent to that in which he was arraigned could not operate as a forfeiture of his bail. *The Atty. General* v. *Beaulieu*, 3 *L. C. J.* 17.

On an information against the bail or surety of a person charged with subornation of perjury, *held*, that after the accused has pleaded guilty to an indictment, no default can be entered against him, except on a day fixed for his

appearance, and that it is the duty of the court to estreat the recognizances in cases like the present.—*R.* v. *Croteau*, 9 *L. C. R.* 67.

A recognizance taken before a police magistrate under 32-33 V., c. 30, s. 44, D., omitted the words "to owe:" *Held*, fatal, and that an action would not lie upon the instrument as a recognizance.—*R.* v. *Hoodless*, 45 *U. C. Q. B.* 556.

Held, that the forfeiture of a recognizance to appear was a debt sufficient to support the application for an attachment under the Absconding Debtor's Act, and that such writ may be granted at the suit of the crown, where the defendant absconds to avoid being arrested for a felony.—*R.* v. *Stewart*, 8 *P. R. Ont.* 297.

A recognizance of bail put in on behalf of a prisoner, recited that he had been indicted at the court of general sessions of the peace for two separate offences, and the condition was, that he should appear at the next sitting of said court, and plead to such indictment as might be found against him by the grand jury; at the next of said sittings, the accused did not appear, and no new indictment was found against him:—*Held*, that the recitals sufficiently showed the intention to be that the accused should appear and answer the indictments already found, and that an order estreating the recognizance was properly made.—*Re Gauthreaux's Bail*, 9 *P. R. Ont.* 31.

Held, that on the return of a writ of certiorari a recognizance is unnecessary.—*R.* v. *Nunn*, 10 *P. R. Ont.* 395.

Held, that since the passing of the Dominion statute, 49 V., c. 49, s. 8, there is no longer necessity for a defendant on removal by certiorari of a conviction against him to enter into recognizances as to costs as formerly required.—*R.* v. *Swalwell*, 12 *O. R.* 391.

CHAPTER 180.

AN ACT RESPECTING FINES AND FORFEITURES.

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

1. Whenever any pecuniary penalty or any forfeiture is imposed for any violation of any act, and no other mode is prescribed for the recovery thereof, such penalty or forfeiture shall be recoverable or enforceable, with costs, by civil action or proceeding at the suit of Her Majesty only, or of any private party suing as well for Her Majesty as for himself—in any form allowed in such case by the law of that Province in which it is brought—before any court having jurisdiction to the amount of the penalty in cases of simple contract—upon the evidence of any one credible witness other than the plaintiff or party interested; and if no other provision is made for the appropriation of any penalty or forfeiture so recovered or enforced, one moiety shall belong to Her Majesty; and the other moiety shall belong to the private party suing for the same, if any, and if there is none, the whole shall belong to Her Majesty.—31 *V.*, *c.* 1, *s.* 7, *part.*

2. Whenever no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any such law, the same shall belong to the Crown for the public uses of Canada.—49 *V.*, *c.* 48, *s.* 1.

3. The Governor in Council may, from time to time, direct that any fine, penalty or forfeiture, or any portion thereof, which would otherwise belong to the crown for the public uses of Canada, be paid to any provincial, municipal or local authority, which wholly or in part bears the expenses of administering the law under which such fine, penalty or forfeiture is imposed, or that the same be applied in any other manner deemed best adapted to attain the objects of such law and to secure its due administration.—49 *V.*, *c.* 48, *s.* 2.

4. Any duty, penalty or sum of money, or the proceeds of any forfeiture, which is, by any act, given to the crown, shall, if no other provision is made respecting it, from part of the Consolidated Revenue Fund of Canada, and shall be accounted for and otherwise dealt with accordingly.—31 *V.*, *c.* 1, *s.* 7, *part.*

5. No action, suit or information shall be brought or laid for any penalty or forfeiture under any act, except within two years after the cause of action arises, or after the offence is committed, unless the time is otherwise limited by such act.—*C. S. U. C.*, c. 78, *s.* 7, *part*, *C. S. L. C.*, *c.* 108, *s.* 1, *part*, *and s.* 2. 29 *V.* (*N. S.*) *c.* 12, *s.* 15, *part.* 1 *R. S. N. B*, *c.* 140, *s.* 2.

CHAPTER 181.

AN ACT RESPECTING PUNISHMENTS, PARDONS AND THE COMMUTATION OF SENTENCES.

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

PUNISHMENTS.

1. Whenever a person doing a certain act is declared to be guilty of any offence, and to be liable to punishment therefor, it shall be understood that such person shall only be deemed guilty of such offence and liable to such punishment after being duly convicted of such act.—32-33 *V.*, *c.* 29, *s.* 1, *part.*

2. Whenever it is provided that the offender shall be liable to different degrees or kinds of punishment, the punishment to be inflicted shall, subject to the limitation contained in the enactment, be in the discretion of the court or tribunal before which the conviction takes place.—32-33 *V.*, *c.* 29, *s.* 1, *part.*

3. Whenever any offender is punishable under two or more acts or two or more sections of the same act, he may be tried and punished under any of such acts or sections; but no person shall be twice punished for the same offence.—32-33 *V.*, *c.* 20, *ss.* 40, *part and* 41, *part, and c.* 21, *s.* 90, *part.* 36 *V.*, *c.* 55, *s.* 33. 40 *V.*, *c.* 35, *s.* 6.

CAPITAL PUNISHMENT.

4. Every one who is indicted as principal or accessory for any offence made capital by any statute, shall be liable to the same punishment, whether he is convicted by verdict or on confession.—32-33 *V.*, *c.* 29, *s.* 82.

5. In all cases of treason, the sentence or judgment to be pronounced against any person convicted and adjudged guilty thereof shall be, that he be hanged by the neck until he is dead.—31 *V.*, *c.* 69, *s.* 4. 54 *Geo.* 3., *c.* 46, *s.* 1, *Imp.*

6. Upon every conviction for murder, the court shall pronounce sentence of death, and the same may be carried into execution, and all other proceedings upon such sentence and in respect thereof may be

had and taken in the same manner, and the court before which the conviction takes place shall have the same powers in all respects as after a conviction for any other felony for which a prisoner may be sentenced to suffer death as a felon.—32-33 *V.*, *c.* 20, *s.* 2. 24-25 *V.*, *c.* 100, *s.* 2, *Imp.*

7. Whenever any offender has been convicted before any court of criminal jurisdiction, of an offence for which such offender is liable to and receives sentence of death, the court shall order and direct execution to be done on the offender in the manner provided by law.—32-33 *V.*, *c.* 29, *s.* 106.

8. 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, for the information of the Governor General; 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 non-decision 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 time 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 are necessary for the consideration of the case by the crown.—32-33 *V.*, *c.* 29, *s.* 107. 36 *V.*, *c.* 3, *s.* 1.

A judgment may be altered at any time during the assizes; and a reprieve may be granted or taken off by a judge, although the session be adjourned or finished, and this, by reason of common usage.—2 *Hale*, 412; *Dyer*, 205.

9. Every one who is sentenced to suffer death shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners; and no person except 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.—32-33 *V.*, *c.* 29, *s.* 108.

10. Judgment of death to be executed on any prisoner shall be

carried into effect within the walls of the prison in which the offender is confined at the time of execution.—32-33 *V.*, *c.* 29, *s.* 109.

11. 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.—32-33 *V.*, *c.* 29, *s.* 110.

12. 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 desires to attend, may also be present at the execution.—32-33 *V.*, *c.* 29, *s.* 111.

13. 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.—32-33 *V.*, *c.* 29, *s.* 112.

14. 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.—32-33 *V.*, *c.* 29, *s.* 113.

15. The duties imposed upon the sheriff, gaoler, medical officer or surgeon by the four sections next preceding, 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.—32-33 *V.*, *c.* 29, *s.* 114.

16. 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 inquire 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.—32-33 *V.*, *c.* 29, *s.* 115.

17. No officer of the prison or prisoner confined therein shall, in any case, be a juror on the inquest.—32-33 *V.*, *c.* 29, *s.* 116.

18. 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.—32-33 *V.*, *c.* 29, *s.* 117.

19. Every one who knowingly and wilfully signs any false certificate or declaration required with respect to any execution, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 29, *s.* 120.

20. Every certificate and declaration, and a duplicate of the inquest required by this act, shall, in every case, be sent with all convenient speed by the sheriff to the Secretary of State, or to such other officer as is, from time to time appointed for the purpose by the Governor in Council; and printed copies of such 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.—32-33 *V.*, *c.* 29, *s.* 121.

21. The omission to comply with any provision of the preceeding sections of this act shall not make the execution of judgment of death illegal in any case in which such execution would otherwise have been legal.—32-33 *V.*, *c.* 29, *s.* 123.

22. Except in so far as is hereby otherwise provided, judgment of death shall be carried into effect in the same manner as if this act had not been passed.—32-33 *V.*, *c.* 29, *s.* 124.

The Imperial Act on capital executions is 31 V., c. 24.

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*, 405; 1 *Chit.* 697; *R.* v. *Camplin*, 1 *Den.* 89, *as cited* in *R.* v. *Fletcher*, *Bell*, *C. C.* 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 *Chit.* 758; 2 *Hale*, 412.

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 *Chit.* 788 ; 2 *Hale*, 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.

IMPRISONMENT.

23. Every one who is convicted of any offence not punishable with death shall be punished in the manner, if any, prescribed by the statute especially relating to such offence.—32-33 *V.*, *c.* 29, *s.* 88, *part.*

24. Every person convicted of any felony for which no punishment is specially provided, shall be liable to imprisonment for life:

2. Every one who is convicted on indictment of any misdemeanor for which no punishment is specially provided, shall be liable to five years' imprisonment:

3. Every one who is summarily convicted of any offence for which no punishment is specially provided, shall be liable to a penalty not exceeding twenty dollars, or to imprisonment, with or without hard labor, for a term not exceeding three months, or to both.—32-33 *V.*, *c.* 29, *s.* 88, *part.*

25. Every one who is convicted of felony, not punishable with death, committed after a previous conviction for felony, is liable to imprisonment for life, unless some other punishment is 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.—32-33 *V.*, *c.* 29, *s.* 88.

26. Every one who is liable to imprisonment for life, or for any term of years, or other term, may be sentenced to imprisonment for any shorter term: Provided, that no one shall be sentenced to any shorter term of imprisonment than the minimum term, if any, pres-

cribed for the offence of which he is convicted.—32-33 *V.*, *c.* 29, *ss.* 89 *and* 90, *part.*

27. When an offender is convicted of more offences than one, before the same court or person at the same sitting, or when any offender, under sentence or undergoing punishment for one offence, is convicted of any other offence, the court or person passing sentence may, on the last conviction, direct that the sentences passed upon the offender for his several offences shall take effect one after another. 32-33 *V.*, *c.* 29, *s.* 92.

See *R.* v. *Wilkes, Burr.* 2577; *R.* v. *Williams*, 1 *Leach* 536; *R.* v. *Orton*, 14 *Cox*, 436 *and* 546.

28. Every one who is sentenced to imprisonment for life, or for a term of years not less than two, shall be sentenced to imprisonment in the penitentiary for the Province in which the conviction takes place:

2. Every one who is sentenced to imprisonment for a term less than two years shall, if no other place is expressly mentioned, be sentenced to imprisonment in the common gaol of the district, county or place in which the sentence is pronounced, or if there is 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 a penitentiary, in which the sentence of imprisonment may be lawfully executed:

3. Provided, that any prisoner sentenced for any term by any military, naval or militia court martial, or by any military or naval authority under any Mutiny Act, may be sentenced to imprisonment in a penitentiary:

4. Imprisonment in a penitentiary, in the Central Prison for the Province of Ontario, in the Andrew Mercer Ontario Reformatory for females, and in any reformatory prison for females in the Province of Quebec, shall be with hard labor, whether so directed in the sentence or not:

5. Imprisonment in a common gaol, or a public prison, other than those last mentioned, shall be with or without hard labor, in the discretion of the court or person passing sentence, if the offender is convicted on indictment, or under "*The Speedy Trials Act*,"—and, if convicted summarily, may be with hard labor if hard labor is part of the punishment for the offence of which such offender is convicted,

—and if such imprisonment is to be with hard labor, the sentence shall so direct:

6. The term of imprisonment, in pursuance of any sentence, shall, unless otherwise directed in the sentence, commence on and from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced:

7. Every one who is sentenced to imprisonment in any penitentiary, gaol, or other public or reformatory prison, shall be subject to the provisions of the statute relating to such penitentiary, gaol or prison and to all rules and regulations lawfully made with respect thereto. —32-33 *V.*, *c.* 29, *ss.* 1, *part*, 91, 93, 94, *part*, 96, *part*, *and* 97. 34 *V.*, *c.* 30, *s.* 3, *part.* 43 *V.*, *c.* 39, *s.* 14, *part.* 43 *V.*, *c.* 40, *s.* 9, *part.* 44 *V.*, *c.* 32, *s.* 4. 46 *V.*, *c.* 37 *s.* 4.

Imprisonment for one calendar month, how computed. —*Nigotti* v. *Colville*, 14 *Cox*, 263, 305.

REFORMATORIES.

29. The court or person before whom 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 sentence such offender to imprisonment in any reformatory prison in the Province in which such conviction takes place, subject to the provisions of any act respecting imprisonment in such reformatory; and such imprisonment shall be substituted, in such case, 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: 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:

2. Every person imprisoned in a reformatory shall be liable to perform such labor as is required of such person. 38 *V.*, *c.* 43. 43 *V.*, *c.* 39, *ss.* 1, *part*, *and* 14, *part*, *and c.* 40, *ss.* 1, *part*, *and* 9, *part.*

WHIPPING.

30. Whenever whipping may be awarded for any offence, the

court may sentence the offender to be once, twice or thrice whipped, within the limits of the prison, under the supervision of the medical officer of the prison; and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence; and, whenever practicable, every whipping shall take place not less than ten days before the expiration of any term of imprisonment to which the offender is sentenced for the offence:

2. Whipping shall not be inflicted on any female.—32-33 *V.*, *c.* 20, *ss.* 20, 21, *parts, and c.* 29, *s.* 95. 40 *V.*, *c.* 26, *s.* 6.

SURETIES FOR KEEPING THE PEACE, AND FINES.

31. Every one who is convicted of felony may be required to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment otherwise authorized:

2. Every one who is convicted of any misdemeanor may, in addition to or in lieu of any punishment otherwise authorized, be fined, and required to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behavior:

3. No person shall be imprisoned for not finding sureties under this section, for any term exceeding one year.—31 *V.*, *c.* 72, *s.* 5, *part.* 32-33 *V.*, *c.* 18, *s.* 34, *and c.* 19, *s.* 58, *and c.* 20, *s.* 77, *and c.* 21, *s.* 122, *and c.* 22, *s.* 74.

32. Whenever any person who has been required to enter into a recognizance with sureties to keep the peace and be of good behavior has, on account of his default therein, remained imprisoned for two weeks, the sheriff, gaoler or warden shall give notice, in writing, of the facts to a judge of a superior court, or to a judge of the county court of the county or district in which such gaol or prison is situate, or, in the North-West Territories, to a stipendiary magistrate,—and such judge or magistrate may order the discharge of such person, thereupon or at a subsequent time, upon notice to the complainant or otherwise, or may make such other order, as he sees fit, respecting the number of sureties, the sum in which they are to be bound and the length of time for which such person may be bound.—41 *V.*, *c.* 19, *s.* 1.

33. Whenever a fine may be awarded or a penalty imposed for any offence, the amount of such fine or penalty shall, within such

limits, if any, as are prescribed in that behalf, be in the discretion of the court or person passing sentence or convicting, as the case may be.—32-33 *V.*, *c.* 29, *s.* 90, *part.*

Several articles censuring the legislation contained in the Imperial Acts similar to the above three last sections having been published in England, when it was enacted there as part of the Consolidated Criminal Acts, Greaves, Q.C., the learned framer of these acts, answered these criticisms by the following remarks:—

"This is a new enactment.—A fine is, at common law, one of the punishments for a misdemeanor, and by this clause, the court may, in addition to, or in lieu of, any of the punishments assigned to any misdemeanor by these acts, fine the offender. (Sec. 31, sub-sec. 2, *ante.*) It may be as well to observe that a fine ought not to be imposed on a married woman, because in presumption of law she has no property wherewith to pay it.—*R.* v. *Thomas, Rep. T. Hard.* 278." 1 *Russ.* 92.

"In all cases of misdemeanor the court might, by the common law, add to the sentence of imprisonment, by ordering the defendant to find security for his good behavior and for keeping the peace, and might order him to be imprisoned until such security were found; *R.* v. *Dunn*, 12 *Q. B.* 1026; but as this power was not generally known, it was thought better to insert it in this clause."

"As it sometimes happens in cases of felony, that it may be expedient to require sureties for keeping the peace after the expiration of any imprisonment awarded, this clause empowers the court to require such sureties. It is easy to see that it may frequently be highly advisable to pass a very short sentence of imprisonment on a youth, and to direct him to be delivered to his friends on their entering into the proper recognizances. And it may be well

worth making the experiment whether requiring adults to find such sureties may not prove beneficial. The great difficulty with which convicts have to contend immediately after their discharge, is the want of some check that may tend to prevent them from relapsing into their former habits; and the knowledge that their sureties would be liable to forfeit their recognizances might, and probably would, in some cases at least, operate as a check upon their conduct. In cases of assault and other breaches of the peace, it has been found highly beneficial to require the parties to find sureties for their future good behavior; and this leads to the hope that, even in cases of felony, a similar result may follow from requiring sureties for keeping the peace, especially where the felony has been accompanied by any personal violence."

"As an attack was made by Mr. Saunders, in the *Law Times* of the 21st of September last, on these clauses, which might, peradventure, cause some magistrates, who have not had a professional education, to doubt, we answered that attack in the *addenda* to the first edition, and, as a reply to that answer was made by Mr. Saunders in the *Law Times* of the 30th November last, we shall answer that reply here. In order to render the matters plain, we will first state the objections raised, then our answers, then the reply, if any, to them; and, lastly, our answers to that reply."

"1. Mr. Saunders asserted that the difficulties of these clauses were 'of so formidable a character as to render it exceedingly dangerous for any magistrate to encounter them.' Now, the power conferred by these clauses is only conferred on courts which try criminals by indictment; and if there be any point of law peculiarly clear, it is that no action will lie against any of the members of such a court for any error in any judgment pronounced by that

court. The courts of quarter sessions, therefore, may act on these clauses with the most perfect safety. To this answer no reply has been given, and no doubt for the best possible reason, viz., that it admitted of none."

"2. Mr. Saunders said, 'it is difficult to understand why the infliction of a fine should be inflexibly associated with the entering into recognizances to keep the peace,' and *vice versâ*. As the clause was originally framed, the court might either impose a fine on the offender, or require him to find sureties; but the select committee of the Commons altered the clause in that respect. Nor is there the slightest difficulty occasioned by the alteration. The fine may be as low; and the recognizances for as short a time, and in as small an amount as the court thinks fit; and, consequently, the court may, in any case, if it think fit, impose a nominal fine on the offender, and require him to find sureties in a large amount; or the court may, if it think fit, impose a heavy fine on the offender, and take his own recognizances alone in a small sum and for a short time. So that the alteration made by the select committee of the Commons can cause no practical difficulty whatever. To this answer Mr. Saunders replied, that the objection taken was that 'the hands of the court were fettered for no practical advantage.' It is sufficient to rejoin that, *practically*, the hands of the court were not fettered at all; for the court may impose a nominal fine, or require recognizances for a nominal term."

"3. M. Saunders said, 'as regards the fine itself, the section makes no provision in the event of its not being paid. Suppose the fine is not paid, what is to be done with the offender? Is he to be committed to gaol in default? What authority is there for this? And, if committed, for how long? and, if for a time certain, is it to be with

or without hard labor? These are difficulties which the framers of the section have evidently not foreseen, and most certainly have not provided for.' The answer is, all these supposed difficulties have no existence whatever. When an offender is convicted and receives judgment, he is in the custody of the sheriff, and the question is not whether he is to be committed to prison, for he is actually in prison, but how he is to get out of prison; and the only means by which he can lawfully get out of prison, is by doing and suffering whatever the court may lawfully adjudge him to do or to suffer."

"It is a general rule, also, that when a statute creates a new felony or misdemeanor, all the common law incidents are impliedly attached to it. Where, therefore, a statute creates a misdemeanor, it at once is liable to the common law punishments for misdemeanor, of which fine and sureties of the peace, and imprisonment in default of paying the one or finding the other are part. So where a statute creates an offence and specifies its punishment, that punishment is to be carried into execution according to the course of the common law. Thus wherever a statute creates a capital felony the offender may be sentenced and executed according to the course of the common law. So, where a statute authorizes the court to impose a fine, the offender may be imprisoned according to the course of the common law till the fine is paid. For, as Lord Coke says, "a fine signifieth a pecuniary punishment for an offence, and regularly to it imprisonment appertaineth."—1 *Inst.* 126 *b.* And hence it is that the statutes simply authorize the courts to impose the fine, and its payment is enforced according to the course of the common law. The framers of the 9 Geo. 4, c. 31, were well aware that this was the law, and by s. 9, in the case of manslaughter, by s. 20, in

the case of taking away girls under sixteen years of age, and by s. 23, in the case of assault upon clergymen, the court was empowered to adjudge the offender to pay a fine; but no provision was made in any of these cases as to what was to be done in default of payment. No one will doubt that Lord Campbell knew the law in this respect; and it is well known that he drew his Libel Act, 5-6 V., c. 96, with his own hand; and by ss. 4 and 5 of that act the court may impose a fine, and there is no provision in default of payment. It would be waste of time to refer to other like enactments on a point so perfectly clear. All the preceding observations, except those founded on the 9 Geo. 4, c. 31, and 5-6 V., c. 96, apply equally to detaining an offender in prison till he finds sureties. But one precedent in point may be added. The 37 Geo. 3, c. 126, s. 4, makes every person uttering coins liable to six months' imprisonment and to find sureties for good behavior for six months after the end of such imprisonment, and in case of a second conviction, sureties are required for two years; but no power of commitment is given in either case. Again, both the 1-2 Phil. and Mary, c. 13, s. 5 and the 2-3 Phil. and Mary, c. 10, s. 2, gave justices who examined persons charged with felony, 'authority to bind all such by recognizances as do declare anything material to prove' the felony, and contained no provision as to what was to be done if the witness refused to be bound. Now, in *Bennett* v. *Watson*, 3 *M. & S.* 1, it was held that under those statutes a justice might lawfully commit a person who was a material witness upon a charge of felony brought before him, and who refused to appear at the sessions to give evidence, in order that her evidence might be secured at the trial, and Dampier, J., said 'the power of commitment is absolutely

necessary to the existence of the statute of Phil. and Mary; for unless there were such a power, every person would of course refuse to enter into a recognizance, and the magistrate could not compel him; and then, if he could further avoid being served with a subpœna, the delinquent might escape unpunished.' This is a very much stronger case than the case of a convict required to find sureties, for he is already in prison, whereas the witness is at liberty, and, therefore in his case, the power both to apprehend and commit has to be implied."

"It is perfectly clear, then, that the courts have power under these clauses to order an offender to be detained in prison until he pay the fine and find sureties. But supposing a provision had been introduced expressly empowering the court to award imprisonment until the fine was paid and the sureties found, it would have made these clauses inconsistent with s. 5 of the offences against the Person Act, which follows s. 9 of the 9 Geo. 4, c. 31; and if that had been altered likewise, both would have been made inconsistent with Lord Campbell's Libel Act, and the other acts containing similar clauses. To this answer Mr. Saunders replied, 'Taking Mr. Greaves' exposition to be correct that the common law incident of imprisonment attaches upon non-payment of the fine, the objection that the imprisonment is indefinite still remains in force. If the fine is not paid, is imprisonment in default to be everlasting?' We rejoin that imprisonment for non-payment of a fine under this clause, is and was intended to be exactly the same as for non-payment of a fine upon a conviction for any common law misdemeanor; that the object of this clause in this respect was to place all misdemeanors against these acts precisely on the same footing as common law misdemeanors; that no complaint had ever been made of

the common law on this subject, and, therefore, there was not only no reason for any alteration in it, but its long use without objection afforded a very good ground for extending it to all similar cases, and that any alteration in these acts would have rendered the law on the subject inconsistent; for it would have rendered the law different in misdemeanors under these acts from what it was with like offences at common law."

"4. But, Mr. Saunders asked, is the offender to be committed to hard labor, and for a time certain? Undoubtedly neither the one nor the other. The imprisonment for non-payment of a fine or not finding sureties is not by way of punishment, but in order to compel the payment of the one and the finding of the other, and therefore it is merely imprisonment until he pay the fine or find the sureties, exactly the same as it is in cases of common law misdemeanors. To this Mr. Saunders replied that 'it was further objected that upon imprisonment in default of paying the fine, the court has no power to impose hard labor. This Mr. Greaves admits.' Now, this is a misrepresentation. Mr. Saunders originally merely asked, 'Is it (the imprisonment) to be with or without hard labor?' and we, having answered that question conclusively, Mr. Saunders puts this new objection, and adds, 'surely the power of imposing hard labor would be in many cases an active stimulant towards accomplishing the end desired.' It might just as well be said that the court ought to have been empowered to order the defendant to be whipped every day until he paid the fine, which would, we conceive, have been a more active stimulant than hard labor. The question is not, however, what is the best stimulant to make the offender pay the fine; but what is the proper substitute for non-payment of the fine.? By the common

law, simple imprisonment has always been that substitute. We have shown that in summary cases, however, wherever justices have authority either to fine, or imprison, whether with or without hard labor, they never ought to have power to award imprisonment with hard labor for non-payment of a fine, *Introduction to 1st Ed., P. xxxiii.*, and our reasoning is completely supported by the high authority of Chief Justice Cockburn, in *R.* v. *Willmott*, 1 *B. & S.* 27. We will now apply the same reasoning to imprisonment for non-payment of a fine on conviction for a misdemeanor against these acts, and we cannot do better than take the example of dog-stealing under the 24-25 Vict., c. 96, s. 18; by which any person who steals a dog may either be imprisoned with or without hard labor for not exceeding six months, or shall forfeit over the value of the dog not exceeding 20l., and by sec. 107, in default of payment he may be imprisoned either with or without hard labor. For a second offence of dog-stealing, the defendant is to be guilty of a misdemeanor, and liable to imprisonment for not exceeding eighteen months, with or without hard labor, and by the general clause in question the court may impose a fine either in addition to or in lieu of these punishments. Now, if the court under this clause adjuges imprisonment without hard labor, it is tantamount to adjudging that the offence does not deserve even imprisonment, and to give the court power to imprison with hard labor for non-payment of the fine would be almost equivalent to giving it power, *uno flatu*, to adjudge the offender not deserving and deserving of hard labor. Nay, more, it would be giving the court power, after adjudging that the defendant merely deserved to be fined for an indictable offence, to adjudge him to be imprisoned with hard labor for mere non-payment of money, no criminal

offence at all. Mr. Saunders, however, says that 'such an anomaly' as not giving the court power to award hard labor for non-payment of a fine imposed for a second offence of dog-stealing, 'clearly shows the defectiveness of the section;' and he arrives at this conclusion thus: After stating the punishment for the first offence, he proceeds: 'then in default of payment he may, under Jervis's Act, 11-12 V., c. 43, s. 19, be committed to prison with or without hard labor.' In which short passage there are two mis-statements. That section only applies where, by the statute in that behalf, no mode of enforcing the payment of the penalty is provided. Now sec. 107 of the Larceny Act does provide for enforcing the payment of the penalty for dog-stealing; and consequently Jervis's Act has nothing to do with the case. But even if it did apply, a distress warrant must be issued in the first instance, unless its issuing would be ruinous to the defendant, or it appeared that he had no goods. It is therefore incorrect to state generally that the defendant may under that section be committed at all. So that we have both a wrong statute cited, and that statute wrongly stated. It is true that a similar argument might have been founded on sec. 107 of the Larceny Act, but it would be completely answered by that we have said here and in the Introduction."

"5. Next, Mr. Saunders said that 'the court will have no authority to take the recognizance of one surety only since the statute speaks only of sureties.' Now the Court of Queen's Bench never takes less than two sureties in any case, and generally four in cases of felony, and with very good reason, for one surety may die, become insolvent, or quit the country; but it is much less likely that two or more sureties should do so. Therefore, there was an

excellent precedent founded on good reason for requiring more than one surety. The select committee of the Commons introduced the power to take the offender's own recognizances. Mr. Saunders in reply admits 'that the Queen's Bench usually requires two sureties,' 'but thinks that circumstances may occur, particularly in the case of a young person, where one surety (the parent) need alone be required.' We reply that the admitted practice, invariably followed from time immemorial by the Court of Queen's Bench, was an infinitely better guide to follow than any other."

"Lastly, Mr. Saunders said that the proviso, which was introduced by the committee of the Commons 'means that if any person is required to find sureties for more than a year, he shall not be imprisoned for not doing it.' According to this reading, every person required to find sureties for a less term than a year would be liable to be imprisoned for life unless he found them; whilst a person required to find them for more than a year would not be liable to be imprisoned at all. The objector, therefore, may well admit that cannot be the intention of the section. The committee of the Commons thought that the clause clearly meant that no one was to be imprisoned for more than a year for not finding sureties. They framed it, and they are at least as competent as the objector to understand its meaning. In reply Mr. Saunders says, that Mr. Greaves admits that the meaning of the Legislature was 'that no person shall be imprisoned under this clause for any period exceeding one year for not finding sureties. That being so, we will only add, that it is very much to be regretted that the British Legislature has not said what it meant, instead of saying what it did not mean.' But has it done so? The words are, 'No person shall be imprisoned under this

clause for not finding sureties for any period exceeding one year, and the objection rests on reading 'sureties' together with 'for any period exceeding one year.' Now, 'sureties to keep the peace or to be of good behavior for any term,' is a perfectly well-known expression; but 'sureties for any period' is a very unusual, if not an altogether unknown expression, and it therefore ought not to be supposed to be used in any case, especially where it makes nonsense of a sentence. Again, in pronouncing sentence nothing is more common than to insert the cause of imprisonment between the word 'imprisoned,' and the term of imprisonment awarded, e.g., 'The sentence of the court, is that you be imprisoned for this your offence for the term of one year,' and if the clause be so read it is perfectly free from objection. If the clause had run 'imprisoned for not paying a fine for any period exceeding one year,' no doubt would have existed as to its meaning, and there is equally little as to the meaning of the clause as it stands; for where a clause is capable of being read in two ways, one of which leads to a manifest absurdity, and the other makes perfectly good sense, it is obvious that the latter is the right reading."

"We said and repeat, hat there was nothing whatever in any one of the numerous objections, and unquestionably nothing to justify a writer in saying that the clause was 'so slovenly drawn;' 'it is astonishing that a section so loose as this one should have been permitted to have found its way into this act;' 'taken altogether this section is a most unfavorable specimen of legal workmanship, and will cause very great embarrassments to those whose duty it will be to carry it into effect.'"

"Not satisfied, however, with 'attacking' this clause in the *Law Times*, Mr. Saunders returns to the charge in his

and Mr. Cox's Edition of the statutes, p. 97, where he starts the additional objection, that 'the section contains new and very extensive powers.' Surely Mr. Saunders cannot but know that the power to fine and require sureties for keeping the peace and being of good behavior on a conviction for misdemeanor is one of the oldest powers known to the common law. Then Mr. Saunders says, 'it may well be questioned whether when a criminal has suffered his appointed punishment, it is judicious to impose upon him the further inconvenience of providing bondsmen for his future good behavior.' It would be enough to answer that such has been the case in common law misdemeanors from time immemorial, and no one ever heard a complaint against it; but it may be well to add, that neither fines nor sureties are ever awarded 'when a criminal has suffered his appointed punishment;' on the contrary, the court always considers them as part of the punishment, and this power is always used in mercy towards the criminal, and a less term of imprisonment awarded, where it is exercised. In fact, instead of the clause being open to this objection, it is a most humane and merciful provision founded on that 'nursing mother,' the common law."

"Mr. Saunders again returns to the charge, p. 244, with the further objection that this clause 'in effect amounts to a bestowal of unlimited powers of mitigation of punishment, and when we find that unlawfully and maliciously wounding, etc., are all misdemeanors, the powers thus given to impose a fine in lieu of any other punishment, looks very like jesting with criminal punishment.'—Had Mr. Saunders forgotten that by sec. 5 of the same act any person convicted of manslaughter (a crime infinitely greater in many cases than misdemeanor) may be sentenced to pay a fine either in addition to or without any other punish-

ment? So under the 9 Geo. 4, c. 31, s. 9, the court might have awarded a fine on a conviction for manslaughter, without any other punishment."—*Greaves' Cr. Acts*, 6.

34. The punishment of solitary confinement or of the pillory shall not be awarded by any court.—32-33 *V.*, *c.* 29, *s.* 81.

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., c. 138, was retained for the punishment of perjury and subornation of perjury, but it is now altogether abolished by 7 Wm. IV., and 1 V., c. 23:—1 *Chit.* 797; *Wharton, Law Lexicon, Verb. Pillory.*

DEODAND.

35. There shall be no forfeiture of any chattels which have moved to or caused the death of any human being, in respect of such death. —32 33 *V.*, *c.* 29, *s.* 54.

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.—*R.* v. *Rolfe, Fost.* 266; 1 *Hawkins*, 74; 1 *Blackstone*, 300. 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," *Fost.* 266, was abolished in England on the 1st day of September, 1846, by the 9-10 V., c. 62.

ATTAINDER.

36. 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.—32-33 *V., c.* 29, *s.* 55.

37. Every one 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.—32-33 *V., c.* 19, *s.* 56.

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 *Stephens' 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 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 *Stephens' 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 of the Procedure Act are taken from the 54 Geo. III., c. 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, c. 21, sec. 10, suspended by the 17 Geo. II., c. 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., c. 93 (Imperial), repealed these last mentioned statutes, but it is not law for us.—1 *Chitty*, 734, 741; 4 *Stephens' Comm.* 455.

This view, on this part of the law, seemed to bear such incongruous consequences, that we thought it better to have upon it the opinion of the learned Mr. *Wicksteed*, law clerk of the House of Commons, the framer of the above clauses.

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

"Sections 55 and 56 of the 32-33 V., c. 29, are taken from the statute of U. C., 3 Wm. IV., c. 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., c. 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., c. 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 of high-treason and misprison of treason in certain cases.' I do not see that this act repeals the two foregoing statutes, (William and Ann) or restores the old law if it was repealed by them, and the Imperial act 54 Geo. III., c. 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., c. 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., c. 145, and still longer before the passing of the U. C. act, 3 Wm. IV., c. 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 V., c. 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., c. 93, and of 54 Geo. III., c. 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., c. 116) nor section 55 of the Procedure Act of 1869 can be taken as reenacting 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 does 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., c. 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 36 and 37 of the above act, on punishments. Parliament has undoubtedly exclusive jurisdiction on the judgment and all the parts of the judgment in criminal cases. But are the attainder, forfeiture, etc., a part of the judgment, or only a consequence of it? See 4 *Blackstn.* 386. If only a con-

sequence 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* v. *Leduc*, 1 *L. C. J.* 252; 2 *Hawkins*, 49.

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.—*R.* v. *Whitehead*, 2 *Moo. C. C.* 181.

As remarked by Mr. Wicksteed (see *ante*), forfeitures, confiscations and attainders are now abolished in England since 1870.

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 V., c. 7, of the Lower Canada Statutes.

As to the validity of assignment by felons, see *Chowne* v. *Baylis*, 31 *Beav.* 351; *Perkins* v. *Bradley*, 1 *Hare*, 219; *Saunders, in re*, 9 *Cox*, 279; *Whitaker* v. *Wisbey*, 12 *C. B.* 44.

PARDONS.

38. The Crown may extend the Royal mercy to any person sentenced to imprisonment by virtue of any statute, although such person is imprisoned for non-payment of money to some person other than the Crown.—*32-33 V., c. 29, s.* 125.

39. Whenever the Crown is pleased to extend the Royal mercy to any offender convicted of a felony punishable with death or otherwise, and grants to such offender either a free or a conditional pardon, 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, 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 of such offender, under the Great Seal, 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. —32-33 *V.*, *c.* 29, *s.* 126.

COMMUTATION OF SENTENCE.

40. 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 labor; 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 or of the Under Secretary of State, shall be sufficient authority to any judge or justice, having jurisdiction in such case, 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 are 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.—32-33 *V.*, *c.* 29, *s.* 127.

UNDERGOING SENTENCE, EQUIVALENT TO A PARDON.

41. When any offender has been convicted of an offence not punishable with death, and has endured the punishment to which such offender was adjudged,—or if such offence is 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 offence whereof the offender was so convicted, have the like effect 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 offence.—32-33 *V.*, *c.* 29, *s.* 128. 9 *Geo.* 4, *c.* 32, *s.* 3, *Imp.*

See *Leyman* v. *Latimer*, 14 *Cox*, 51.

42. When any person convicted of any offence has paid the sum adjudged to be paid, together with costs, under such conviction, or has received a remission thereof from the Crown, or has suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance, or has been discharged from his conviction by the justice of the peace in any case in which such justice of the peace may discharge such person, he shall be released from all further or other proceedings for the same cause.—32-33 *V.*, *c.* 21, *s.* 120, *and c.* 22, *s.* 73.

43. Nothing in this act shall, in any manner, limit or affect Her Majesty's Royal prerogative of mercy.—32-33 *V.*, *c.* 29, *s.* 12[illegible].

GENERAL PROVISIONS.

44. 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, from time to time, deems 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. —32-33 *V.*, *c.* 29, *s.* 118.

45. 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 Parliament is not then sitting, within fourteen days after the next meeting thereof.—32-33 *V.*, c. 29, *s.* 119.

46. The forms set forth in the schedule of this Act, with such variations or additions as circumstances require, shall be used for the respective purposes indicated in the said schedule, and according to the directions contained therein.—32-33 *V.*, *c.* 29, *s.* 122.

47. Nothing in this act shall alter or affect any laws relating to the government of Her Majesty's land or naval forces.—32-33 *V.*, *c.* 29, *s.* 137.

SCHEDULE.

CERTIFICATE OF SURGEON.

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.

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
L. M., Justice of the Peace for
G. H., Gaoler of
etc., etc.

SURETIES.

COMPLAINT BY THE PARTY THREATENED, FOR SURETIES FOR THE PEACE.

Canada,
Province of , district *(or* county, united counties, *or as the case may be,)* of .

The information (*or* complaint) of C. D., of the township of , in the said district (*or* county, united counties, *or as the case may be,*) of , *(laborer)*. *(If preferred by an attorney or agent, say*—by D. E., his duly authorized agent (*or* attorney,) in this behalf), taken upon oath, before me, the under-

signed, a justice of the peace, in and for the said district *(or* county, united counties, *or as the case may be)* of , at N., in the said district, (county, *or as the case may be)* of , this day of , in the year one thousand eight hundred and , who says that A. B., of the *(township)* of , in the district (county, *or as the case may be,)* of , did, on the day of (instant *or* last past, *as the case may be,)* threaten the said C. D. in the words or to the effect following, that is to say, *(set them out, with the circumstances under which they were used:)* and that from the above and other threats used by the said A. B. towards the said C. D., he, the said C. D. is afraid that the said A. B. will do him some bodily injury, and therefore prays that the said A. B. may be required to find sufficient sureties to keep the peace and be of good behavior towards him, the said C. D.; and the said C. D. also says that he does not make this complaint against nor require such sureties from the said A. B. from any malice or ill-will, but merely for the preservation of his person from injury.

FORM OF RECOGNIZANCE FOR THE SESSIONS.

Be it remembered that on the day of , in the year , A. B. of *(laborer,)* L. M. of *(grocer,)* and N. O. of *(butcher,)* personally came before *(us)* the undersigned, *(two)* justices of the peace for the district *(or* county, united counties, *or as the case may be,)* of , and severally acknowledged themselves to owe to our Lady the Queen the several sums following, that is to say: the said A. B. the sum of , and the said L. M. and N. O. the sum of , each of good and lawful money of Canada, to be made and levied, of their goods and chattels, lands and tenements respectively, to the use of our said Lady the Queen, her heirs and successors, if he, the said A. B., fails in the condition indorsed *(or* hereunder written.)

Taken and acknowledged the day and year first above mentioned, at before us.

J. S.
J. T.

The condition of the within (*or* above) written recognizance is such that if the within bound A. B. (of, etc.) appears at the next court of general sessions of the peace (*or other court discharging the functions of the court of general sessions, or as the case may be*), to be holden in and for the said district (*or* county, united counties, *or as the case may be,*) of to do and receive what is then and there enjoined him by the court, and in the meantime keeps the peace and is of good behavior towards Her Majesty and her liege people, and specially towards C. D. (of, etc.), for the term of now next ensuing, then the said recognizance to be void, otherwise to stand in full force and virtue.

FORM OF COMMITMENT IN DEFAULT OF SURETIES.

Canada,
Province of , district (*or* county, united counties, *or as the case may be,*) of

To all or any of the constables or other peace officers in the district (*or* county, united counties, *or as the case may be,*) of , and to the keeper of the common gaol of the said district (*or* county, united counties, *or as the case may be,*) at , in the said district (*or* county, etc.)

Whereas on the day of instant, complaint on oath was made before the undersigned (*or* J. L., Esquire,) a justice of the peace in and for the said district (*or* county, united counties, *or as the case may be,*) of , by C. D., of the township of , in the said district (*or* county, *or as the case may be*) (*laborer*), that A. B., of (etc.,) on the day of , at the township of , aforesaid, did threaten (*etc., follow to end of complaint, as in form above, in the past tense, then*): And whereas the said A. B. was this day brought and appeared before the said justice (*or* J. L., Esquire,) a justice of the peace in and for the said district (*or* county, united counties, *or as the case may be,*) of , to answer unto the said complaint: and having been required by me to enter into his own

recognizance in the sum of , with two sufficient sureties in the sum of each, as well for his appearance at the next general sessions of the peace (*or other court discharging the functions of the court of general sessions, or as the case may be,*) to be held in and for the said district (*or* county, united counties, *or as the case may be,*) of , to do what shall be then and there enjoined him by the court, as also in the meantime to keep the peace and be of good behavior towards Her Majesty and her liege people, and especially towards the said C. D., has refused and neglected, and still refuses and neglects, to find such sureties: These are therefore to command you, and each of you, to take the said A. B., and him safely to convey to the (common gaol) at aforesaid, and there to deliver him to the keeper thereof, together with this precept: And I do hereby command you, the said keeper of the (common gaol,) to receive the said A. B. into your custody in the said (common gaol,) there to imprison him until the said next general sessions of the peace (*or the next term of sitting of the said court discharging the functions of the court of general sessions, or as the case may be,*) unless he, in the meantime, finds sufficient sureties as well for his appearance at the said sessions (*or* court) as in the meantime to keep the peace as aforesaid.

Given under my hand and seal, this day of , in the year , at in the district (*or* county, *or as the case may be,*) aforesaid.

J. S. [L.S.]

APPENDIX.

MSS. NOTE BY C. S. GREAVES, ESQ., Q.C., ON RAPE.

For the purpose of the better consideration of the statutes relating to rape, it will be best to place them together.

Among the Laws of William the Conqueror, at the end of Kelham's Norman Dictionary, p. 36, we have "*De muliere vi compressâ et, pudicitiâ luctamine tentatâ, qui fœminam vi compresserit forisfacit membra sua. Qui prostravit fœminam ad terram et* (Quœre ? ut,) *vi vim inferat, mulcta ejus Domino est X solidi. Si vero eam compresserit, forisfacit membra.*

By the 3 Edw. 1, c. 13, "the King prohibiteth that none do ravish, or take away *by force* any maiden within age (neither by her own consent nor without,) nor any wife or maiden of full age, nor any other woman *against her will;* and if any do, at his suit that will sue within 40 days, the King shall do common right;" (and if none sue the King shall, and, on conviction, imprisonment and fine shall follow.) By the 13 Edw. 1. st. 1. c. 34, "if a man from henceforth do *ravish* a woman married, maid, or other, *where she did not consent neither before nor after,* be shall have judgment of life and member. And likewise where a man *ravisheth* a woman married, lady, damosel or other, *with force, although she consent after,* he shall have such judgment as before is said, *if he be attainted at the King's suit,* and there the King shall have his suit." By the C. R. II, st. 1, c. 6, whensoever, ladies and the daughters of noblemen and other women "be ravished, and after such rape do consent to such ravishers, that as well the ravishers as they that be ravished and every of them be from thenceforth disabled" to take any inheritance, etc., The 18 Eliz., c. 7, took away benefit of clergy in all cases of rape.

The statute of William the Conqueror was repealed by the 3 Edw. 1, c. 13, and it and the other statutes continued in force until the 9 G. 4, c. 31, which repealed them.

The crime of rape was felony at common law, and the offender was to suffer death (2 Inst. 180); and it is thus defined by Lord Coke, "rape is when a man hath carnal knowledge of a woman *by*

force and against her will ;" (*Co. Litt* 123, *b)* and commenting upon *what this word (rape) doth signify in the* 3 *Edw.* 1, *c.* 13, *and other statutes,* Lord Coke says, "it is well described by the mirror '*rape solonque le volunt del estatute est prise pour un proper mots done pur chescun afforcement de fem*' (forcing of a woman, Kelham, W. D.) *But better in another place,*" rape is when a man hath carnal knowledge of a woman *by force and against her will,*" (2 *Inst.* 180, 3 *Inst.* 60), and this definition has been followed in too numerous books to warrant a reference to them.

Then rape, like murder, has a fixed meaning, which nothing else can express. In the Year Book, 9 Ed. 4 f. 26 pl. 35, a man was indicted for that he *Aliciam felonice cepit et eam tunc et ibidem carnaliter cognovit contra voluntatem suam.* Per Lakin (Judge of K.B.); The statute (13 Ed. 1, c. 34,) says that if a man ravish a Dame or Damosel ; so the indictment ought to state according to the statute that he committed the felony, *scilicet quod ipsam rapuit,* etc., for it cannot be taken by the indictment for a case of felony. If a special act be made that if one ravish such a woman, that this shall be felony, and he be indicted *quod eam felonice cepit et eam carnaliter cognovit,* this avails not ; but she ought to state according to the statute that she was ravished." Per Yelverton (Judge of K B.:) "If a woman bring an appeal of rape, she ought to say *rapuit,* or otherwise it availeth not." Hele (counsel): "writs ought to follow the form, and this is the form of an appeal, as you say ; but an indictment holds no form, but only (states) the truth of the fact, and this matter in itself proves that he ravished her ; wherefore it is sufficiently good, for it is the same in effect as if it had said *rapuit.* Billing (C.J.K.B. :) "Where a man is indicted of murder, if he buy a charter of pardon, he ought to make mention expressly of murder, or otherwise it shall not be allowed ; therefore, if a man be indicted that he of malice prepense assaulted and killed a man, and says not *murdravit,* notwithstanding that this matter proves that he murdered him, yet the indictment is bad, because he is not indicted *quod murdravit,* etc. So here it ought to have the word that makes the felony,—scilicet *rapuit.*" Lord Coke thus applies this case " this word rape is so appropriated by law to this case, as without this word (*rapuit*) it cannot be expressed by any periphrasis or circumlocution ; for *carnaliter cognovit eam,* or the like, will not serve." (Co Litt. 123b.) Accordingly every indictment for rape has always used the word.

No rule is better settled than that where a word has had a definite

meaning attached to it at common law, and that word is used in any statute it will have the very same meaning in the statute as it had at common law, and that is more especially the case when the word imports an offence; and consequently the common law meaning of rape must be given to that word wherever it is used in any statute, and so the meaning affixed to any term in a statute is the meaning of the same term in any subsequent statute.

The punishment of rape was changed from death to loss of members by the statute of William the Conqueror, and thereby the crime ceased to be felony (2 *Inst.* 180;) and so continued until the 13 Edw. 1, s. 1, c. 34. During all the time previous to this statute if the woman demanded the man for her husband, it saved him from punishment (2 *Inst.* 180), and Lord Coke says that at common law this election was confined to the woman (2 *Inst.* 181.) But on the same page he says "it is not credible what ill success this act (3 Edw. 1, c. 13) had," and cites the case of *Warren de Henwick (Hil. 6, Edw. 1,)* who publicly ravished the daughter of S. de Warton, and "came and desired to have her as his wife, which was granted by the Justices, and he was affianced to her in open court."

This state of things led to the 13 Edw. 1, st. 1, c. 34, which amended but did not repeal, the 3 Edw. 1, c. 13. Therefore they must be construed together.

The 3 Edw. 1, c. 13, contained two distinct clauses. The first applied to girls, who were within age. The second to all other women. The first applied to cases whether by consent or without; and this shows that girls within age were capable of consenting, and that it was not rape where they did; but this clause rendered their consent of no avail. Whilst in the latter case the words are "against her will;" as in such cases, the woman was capable of consenting. And thus it is shown that each of the clauses was accurately framed to meet the cases at which each was directed. It is also perfectly clear that *each clause only applied to the time at which the offence was committed;* and did not affect anything that occurred either before or after that time.

The evil consequences of this statute (as we have pointed out) led to the passing of the 13 Ed. 1, st. 1, c. 34, which does not repeal the previous statute. It also contains two clauses; the first applies where a man "do ravish a woman married, maid, or other, where she did not consent neither before nor after." The second where a man "ravisheth a woman, although she consent after." The first applies

where there never is any consent at all; the second where there is consent after the rape. It is clear that *the words "did not consent neither before nor after" do not apply to the time of the rape itself*, but actually exclude it. Lord Coke (2 *Inst.* 433) says "this clause is intended of an appeal to be brought by the party ravished; for, *if she consent either before or after*, she shall have no appeal; but, *if she consented neither before nor after*, then she shall have an appeal, and there is no law that gives a woman an appeal of rape but this." (Lord Coke refers to "13 Edw. 3, Coron. 122," which is not in the Year Books; as they skip from 10th to 17th Edw. III.) Lord Coke adds "Hereby the ancient law concerning the election given to her that is ravished is taken away." This explains the origin of the clause, and shows that the words do not apply to the act itself, and were not introduced in order to define the offence in any respect. The reasons why the clause does not in terms refer at all to consent at the time of the rape are that the word "ravish" at common law imported that the act was against the will; and the 3 Edw. 1, c. 13, contained the very words "against her will," and that statute and this *must* be read together. *It was absolutely necessary to use the word "consent," as applicable to the time before and after the act;* for it was impossible to apply the words "against the will" to either of those times: they could only be applied to the time of the act itself. It is manifest that the later statute was very carefully framed upon the former. The words "a woman married, maid or other" are plainly substituted for "any wife or maiden of full age, nor any other woman" in the former statute. And this leads to the inference that the first clause in that statute, relating to "any maiden within age," is not affected in any way by the later statute. So too the words in the second clause, "if he be attainted at the King's suit," plainly refer to the previous statute, and limit a prosecution by the crown to cases where there is no suit by any private individual; and the 6 R. II st. 1, c. 6, plainly shows that the suit by a private person continued after the 13 Edw. 1, st. 1, c. 34; and that where the woman consented after the rape, it saved the man. Cases like that of Warren de Henwick were completely met by the first clause, which obviously prevented the man from claiming and obtaining the woman against her consent.

Lord Coke in his chapter on Rape (3 *Inst.* 60) clearly considered the former statutes of the 3 Edw. 1, c. 13, the 13 Edw. 1, statute 1, c. 34, the 6 R. 2, c. 6, and the 18 El., c. 7, as all existing together; and,

with his usual accuracy, thus states their effect: "Rape is felony by the common law, declared by parliament, for the unlawful and carnal knowledge and abuse of any woman above the age of ten years against her will, or of a woman child under the age of ten years, with her will or against her will, and the offender shall not take the benefit of clergy;" and then Lord Coke refers to the 102 Inst. as to "what offence this was at common law," which have already been cited. It is plain, therefore, that Lord Coke put the same construction as I have done upon the 3 Edw. 1, c. 13, and 13 Edw. 1. st. 1, c. 34, and there can be no doubt that that construction was right. Equally clear is it that there was no intention in any way to alter what was the common law offence by these statutes, or to define the offence *de novo*. The alteration of the punishment left the offence as it was at common law.

Indictments for rape have always alleged the offence to be committed by violence *and* against the will, and nothing could more clearly show that proof of both is necessary. The indictment runs "the said A. *violently* and *against her will* feloniously did ravish." Robbery is exactly similar; there the indictment runs "from the person and *against the will* of the said A. feloniously and *violently* did steal." It seems impossible to draw any distinction between these forms; and the definition of robbery is stealing from the person and "*against the will by violence* and putting in fear," etc. Now both these offences require the act to be done with violence and against the will; and it is quite clear that in *robbery there must be some violence to the person beyond the force that may be used in taking the articles;* for no mere taking from the person, even against the will, can suffice in robbery. It is quite clear that merely taking an article from a man asleep or drunk would not suffice. And for the same reason it would seem that having connection with a woman in a state of insensibility can not constitute a rape, because there is no violence ultra the mere connection. In robbery the violence is the principle ingredient, and in rape it seems at least to be one necessary ingredient. Violence to the person has always been an offence; so that robbery is in truth compounded of two offences, larceny and assault. And it is difficult to understand how a case can amount to rape where there is no violence ultra the act itself.

It is certain that to obtain an article from any one by fraud without violence is not robbery; but if there be both fraud and violence the crime may be complete.

. . .

Nothing could more clearly show that violence to the person is essential to the crime of rape than the statute of William the Conqueror, and it is clear from it that the violence must be such as to overcome the resistance of the woman; even in the case of an attempt there must be a struggle, *luctamen*. It need hardly be added that a mere attrectation that is sufficient to constitute an assault in point of law is insufficient, unless indeed there were an overpowering terror otherwise created.

Speaking of an appeal of rape at common law Bracton says: "*cum virgo corrupta fuerit et oppressa, statim cum factum recens fuerit cum clamore et hutesio debet accurrere ad villas vicinas, et ibi injuriam sibi illatam probis hominibus ostendere, sanguinem et vestes suas sanguine tinctas et vestium scissuras. Lib. III, c.* 28, *f.* 147. Lord Hale cites this passage (1 *Hale*, 632); and evidently fully approves of it. (*Ibid* 633, 4). Nothing could more clearly prove that from the time of Bracton till Lord Hale wrote the act must have been done both violently and against the will in order to constitute the crime. And Lord Hale fully justifies my views as to the dangers to which innocent men may be subjected by false charges of rape.

In *R.* v. *Jackson, R. & R.* 487, the prisoner was convicted of a burglary with intent to commit a rape. The prisoner got into the woman's bed as if he had been her husband, and was in the act of copulation when she made the discovery, and immediately, and before completion, he desisted. The jury found that he entered the house with intent to pass for her husband, and to have connexion with her if she did not discover the mistake; but not with the intention of forcing her if she made that discovery. The question was reserved whether the connexion with the woman, whilst she was under that mistake, would have amounted to rape. Four of the judges thought that the having carnal knowledge of a woman whilst she was under the belief of its being her husband would be a rape; but the other eight judges thought that it would not; and Dallas, C. J., pointed out forcibly the difference between compelling a woman against her will, when the abhorrence, which would naturally arise in her mind, was called into action, and beguiling her into consent and co-operation. This case was not argued, nor was any case on the definition of rape referred to; and it was decided as if the only question was as to consent and that no violence was necessary. It is very difficult to see how a man can be guilty of a rape, who has no intention of forcing a woman; and equally so how a man can be

guilty of a burglary with intent to commit a rape under such circumstances. It has been held that there must be an intent to have connexion at all events; and notwithstanding any resistance on the part of the woman. *R.* v. *Lloyd*, 7 *C. & P.*, 318, per Patteson, J. The observations of Dallas, C. J., afford very sound grounds why the common law offence was confined to cases where the act was against the woman's will.

In *R.* v. *Saunders*, 8 *C. & P.*, 265, the prisoner was indicted for a rape on a married woman. Being asleep in bed she was awoke by a hand passed round her, which turned her round, and she, supposing it to be her husband, made no resistance to that or to the connexion that immediately followed, but while the connexion was going on, she perceived by the prisoner's breathing that it was not her husband, and she immediately pushed him off her. Gurney, B. "I am bound to tell you (the jury) that the evidence in this case does not establish the charge contained in this indictment as the crime was not committed against the will of the prosecutrix, as she consented, believing it to be her husband; but if you think that that was the case, and that it was a fraud upon her, and that there was not consent as to this person, you must find the prisoner guilty of an assault." Gurney, B., was a great criminal lawyer, and his words here are very correct.

In *R.* v. *Williams*, 8 *C. & P.* 286, the prisoner was indicted for a rape upon a married woman, and it was opened (according to the statement of the prosecutrix in the depositions) that the prisoner had got into bed with the prosecutrix whilst she was asleep, and had penetrated her person before she was aware that it was not her husband, and that he persisted in completing his purpose notwithstanding her resistance after she had discovered that he was not her husband; and it was submitted that this distinguished the case from *R.* v. *Jackson*. But the prosecutrix stated that she had allowed the prisoner to have connexion with her believing him to be her husband, and that she did not discover who he was until the connexion was over. Alderson, B.: "that puts an end to the capital charge. *R.* v. *Jackson*, is in point." It was then urged for the prisoner that to constitute an assault there must be resistance in the party assaulted. Alderson B.: "In an assault of this nature there need not be resistance—the fraud is enough."

In *R.* v. *Clarke*, *Dears.* 397, the prosecutrix, having fallen asleep, was awakened by a man in bed with her, drawing her towards

him, and having connexion with her; she assented to the connexion in the belief that the man was her husband. She afterwards discovered that the man was not her husband The jury found that he intended to have connexion with her fraudulently, but not by force; and if detected to desist. Upon a case reserved the case of *R.* v. *Jackson* was questioned, but Jervis, C. J., said: "We have conferred with several of the other judges, and we think we cannot permit this question to be opened now, but are bound by the decision in *R.* v. *Jackson.*" One might have thought that this case at last had conclusively settled that fraud is not equivalent to force in cases of rape.

In *R.* v. *Camplin*, 1 *Den.* 89; 1 *C. & K.* 746, the prisoner was convicted of a rape on a girl of thirteen years of age. He had made her quite drunk, and when she was in a state of insensibility took advantage of it, and violated her. The jury found that he gave her the liquor for the purpose of exciting her, not with the intention of rendering her insensible, and then having sexual intercourse with her. Upon a case reserved it was contended for the prisoner that there must be actual force and an opposing will on the part of the woman. But ten judges held the conviction right, and three thought it wrong. In the course of the argument, Patteson, J., said: "if a man knocks a woman down, and makes her insensible, and then has connexion with her while she is insensible, according to you that would be no rape, because she did not resist and evinced no opposing will." This is exactly like the case where a man is knocked down and stripped of his property while senseless, which is clearly robbery.—2 *Russ. C. & M.* 109, and the violence has been used in order to effect the object and to prevent resistance. Alderson, B., added, "In cases of fraud the woman's will is exercised under the influence of fraud; but in the case put by my brother Patteson there is force. The resistance was impossible, owing to the blow given by the prisoner. Here it was rendered impossible by the liquor which he had administered." In the addenda to 1 *Den. C. C. XVI*, the reasons for this decision are given by Parke, B., "of the judges who were in favor of the conviction, several thought that the crime of rape is committed by violating a woman when she is in a state of insensibility, and has no power over her will, whether such state is caused by the man or not, the accused knowing at that time that she is in that state; and Tindal, C. J., and Parke, B., remarked that in a statute of Westminster 2, c. 34, the offence of rape is described to be ravishing a woman "where she did not consent," and not ravishing *against her will.*" It is very difficult to con-

ceive a more erroneous statement. We have shown that that statute did not define the crime at all. The words are not merely "where she did not consent," but "where she did not consent, neither before nor after;" and, therefore, do not apply to the act itself, and the 3 Edw. 1, c. 13, which does apply to the act, and *must* be construed together with this act, has the words "against her will." If the statute had been referred to in the argument, the explanation we have given might have been offered, and it would have been seen that the statutes when properly considered have a totally different meaning.

The note proceeds, "But all the ten judges agreed that in this case, where the prosecutrix was made insensible by the act of the prisoner, and that, an unlawful act, and when also the prisoner must have known that the act was against her consent at the last moment that she was capable of exercising her will, because *he had attempted to procure her consent and failed,* the offence of rape was committed. The other three judges did not think that this could be considered as being sufficiently proved." In neither *Den. C. C.* nor *C. & K.* is there anything to warrant the statement underscored.

But in passing sentence on the prisoner, Patteson, J., said: "It appeared upon the evidence that the prosecutrix refused her consent, so long as she had sense or power to express such want of consent." 1 *C. & K.* 749.

And the very learned judge added: "Your case, therefore, falls within the description of those cases, in which force and violence constitute the crime; but in which fraud is held to supply the want of both." We are quite unaware of any such cases; it is clear that fraud does not supply the force and violence necessary to constitute robbery; and even in larceny where a chattel is obtained by fraud from any one who has power to part with the property in it, a trespass is not committed, and consequently the offence is not even larceny.

In *R.* v. *Page*, 2 *Cox*, 33, Alderson, B., stated the decision in Camplin's case thus: "The judges in the affirmative thought that on these facts it must be presumed that this was *contrà voluntatem*, it being clear that the woman had not consented when he began to administer the liquor, and that she never did actually consent at all; that his having connexion with her when insensible was, therefore, clearly *contra voluntatem ultimam*, which must be, as against him, presumed to continue unchanged. Denman, C. J., Parke, B., and Patteson, J., thought that a connexion without the consent of the woman was

rape, e. g., in the case of a woman insensibly drunk in the streets, not made so by the prisoner. And in *R.* v. *Page*, where the prosecutrix stated that she usually slept with her father, and, on waking from sleep, she found him having connexion with her, it was urged that *Camplin's Case* supported the position that if the prisoner had connexion with the girl while she was in such a state as to be incapable of giving consent, it was rape. Alderson B., said: "I do not understand that case to have gone so far as you affirm. It only decided that where the state of unconsciousness was caused by any act of the prisoner, connexion with the woman in such a state would constitute the offence. The wine was offered to her by the man in that case, and there was at any rate evidence to show that he had induced her to take it. I concurred in that judgment only on that ground."

In *R.* v. *Ryan*, 2 *Cox* 115, the prosecutrix was in a state not to understand right from wrong; but her general habits were those of decency and propriety, and Platt, B., left the question to the jury whether she was likely to have consented; and added that "if she was in a state of unconsciousness, whether it was produced by any act of the prisoner or by any act of her own, the prisoner having connexion with her in that state would be guilty of rape. If you believe that she was in a state of unconsciousness, the law assumes that the connexion took place without her consent." So on the trial for the rape of an idiot girl, Willes, J., directed the jury that if they were satisfied that the girl was in such a state of idiocy as to be incapable of expressing consent or dissent, and the prisoner had connexion with her without her consent, he was guilty; but a consent produced by mere animal instinct would prevent the act from being a rape. *Anon.* stated in *Bell C. C.* 70.

In *R.* v. *Fletcher, Bell, C. C.* 63, the prosecutrix was incapable of distinguishing right from wrong, and the prisoner met her, and was seen to have connexion with her. She was not shown to have offered any resistance, though she did exclaim whilst the prisoner was in the act that he hurt her, and on the prisoner rising from her and her getting up she made a start as if to run away. The jury found that *she was incapable of giving consent from defect of understanding*. Upon a case reserved it was contended that there must be either force or *fraud*, and that there was neither in this case; and the cases of *R.* v. *Jackson*, etc., were referred to; on which Lord Campbell, C.J., said: "In those cases it was at first held that fraud supplied the place of force."

This is certainly a mistake. There are no such decisions in the books, and none are referred to in *R.* v. *Jackson*, which they would have been if they existed and had not been reported. Lord Campbell, C. J., also asked "what do you say to the definition of rape in the 13 Edw. 1, c. 34?" The answer was that that section imports the definition of the word rape into the word ravish, and it does not alter the common law definition of rape. But, strange to say, the previous statute of the 3 Edw. 1, c. 13, was never referred to in the case. Lord Campbell, C. J.: "The question is what is the real definition of the crime of rape, whether it is the ravishing a woman *against her will, or without her consent*. If the former is the correct definition, the crime is not in this case proved; if the latter, it is proved. *Camplin's case* seems to me really to settle what the proper definition is; and the decision in that case rests upon the authority of an act of Parliament. The statute of Westminster 2, c. 34, defines the crime to be where "a man do ravish a woman, married, maid or other, *where she did not consent neither before nor after*; 2 *Inst.* 433. We are bound by that definition, and it was adopted in *Camplin's case*, acted upon in *Ryan's case*, and subsequently in a case before my brother Willes."

It is perfectly clear that this decision wholly rests upon the ground that the 13 Ed. 1, c. 34, defines the crime of rape, and a more erroneous judgment never was delivered. It has been abundantly shown that that statute contains no definition of rape at all; that the words relied on do not apply to the act of rape itself; and that the 3 Ed. 1, c. 13, and 13 Edw. 1, c. 34, *must* be construed together; and as the former has the words "against her will" applied to the act itself, the act must be done against the consent of the woman.

Nor is it to be omitted that the court wholly failed to notice that there was no evidence of any violence or of any fraud that could supply that defect; and even the 13 Edw. 1, c. 34, in terms requires the connexion to be "with force;" and it is perfectly clear that the statute renders it essential that there should be force beyond that which is exerted merely in the connexion; for the words are "ravisheth" "with force;" and the word "ravisheth" at all events includes everything that is incident to the connexion. The force necessary to constitute the crime is force used to overcome the resistance of the woman, not the mere force used in the having the connection; in the same way as in robbery there must be force beyond the force used to remove the chattel.

Equally remarkable is it that the court never noticed that Lord

Coke, Lord Hale, and others all wrote upon the statutes, and all hold that in order to constitute a rape the act must be done against the will of the woman. On no subject is there a greater concurrence of opinion; and on no point is there an opinion entitled to greater weight. It cannot be pretended that any judge of the present day is abler than Lord Coke or Lord Hale, and both were very much more conversant with our old statutes than any judge in our time; and Lord Hale was an infinitely better criminal lawyer than any judge of recent times; but stranger still is it that Lord Campbell cites the 2 *Inst.* 433 for the clause in the statute, and never notices Lord Coke's note on it, which shows how erroneous his judgment was.

Lord Campbell, C. J., also added: "It would be monstrous to say that if a drunken woman returning from market lay down and fell asleep by the road side, and a man, by force, had connexion with her whilst she was in a state of insensibility and incapable of giving consent, he would not be guilty of rape." I totally dissent from this *obiter dictum*. Substitute for "had connexion with her" the words "took a purse from her," and the fallacy will at once appear. No one ever dreamt of such a case being a robbery, and yet it is a bad offence. The Greeks considered it so infamous to steal from a dead body that they had a proverb to denote the disgraceful nature of the act, viz., "he would even plunder a dead man." But disgraceful acts ought not to be included in well known crimes, however bad they may be, unless they clearly fall within them; and it is to be feared that these cases are but too strong examples of the proverb that "bad cases make bad law." Some of the *dicta* in them naturally enough sprang from the indignation felt at the acts that had been done, and the attention seems to have been too exclusively confined to the particular cases. It seems never to have occurred to any one to consider what the consequences might be to innocent persons, and the door that might be opened to the fabrication of false charges. A very long experience in criminal courts satisfies me that the majority of charges of rape are false, and that innocent persons are put in great peril by them; and for the most part no one except the man and woman are alleged to be present, and consequently it is open to the woman to fabricate any story she likes without fear of contradiction by any one except the prisoner; and the stories that have turned out to be fabrications may be said to have culminated in a case, in which the prosecutrix, a nice looking girl of under age, told as clear a story as ever was heard

in examination in chief; but Gurney, B., who had taken down her examination in shorthand, desired her to repeat her story; which she did word for word as it was on his notes, on which that great criminal lawyer at once directed an acquittal. It is in consequence no doubt, of the prevalence of false charges that it has always been expected that marks on the person of the woman should have been seen; and this expectation was, no doubt, founded upon the belief that if the woman was true to herself, and resisted as she ought, her tender flesh would bear clear proof that violence had been offered to her in order to overcome her resistance. Of course there may be cases where the absence of marks may be explained; as by present fear of death or the intimidation of numbers. But the holding that fraud is equivalent to force opens the way to charges where no marks are to be expected. How very easy would it be to utilize *Camplin's Case*, in support of a false charge.

Suppose a man and woman are drinking together in a room, and she consents to connexion, and during it some one walks unexpectedly into the room, and finds them in the act, what would be more easy—nay what would be more probable than that she would charge the man with a rape?

It may well be asked, also, if fraud is equivalent to force and want of consent, how far is it to be extended? A married or single man induces a woman to yield to his wishes by a promise to marry her. No one can doubt that this is a gross fraud; but is it a rape? A man administers drugs to a woman and thereby so excites her passions as to yield to his desires; no doubt it is a gross fraud, but, is it a rape? Is it not turning cases of seduction into rape?

There is a class of cases which seem to bear extremely strongly upon this point. A man being lawfully married to a wife still living induces a maiden to marry him. Here from first to last he must have acted fraudulently with intent to obtain the possession of her person; and her consent to the marriage and to the connexion must have been obtained by the fraud; and she must have consented to the connexion *under the honest belief that he was her husband;* whereas he was no more her husband than the stranger in *Jackson's Case, etc.* The bigamy acts plainly prove that cases of bigamy never have been considered as cases of rape. Consider also the Abduction Statutes, 3 Hen. 7, c. 2, etc.

Lord Coke tells us that Isabell, late wife of John Botiler, by her petition showed how William Pull, by duress and menaces of

imprisonment enforced her to marry him, and by color thereof ravished her, for which she prayed an appeal, and it was granted her. (*3 Inst.* 60, *citing Rot. Parl.* 15 *H.* 6, *nu.* 15). And also that an appeal was granted in the similar case of dame Joan Beamont against E. Lancaster, who had married her against her will and ravished her. (*Rot. Parl.* 31 *H.* 6, *nu.* 72.) In these cases the appeal was specially, given by Parliament, and they strongly tend to show that a marriage procured by fraud alone would not be rape, but that there must be force in order to constitute the crime ; and the 31 H. 6, c. 9, which was passed in consequence of the preceding case, in order to give a remedy to women forced to enter into bonds, tends the same way.

In *R. v. Fletcher*, 14 *Law T. R.* 573, the prisoner was tried for a rape, and the question reserved was whether the case ought to have gone to the jury, there being no evidence, except the fact of the connexion, and the imbecile state of mind of the girl. Of the fact of connexion there was the fullest proof, for it was admitted by the prisoner. There was, however, no evidence that the connexion was against the will of the girl. The indictment charged the prisoner with having committed the offence against her will and without her consent. The judges were all of opinion that some evidence of that allegation as a fact should have been given ; and that there was not that sort of testimony, on which a judge would be justified in leaving the case to a jury to find a verdict. "We are unanimously of opinion that there was here no evidence to establish either that the connexion was against her will or without her consent." And Pollock, C. B., added : "I wish to add for myself that I think the act of Parliament (24-25 V., c. 100, ss. 50, 51,) which makes sexual connexion a criminal offence in the case of children of tender years has a tendency to throw light upon the case before us. Here the contention on the part of the crown must be that an idiot is incapable of consent; but it may be said in answer that the same cause, which required an act of Parliament to make the mere fact of connexion a criminal offence in the case of children of tender years would require an act of Parliament in the case also of idiots." The same remark arises upon the 1 Edw. 1, c. 13, as to maidens within age. The case of *R. v. Pressy*, 17 *Law T.* 295, only decided that the prisoner being charged with having committed a rape on the prosecutrix *against her will* his answer, "Yes I did," was evidence to go to the jury ; and so it clearly would have been, if the crime must be committed against the will. In *R. v. Barrow*, 19 *Law T.* 293, the prose-

cutrix was in bed, and her husband beside her. She had her baby in her arms, and was between waking and sleeping; but was completely awakened by a man having connexion with her, and pushing the baby out of her arms. She thought it was her husband, and she could count five after she completely awoke before she found it was not her husband. Kelly, C.B., thought, especially on the authority of the judgment of Lord Campbell in *R.* v. *Fletcher,* that the case was made out; as it was sufficient that the act was done by force and without consent before or afterwards; that the act itself, coupled with the pushing aside of the child, amounted to force, and there was certainly no consent before and the reverse immediately afterwards. But on a case reserved the conviction was quashed. Bovill, C. J., "It does not appear that the prosecutrix was asleep or unconscious at the time when the first act of connexion was committed. What was done was, therefore, with her consent, though that was obtained by fraud. We are of opinion that this case comes within that class of cases, in which it has been decided that where, under such circumstances, consent has been obtained by fraud, the offence does not amount to rape." This case, therefore, is another strong confirmation of the class of cases, of which *R.* v. *Jackson* was the first; and it is a distinct authority against the doctrine that in cases of rape fraud amounts to force. See *R.* v. *Sweenie*, 8 *Cox*, 223, as stated in 2 *Heard's Leading Criminal Cases*, 259.

In *R.* v. *Barratt*, 29 *Law T.* 408, the prosecutrix was blind and out of her mind; if told to lie down she would do so, and she had been told to lie on a couch until her sister returned. The prisoner knew her state, and he was seen lying on her on the couch, and on going into the room her father found the prisoner standing up at the end of the couch buttoning up his trowsers, while she was lying quietly on the couch. The jury were directed that "if the prisoner had connexion by force with the girl, and if the girl was in such an idiotic state that she did not know what the prisoner was doing, and the prisoner was aware of her being in that state, they might find him guilty of rape; but if the girl, from animal instinct, yielded to the prisoner without resistance, or if the prisoner, from the girl's state and condition, had reason to think the girl was consenting, they ought to acquit him." The jury found him guilty of an assault with intent, etc. The case was argued only on the part of the crown—(a course which ought never to be allowed.) It was held that the

conviction was right, upon the ground that the prosecutrix was incapable of giving her consent, and rests entirely upon the decision of *R.* v. *Fletcher, Bell, C. C.* 63.

In *R.* v. *Flattery*, 36 *Law T.* 32, the prisoner professed for money to give medical and surgical advice, and the prosecutrix, being in ill-health, went with her mother to consult him. The prisoner put several questions to the mother as to the condition of the daughter, and made some examination of her person. The prisoner then fraudulently, and knowing that he was speaking falsely, told the mother, in the hearing of the daughter, that "it was nature's string wanted breaking," and asked if he might break it. The mother replied that she did not know what he meant, but that she did not mind if it would do her daughter any good. The prisoner went into an inner room with the girl, and there had connexion with her, she making but feeble resistance, believing that the prisoner was merely treating her medically, and performing a surgical operation to cure her of her "illness and fits," and submitting to his treatment solely because she so believed. Unless such submission in law constitutes consent, there was no consent. It was held, on a case reserved, that the offence was rape, upon the ground that there was no consent to the prisoner having connexion with the girl. The decision proceeded entirely on the case of *R.* v. *Camplin*, and the erroneous opinion that the 13 Ed. 1, c. 34, defined the crime of rape. *R.* v. *Barrow* was much questioned; and Kelly, C. B., said: "I lament that it has ever been decided to be the law that, where a man obtains possession of a woman's person by fraud, it does not amount to rape."

There had been previous cases where indictments for assault had been held to be supported by proof of the like false pretences of medical or surgical treatment, by which females had been deceived and suffered their persons to be handled. (*R.* v. *Rosinski, R. & M. C. C.* 19,) or otherwise indecently dealt with (*R.* v. *Stanton*, 1 *C. & K.* 415) or connexion to take place (*R.* v. *Case*, 1 *Den.* 580.) In this case Wilde, C. J., said, the cases showed that "where consent is caused by fraud, the act is at least an assault, and perhaps amounts to rape." The cases referred to were *R.* v. *Saunders*, 8 *C. & P.* 265; and *R.* v. *Williams*, 8 *C. & P.* 286; and, instead of showing that the act is rape in such cases they are clear decisions to the contrary.

Some expressions appear to have been used equivocally in these cases.

Thus the expression "incapable of consent" has been applied as well to the case where the woman was actually senseless as where she was devoid of reason, but possessed of her animal propensities. There can be no doubt, that many unfortunate persons, devoid of sufficient understanding to decide between right and wrong, are subject to very strong animal passions, which would lead them to assent to, if not actually to court, connexion; and it cannot be contended that connexion with such persons is a rape. In *R.* v. *Barratt* it was rightly left to the jury that the girl, though out of her mind, might yield from animal instinct. But in *R.* v. *Fletcher*, *Bell C. C.* 63, the jury were erroneously told that if "the girl was incapable of giving consent, or of exercising any judgment on the matter, they might convict;" and they found that the girl was incapable of giving consent from want of understanding. Upon such a direction and finding the verdict of guilty was clearly erroneous. The case is exactly like that of very young children, who can consent to connexion, though they are incapable of judging of the nature and quality of the act. In *R.* v. *Read*, 1 *Den.* 377, the jury found that a girl of nine years of age assented, but that "from her tender age she did not know what she was about;" and it was held that the prisoner could not be convicted of an assault. So where the girl was too young to be examined; Patteson, J., said "we know that a child can consent to that which, without such consent, would constitute an assault." *R.* v. *Cockburn*, 3 *Cox*, 543. This great judge also said "my experience has shown me that children of very tender age may have very vicious propensities." See *R.* v. *Johnson*, 12 *Law T.* 503.

A woman may be quite incapable of exercising reasoning power, and yet be perfectly capable of exerting her natural appetites; and consequently the want of the former in no way negatives the existence of the latter. The verdict, therefore, in *R.* v. *Fletcher*, *Bell, C. C.*, 63, was clearly wrong.

Nor can there be any doubt that in many cases of unsound mind the animal passions are extremely strong; and in the absence of reason to control them, the reasonable inference is that they will be gratified whenever an opportunity occurs, and when there is no evidence to the contrary, it would seem that the fair presumption is that that is the case. This point, though one of fact, deserves more consideration than it has received.

Several cases have turned on the distinction that has been taken

between consent and submission. In *R.* v. *Day*, 9 *C. & P.* 722, Coleridge, J., said, "There is a difference between consent and submission. Every consent involves a submission; but it by no means follows that a mere submission involves a consent. It would be too much to say that an adult submitting quietly to an outrage of this description was not consenting; on the other hand the mere submission of a child, when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law." And it was left to the jury to say "whether the submission of the prosecutrix was voluntary on her part, or the result of fear under the circumstances in which she was placed." See also *R.* v. *Jones*, 4 *Law. T.* 154. *R. v. Case*, 1 *Den.* 580. An important question arises occasionally in these cases in addition to the question whether the woman submitted, but did not consent. It is "did the man *bonâ fide* believe that she was consenting?" In *R.* .v *Flattery*, Denman, J., said "there is one case where a woman does not consent to the act of connexion, and yet the man may not be guilty of rape, that is where the resistance is so slight and her behavior such that the man may *bonâ fide* believe that she is consenting." And, *a fortiori*, that may be the case where the woman submits, and makes no resistance at all. In *R.* v. *Barratt*, where the girl was blind and out of her mind, and there was no evidence whatever of resistance, the surgeon proved that there were no external marks of violence, but that in his opinion there had been recent connexion, and he thought she had been *in the habit of having connexion*, there would seem to have been cogent evidence that the animal passions of the girl had led to the connexion, and the case ought to have ended in an acquittal

It may admit of question whether the distinction drawn in *R.* v. *Flattery*, between consent obtained by fraud from a married woman, and consent obtained by fraud from a girl to what she supposes is medical treatment, can be supported. In the one case the consent is given to a connexion with a man, as to whom the woman is completely deceived. In the other it is given to an act, as to the nature of which she is completely deceived, and in both the act done is totally different from the act to which the assent was given. In each case the power to do the act is obtained by fraud; and in each the nature and quality of the act is totally different from what the woman supposed it would be. The intent, the object, the fraud,

and the end obtained are all the same in both cases; then how is it possible to draw any sound distinction between them? False pretences are very similar; in them the only material points are "were these false pretences?" "Were they fraudulently used?" "Was the chattel obtained by them?" Every kind of false pretence is sufficient, and no distinction is ever drawn between one false pretence and another. They are merely the means by which the fraud is effected, and it is quite immaterial what they are, for the fraud is the gist of the offence.

That *Camplin's case* was not a well considered decision is plain from the different grounds assigned for the judgment by Parke and Alderson, B. B., and Patteson, J.; and the numerous cases that have since been reserved prove not only that it has not been considered satisfactory, but also that it has given rise to many difficulties; which of itself is sufficient to throw doubt on any decision. Whether, however, if the mistake, on which it was founded, if pointed out, would induce our judges to come to a contrary decision, it is impossible to predict. All that can be said is that, as the judges in *Camplin's Case and Fletcher's Case, Bell, C. C.* 63, held that they were *bound by one statute*, the judges ought to consider themselves *bound by the two statutes* to decide according to the true construction of their provisions. That the law on this point is in a very unsettled state cannot be doubted; and where that is the case, especially in so penal a matter, it would be well to remember that *nusquam major est servitus quam ubi jus aut vagum aut incognitum.*

20*th February*, 1878.