Justices, vol. 3, calls this a mystery of the English Procedure.

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

"Averments of time in criminal proceedings, says *Taylor, Ev.*, 229, are now even of less importance than those of place; for excepting in the very few cases where time is of the essence of the offence, the indictment need not contain any allegation respecting it. Indeed, independent of the new law, the date specified in the indictment has been so far disregarded that, where a court had no jurisdiction to try a criminal, except for an offence committed after a certain day, the judges held that no objection could be taken to the indictment in arrest of judgment, for alleging that the act was done before that day, the jury having expressly found that this was not correct.—*R.* v. *Treharne*, 1 *Moo. C. C.* 298."

It is said in *Archbold*, page 50: "There are, however, some exceptions to this rule: 1. The dates of bills of exchange, and other instruments must be truly stated, when *necessarily* set out; 2. Deeds must be pleaded either according to the date they bear, or to the day on which they were delivered; 3. If any time stated in the indictment is to be proved by matter of record, it must be truly stated; 4. If the precise date of a fact be a necessary ingredient in the offence, it must be truly stated."

See, *post*, sec. 237, as to amendment of variances between the proof and the indictment, in documents in writing.

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

It seems that an entire omission of venue is not provided for by this clause, and that such an omission might still be taken advantage of; but no venue need now be stated in the body of the indictment, except where local description is required, but the name of the district, county, or place in the margin shall be taken to be the venue; sec. 104, *ante*. But an entire omission of venue in the cases where it is yet necessary, though it may be taken advantage of under sec. 143 of the Procedure Act, by way of demurrer or motion to quash the indictment, could probably be rectified by amendment under that section; and, if not taken advantage of by demurrer or motion to quash, the omission could not be taken advantage of by motion in arrest of judgment. See 3 *Burn*, 22.

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

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

So that the words "to the great damage of the said ....," "to the evil example of all others," "to the great displeasure of Almighty God," etc., probably never necessary, are now not to be used. And an indictment for a public nuisance need not now conclude, "*ad commune nocumentum.*"—*R.* v. *Holmes, Dears.* 207.

And before these statutes, it was held that the conclusion "against the form of the statute" in an indictment for a common law offence, instead of "against the peace," did not invalidate the indictment; the conclusion may

then be treated as a surplusage.—*R.* v. *Mathews*, 2 *Leach*, 585.

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

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

Sec. 142, *post*, enacts, *inter alia*, that no indictment shall be abated by reason of any want of addition of any party offering such plea.

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

Lastly, this clause enacts that no indictment shall be held insufficient for want of the statement of the value or price of any matter or thing, or the amount of damage injury or spoil in any case where the value or price, or the amount of damage, injury or spoil, is not of the essence of the offence.

The rule is, that if a statute makes, for instance, the stealing of a particular thing a felony, without reference to its value, then the value need not be alleged in the indictment. But wherever the value is an element to be considered by the court in determining the punishment, it must be alleged in the indictment and duly proved on the trial.—1 *Bishop, Cr. Proc.* 541. So suppose an indictment charges the defendant with the larceny of a diamond ring, without alleging the value of the ring, the defendant cannot be sentenced to more than seven years in the penitentiary, under sec. 5 of the Larceny Act, though, at the trial, the ring was proved to be worth one thousand pounds; and the court cannot sentence him to the greater punishment allowed by sec. 86 of the said Larceny Act, because the value was not alleged in the indictment.

The value is of the essence of the offence, where, by the statute, it is said, for instance: "Whosoever steals in any dwelling-house any chattel, etc., to the value in the whole of *twenty-five dollars or more:*" sec. 45 of the Larceny Act. To bring an indictment under this section, the value of twenty-five dollars or more must necessarily be alleged in the indictment and proved. But suppose it is alleged to be of fifty dollars, and proved to be only of thirty, this will be sufficient, because the value proved constitutes the offence created by statute.

If there are more than one article mentioned in the indictment, it is better to state and prove the value of each, so as to form, in the whole, the amount necessary to bring the case under the statute.—*R.* v. *Forsyth, R. & R.* 274; 1 *Taylor, Ev. par.* 230. However, in *R.* v. *Thoman*, 12 *Cox*, 54, it has been held by the court of criminal appeal that in an indictment, under 24-25 V., c. 97, s. 51, Imp. (sec. 58, c. 168 of Canadian Acts,) for maliciously damaging personal property, the damage exceeding five pounds, it is not necessary to allege the value of each article injured, or the value of the damage done to each article, but only that the amount of damage done to the several articles exceeded five pounds in the aggregate.

129. Whenever, in any indictment, it is necessary to make an averment as to any money or to any note of any bank, or Dominion or Provincial note, it shall be sufficient to describe such money or note simply as money, without any allegation, so far as regards the description of the property, specifying any particular coin or note; and such averment shall be sustained by proof of any amount of coin or of any such note, although the particular species of coin of which

such amount was composed or the particular nature of the note is not proved.—32-33 *V., c.* 29, *s.* 25.

130. Whenever it is necessary to make an averment in an indictment, as to any instrument, whether the same consists wholly or in part of writing, print or figures, it shall be sufficient to describe such instrument by any name or designation by which the same is usually known, or by the purport thereof, without setting out any copy or *fac simile* of the whole or of any part thereof.—32-33 *V., c.* 29, *s.* 24.

The 130th sec. is taken from the 14-15 V., c. 100, s. 7, of the Imperial Statutes upon which *Greaves* remarks: "This section renders it sufficient to describe any instrument to which it applies by any name or designation by which it is usually known, or by its purport. It is to be observed also that this section applies not merely to instruments in respect of which any offence is alleged to have been committed, but to every instrument as to which any averment may be made in any indictment. —*Lord Campbell's Acts, by Greaves*, 12.

The 129th sec. is taken from the 14-15 V., c. 100, s. 18, of the Imperial Statutes, upon which *Greaves* says "This section was framed upon the 7-8 Geo. IV., c. 29, s. 48, and was intended to meet the case of *R.* v. *Bond*, 1 *Den.* 517. It originally applied to money and valuable securities, the same as the section from which it was taken; but it was thought better that it should only extend to coin and the notes of the Band of England and other banks. In these cases it is sufficient in any indictment whatever, where it is necessary to make any averment as to any coin or bank note, to describe such coin or note simply as money, without specifying any particular coin or note; and such an allegation will be supported by proof of any amount, although the species of coin or the nature of the note be not proved."

As to sec. 130 it is only necessary to remark that, at

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

As to sec. 129, it is said in *Archbold*, 59, that before this enactment, *money* was described in an indictment as so many "pieces of the current gold," or "silver," or "copper coin of the realm, called.....," and the particular species of coin must have been specified; so, though *Lord Hale*, 1 *P. C.* 534, and *Starkie*, 1 *Cr. Pl.* 187, seem to be of a contrary opinion, an indictment charging the stealing of ten pounds in moneys numbered was held bad.—*R.* v. *Fry*, *R. & R.*, 482. And in *Bond's* case, cited, *supra*, by Greaves, it was held that an indictment charging a stealing of seventy pieces of the current coin of the realm called sovereigns, of the value of seventy pounds, 140 pieces, etc., called half-sovereigns, etc., 500 pieces, etc., called crowns, etc., is not supported by proof of a stealing of a sum of money consisting of some or other of the coins mentioned in the indictment, without proof of some one or more of the specific coins there charged to have been stolen. Of course these decisions could not now be followed.

On sec. 129, see *R.* v. *Páquet*, 2 *L. N.* 140.

131. In any indictment for forging, altering, offering, uttering, disposing of or putting off any instrument, stamp, mark or thing, it shall be sufficient to describe the same by any name or designation by which the same is usually known, or by the purport thereof, without

setting out any copy or *fac simile* thereof, or otherwise describing the same or the value thereof.—32-33 *V., c.* 19, *s.* 49. 24-25 *V., c.* 98, *s.* 42, *Imp.*

132. In any indictment for engraving or making the whole or any part of any instrument, matter or thing whatsoever, or for using or having the unlawful custody or possession of any plate or other material upon which the whole or any part of any instrument, matter or thing whatsoever has been engraved or made, or for having the unlawful custody or possession of any paper upon which the whole or any part of any instrument, matter or thing whatsoever has been made or printed it shall be sufficient to describe such instrument matter or thing by any name or designation by which the same is usually known, without setting out any copy or *fac simile* of the whole or any part of such instrument, matter or thing.—32-33 *V., c.* 19, *s.* 50. 24-25 *V., c.* 98, *s.* 43, *Imp.*

133. Any number of accessories at different times to any felony may be charged with substantive felonies, in the same indictment, *and may be tried together*, notwithstanding the principal felon is not included in the same indictment, or is not in custody or amenable to justice.—31 *V., c.* 72, *s.* 7, *part.* 24-25 *V., c.* 96, *s.* 6, *Imp.*

See, *ante*, under c. 145.

Greaves' note.—This clause is framed from the 14-15 V., c. 100, s. 15, and the words in *italics* inserted. The committee of the Commons who sat on the 14-15 V., c. 100, struck out those words, not perceiving that they were the only important words in the clause: for there never was any doubt that separate accessories and receivers might be included in the same indictment under the circumstances referred to in the clause; the doubt was, whether they could be *compelled* to be tried together in the absence of the principal where they separately became accessories, or separately received.

134. Several counts may be inserted in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, committed by him against the same person, within six months from the first to the last of such acts, and all or any of them may be proceeded upon.—32-33 *V., c.* 21, *s.* 5. 24-25 *V., c.* 96, *s.* 5.

See *R.* v. *Suprani*, 13 *R. L.* 577, *post*, under sec. 202.

Before the passing of the act, it was no objection in point of law that an indictment contained separate counts charging distinct felonies of the same degree, and committed by the same offender.—2 *Hale*, 173; 1 *Chit.* 253; *R.* v. *Heywood, L. & C.* 451. It was, in truth, a matter for the discretion of the court; and if the court thought the prisoners would be embarrassed by the counts, the court would either quash the indictment, or compel the counsel for the prosecution to elect.—*R.* v. *Young*, 2 *East, P. C.* 515. It seems that, where three acts of larceny are charged in separate counts there may also be three counts for receiving.—*R.* v. *Heywood, L. & C.* 451.

Greaves, on this clause, says: "It frequently happened before this statute passed, that a servant or clerk stole sundry articles of small value from his master at different times, and in such a case it was necessary to prefer separate indictments for each distinct act of stealing, and on the trial it not seldom happened that the jury, having their attention confined to the theft of a single article of small value, improperly acquitted the prisoner on one or more indictments. The present section remedies these inconveniences, and places several larcenies from the same person in the same position as several embezzlements of the property of the same person, so that the prosecutor may now include three larcenies of his property committed within the space of six calendar months in the same indictment."—*Lord Campbell's Acts, by Greaves*, 19.

See *R.* v. *Benfield*, 2 *Burr.* 980.—The indictment need not charge that the subsequent larcenies were committed within six months after the commission of the first.—*R.* v. *Heywood, L. & C.* 451.

135. In any indictment containing a charge of feloniously steal-

ing any property, a count, or several counts, for feloniously receiving the same or any part or parts thereof, knowing the same to have been stolen may be added, and in any indictment for feloniously receiving any property, knowing it to have been stolen, a count for feloniously stealing the same may be added.—32-33 *V.*, *c.* 21, *s.* 101, *part.* 24-25 *V.*, *c.* 96, *s.* 92, *Imp.*

See remarks under preceding section.

The words "containing a charge of" are substituted for the word "for" in the former act, in order that a count for receiving may be added in *any* indictment containing a charge of stealing any property. It will therefore apply to burglary with stealing, housebreaking, robbery, etc. It is also provided, by this clause, for cases which frequently occur, and were not within the former clause; where different prisoners may be proved to have had possession of different parts of the stolen property.—*Greaves' Cons. Acts*, 180.

136. Every one who receives any chattel, money, valuable security or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling and otherwise disposing whereof, amounts to a felony either at common law or by statute, knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled or disposed of, may be indicted and convicted, either as an accessory after the fact, or for a substantive felony, and in the latter case, whether the principal felon has or has not been previously convicted, or is or is not amenable to justice: Provided, that no person, howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence.—32-33 *V.*, *c.* 21, *s.* 100, *part.* 24-25 *V.*, *c.* 96, *s.* 91, *Imp.*

This clause applies to all cases where property has been feloniously extorted, obtained, embezzled, or otherwise disposed of, within the meaning of any section of this act.—*Greaves, Cons. Acts*, 179.

See remarks under secs. 82 and 83 of *The Larceny Act*, p. 443, *ante*.

137. Every such receiver may, if the offence is a misdemeanor

be indicted and tried for the misdemeanor, whether the person guilty of the principal misdemeanor has or has not been previously convicted thereof, or is or is not amenable to justice.—32-33 *V.*, *c.* 21, *s.* 104, *part.* 24-25 *V.*, *c.* 96, *s.* 95.

138. Any number of receivers at different times, of property, or any part or parts thereof, so stolen, taken, extorted, obtained, embezzled or otherwise disposed of at one time, may be charged with substantive felonies in the same indictment, and may be tried together notwithstanding that the principal felon is not included in the same indictment, or is not in custody or amenable to justice.—31 *V*, *c.* 72, *s.* 7, *part.* 32-33 *V.*, *c.* 21, *s.* 102. 24-25 *V.*, *c.* 96, *s.* 93, *Imp.*

See sec. 40 of c. 145, p. 28, *ante*.

139. In any indictment for any indictable offence, committed after a previous conviction or convictions for any felony, misdemeanor or offence or offences punishable upon summary conviction (and for which a greater punishment may be inflicted on that account), it shall be sufficient, after charging the subsequent offence, to state that the offender was at a certain time and place, or at certain times and places convicted of felony or of a misdemeanor, or of an offence or offences punishable on summary conviction, as the case may be, *and to state the substance and effect only, omitting the formal part of the indictment and conviction, or of the summary conviction, as the case may be, for the previous offence*, without otherwise describing the previous offence or offences.—32-33 *V.*, *c.* 29, *s.* 26, *part.*

See s.s. 207 and 230, *post*.

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

The following remarks on section 116 of the English Larceny Act apply to section 139 of our Procedure Act, with the exception of the passage discussing whether this clause of the English act applies only to the Larceny Act,

or to any indictment for any offence. With us, sect. 139 of the Procedure Act clearly applies to all indictments for any subsequent offence whatever.

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

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

performance, *R.* v. *Austrey*, 6 *M. & S.* 319; and to suppose that this clause, which makes it sufficient to allege the former conviction '*after* charging the subsequent offence' can be satisfied by alleging it *before* charging the subsequent offence, is manifestly erroneous.

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

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

any of *the offences* in this section mentioned, shall be guilty of felony.' An indictment, therefore, in the form suggested would be strictly in accordance with these clauses; and in principle it is supported by the forms of indictment for perjury, and for murder where several are charged as principals in the first and second degree, and *R.* v. *Crighton*, *R. & R.* 62, appears fully to warrant such an indictment; for there the indictment alleged that the prisoner received a sum of money on account of his masters, and 'did *fraudulently* embezzle' part of it, 'and *so* the jurors aforesaid, upon their oath aforesaid, do say 'that the prisoner on,' etc., 'in manner and form aforesaid the said sum' from his said masters '*feloniously* did steal,' etc. It was objected that the indictment did not charge that the prisoner '*feloniously* embezzled;' it was answered that this was unnecessary; as the indictment in charging the embezzlement pursued the words of the statute, and that it was sufficient in having drawn the conclusion that *so* the prisoner feloniously stole the money; and, on a case reserved, the conviction was held right. It is obvious that the clauses in these acts are precisely similar to the clause on which that case was decided.

"It must not be supposed that in what I have said I mean to raise a doubt as to the validity of an indictment which follows the ordinary form; all I suggest is, that an indictment in the form I have pointed out would be good.

"*Mr. Saunders, Cr. L.* 94, complains that this clause does not provide against the clerk of assize or the clerk of the peace announcing 'a true bill for felony after a previous conviction.' This practice was clearly irregular even before this act passed, and the reason why no provision was made against it was that no one on the select committee of the Commons had ever heard of such practice.

After the trouble the Legislature has taken to prevent the previous conviction being mentioned till after the prisoner has been convicted of the subsequent offence, it is to be hoped that any court where such a practice may have prevailed will forbid it in future.

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

"The defendant is first to be arraigned on that part only of the indictment which charges the subsequent offence; that is to say, he is to be asked whether he be guilty or not guilty of that offence. If he plead not guilty, or if the court order a plea of not guilty to be entered for him under the 7-8 Geo. IV., c. 28, s. 2, or 9 Geo. IV., c. 54, s. 8 (section 145 Procedure Act), where he stands mute or will not answer directly to the charge, then the jury are to be charged in the first instance to try the subsequent offence only. If they acquit of that offence, the case is at an end; but if they find him guilty of the subsequent offence, or if he plead guilty to it on arraignment, then the defendant is to be asked whether he has been previously convicted as alleged, and if he admit that he has, he may be sentenced accordingly; but if he deny it, or stand mute of malice, or will not answer directly to such question, then the jury are to be charged to try whether he has been so previously convicted, and this may be done without swearing them again, and then the previous conviction is to be proved in the same manner as before this act passed.

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

"In a case tried at Gloucester since this act came into operation, the proof of the identity of the prisoner failed,

and Willes, J., directed the jury to be discharged as to the previous conviction, entertaining a doubt whether, if the jury gave a verdict, it might not be pleaded to a future indictment which alleged that previous conviction, and therefore it may be well to say a few words on this point. There is no authority bearing directly on the question, and the pleas of *autrefois acquit* and *convict* afford no support to such a plea; for the former rests on the ground that no one ought to be put in peril a second time for the same offence, and the latter on the ground that no one ought to be punished twice for the same offence; now the clauses giving a higher punishment for having been previously convicted, clearly take away the grounds on which both these pleas rest; and all that a finding in favor of a prisoner on the allegation of a previous conviction necessarily amounts to is that the jury are not satisfied that he was previously convicted. It by no means amounts to a determination that he had not been previously convicted. It may, therefore, well be doubted whether any such plea would be good; but, supposing that this difficulty were surmounted, another obstacle presents itself. In order to plead such a plea, the prisoner must set out the indictment in the case where his identity was not proved and his conviction for the felony charged in it, and aver that he was the same person that was so convicted; for until he had been so convicted the jury could have no jurisdiction to inquire as to his previous conviction, and then it would appear, by his own showing, that he had been convicted of felony before the commission of the offence charged in the indictment to which that plea was pleaded, and thus the question would arise whether the court might not sentence him accordingly. The clauses which apply to subsequent offences merely state that if a person be convicted of any

such offence after a previous conviction he shall be more severely punished, but never say in what manner the former conviction *must* be shown. In some instances no form of indictment or proof is given; in others it is stated what form of indictment and what evidence *shall be sufficient.* But it is plain that such provisions are merely for the purpose of facilitating the statement in the indictment and the evidence in support of it, and they leave the question as to the sufficiency of any other statement or proof wholly unaffected; and, therefore, where a defendant has by his plea alleged that he has been previously convicted, it seems open to contend that judgment might well be given for a subsequent offence on such a record; for the judgment ought to be according to the merits as appearing on the whole record.

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

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

In *Archbold*, 363, are found the following remarks and form of conviction under sec. 33 of the English Larceny Act sec. 19 of our Larceny Act. As observed before, section 139 of our Procedure Act, is the reproduction of section 116 of the English Larceny Act, under which the said form of indictment and remarks, in *Archbold*, are

given so that these remarks may be usefully inserted here, as entirely applicable to our own law on the subject.

INDICTMENT.

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

" *2nd Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the ..... day of ..... A. D. 1866, one oak sapling of the value of two shillings, the property of the said J. N., then growing in certain land, situate in the said parish of ....., in the said county of ....., feloniously did steal, take and carry away, thereby then doing injury to the said J. N., to an amount exceeding the sum of one shilling, to wit, to the amount of two shillings, against the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore and before the committing of the offence in this count hereinbefore mentioned, to wit, on the ..... day of ..... A. D. 1865 *(here set out the first conviction as in the first count:)* and the jurors aforesaid, upon their oath aforesaid, do further say that heretofore, and before the committing of the offence in this count first hereinbefore mentioned, to wit, on the ..... day of..... A. D. 1866 *(here set out the second conviction as directed in the first count.)*

"A first and second offence against the 24 & 25 V., c. 96, s. 33 (sec. 19 of our Larceny Act), are both punishable on summary conviction, but a subsequent offence against that section is a felony. The 24-25 Vic., ch. 96, sec. 116 (sec. 139 of Procedure Act), enacts, that 'in any indictment for any offence punishable under this act, and committed after a previous conviction or convictions for any felony, misdemeanor, *or offence, or offences punishable under summary conviction*, it shall be sufficient, *after charging the subsequent offence*, to state that the offender was at a certain time and place, or at certain times and places convicted of felony, or of an indictable misdemeanor, or of an offence or offences punishable upon summary conviction (as the case may be) without otherwise describing the previous felony, misdemeanor, offence, or offences,' etc. It appears clear from this enactment that it was intended that the subsequent offence should first be charged, and in both counts of the above form of indictment that course has accordingly been adopted.

"It will be seen that the first count consists of three parts: 1. The charge of the subsequent offence which is charged as an offence, *not as a felony;* 2. The charge of the two previous summary convictions; 3. An averment, commencing, 'and so the jurors aforesaid,' etc. The reason for charging the subsequent offence first has been already given. The reason for charging it in the first instance as an offence only is as follows: sec. 116, above referred to, goes on to enact that 'the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows (that is to say) the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only, and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted, as alleged in the indictment, and if he answer that he had been so previously convicted, the court may proceed to sentence him accordingly; but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last mentioned inquiry.'

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

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

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

"Sec. 116 of 24-25 V., c. 96, is analogous to sec. 37 of 24-25 V., c. 99 (The Coinage Act) *(these two clauses are combined in sec.* 139 *of our Procedure Act,)* and the mode of proceeding at the trial above suggested was approved by the court of criminal appeal in *R.* v. *Martin*, 11 *Cox*, 343, where the prisoner was indicted under sec. 12 of 24-25 V., c. 99, for being unlawfully in possession of counterfeit coin, after having been convicted of unlawfully uttering counterfeit coin. The court held that, as sec. 37 of 24-25 Vic., c. 99 (sec. 139 and sec. 207 of our Procedure Act) regulated the mode of proceeding at the trial, the prisoner must be first arraigned upon the subsequent offence and evidence respecting the subsequent offence must first be submitted to the jury, and the charge of the previous conviction must not be inquired into until after the verdict on the charge of the subsequent offence.

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

In the case hereinbefore cited of *R.* v. *Martin*, 11 *Cox*, 343, Lush, J., said that when he decided the unreported case mentioned in *Archbold* as a different ruling on the

question, (p. 757 of the 17th edit.) his attention had not been called to the clause under consideration, and he concurred with the court in the judgment. *R.* v. *Goodwin*, 10 *Cox*, 534, then stands overruled. Nor can *R.* v. *Hilton*, *Bell, C. C.* 20, be followed in Canada since the enactment of the said section of the Procedure Act.

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

In *R.* v. *Fox*, 10 *Cox*, 502, upon a writ of error by the crown to increase the sentence, the Irish court of criminal appeal perceived that it appeared from the record that the provisions of sec. 116 of the Larceny Act, under which the indictment had been tried, as to the arraigning of the prisoner, etc., had been neglected, and, thereupon, quashed the conviction.

In *R.* v. *Spencer*, 1 *C. & K.* 159, it was held that the indictment need not state the judgment, but the introduction of the words given in *italics, supra*, in clause 139 of the Procedure Act, seem to require with us the statement of the judgment. It will be, at all events, more prudent to allege it.

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

See, *post*, sec. 25, c. 181, as to punishment in the case of a second conviction for felony.

At common law, a subsequent offence is not punishable more severely than a first offence; it is only when a statute declares that a punishment may be greater after a previous conviction that this clause 139 of the Procedure Act applies. So in an indictment for a misdemeanor, as for obtaining money by false pretences, a previous conviction for felony cannot be charged.—*R.* v. *Garland*, 11 *Cox*, 224. And then this clause does not prevent the prosecution from disregarding, if it chooses, the fact of a previous conviction and from proceeding as for a first offence. But the court cannot take any notice of a previous conviction, unless it were alleged in the indictment and duly proved on the trial, for giving a greater punishment than allowed by law for the first offence.—*R.* v. *Summers*, 11 *Cox*, 248; *R.* v. *Willis*, 12 *Cox*, 192.

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

By section 207 of the Procedure Act, it is enacted that, if upon such a trial for a subsequent offence, the defendant gives evidence of his good character, it shall be lawful for the prosecutor to give in reply evidence of the previous conviction, before the verdict on the subsequent offence is returned, and then the previous conviction forms part of the case for the jury on the subsequent offence.

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

This doctrine was confirmed in *R.* v. *Shrimpton*, 2 *Den.* 319, where Lord Campbell, C. J., delivering the judgment of the court, said: "It seems to me to be the natural and necessary interpretation to be put upon the words of the proviso in the statute, that if, whether by himself or by his counsel, the prisoner *attempts* to prove a good character, either directly, by calling witnesses, or indirectly, by cross-examining the witnesses for the crown, it is lawful for the prosecutor to give the previous conviction in evidence for the consideration of the jury." In the course of the argument Lord Campbell said that, however, he would not admit evidence of a previous conviction, if a witness for the prosecution, being asked by the prisoner's counsel some question which has no reference to character, should happen to say something favorable to the prisoner's character.

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

See sec. 86, c. 178, *Summary Convictions Act* and sec. 230, *post*, as to what is sufficient proof of a conviction.

PRELIMINARY REQUIREMENTS AS TO CERTAIN INDICTMENTS.

140. No bill of indictment for any of the offences following, that is to say, perjury, subornation of perjury, conspiracy, obtaining

money or other property by false pretences, forcible entry or detainer, nuisance, keeping a gambling house, keeping a disorderly house, or any indecent assault, shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless the indictment for such offence is preferred by the direction of the attorney general or solicitor general for the province, or by the direction or with the consent of a court or judge having jurisdiction to give such direction or to try the offence;

2. Nothing herein shall prevent the presentment to or finding by a grand jury of any bill of indictment, containing a count or counts for any of such offences, if such count or counts are such as may now be lawfully joined with the rest of such bill of indictment, and if the same count or counts are founded, in the opinion of the court in or before which the said bill of indictment is preferred, upon the facts or evidence disclosed in any examination or deposition taken before a justice in the presence of the person accused or proposed to be accused by such bill of indictment, and transmitted or delivered to such court in due course of law.—32-33 *V.*, *c.* 29, *s.* 28. 40 *V.*, *c.* 26, *ss.* 1 *and* 2.

Sec. 80, *ante*, applies to this sec. 140; and, *held*, that if the magistrate dismisses the charge and refuses to commit or bail the person accused, he is bound, if required to do so, to take the prosecutor's recognizance to prosecute the charge.—*R.* v. *Lord Mayor*, 16 *Cox*, 77. See *ex parte Wason*, 38 *L. J. Q. B.* 302.

This clause 140 forms in England the acts known as the "Vexatious Indictments Act."—22-23 V., c. 17 and 30-31 V., c. 35.

The following offences fall under this enactment:

Perjury,
Subornation of Perjury,
Conspiracy,
Obtaining money or other property by false pretences,

Keeping a gambling house,
Keeping a disorderly house,
Any indecent assault.
Nuisance, and forcible entry and detainer.

The reasons for this legislation are thus given in *Archbold*, page 5: "Formerly any person was at liberty to prefer a bill of indictment against any other before a grand jury for any crime, without any previous inquiry before a justice into the truth of accusation. This right was often much abused, because, as the grand jury only hear the evidence for the prosecution, and the accused is totally unrepresented before them, it frequently happened that a person wholly innocent of the charge made against him, and who had no notice that any proceedings were about to be instituted, found that a grand jury had been induced to find a true bill against him, and so to injure his character and put him to great expense and inconvenience in defending himself against a groundless accusation. The above provisions have been introduced, in order in some degree to remedy this state of the law."

The Imperial statute requires that the indictment, when authorized by a judge, or by the attorney general or solicitor general, should be preferred by the direction, *or with the consent in writing*, of such judge, or attorney general, or solicitor general. Though the words "in writing" are omitted in our statute, there is no doubt that no verbal proof of such a direction would be sufficient for the grand jury, and that this direction must be in writing. By the terms of the clause itself, any judge of any court having jurisdiction to try the offence may give this direction, as well as any judge authorized to direct that a person guilty of perjury before him be prosecuted, under sec. 4. of c. 154, p. 42, *ante*.

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

When the indictment is preferred by the direction in writing of a judge of one of the superior courts, it is for the judge to whom the application is made for such direction to decide what materials ought to be before him, and it is not necessary to summon the party accused or to bring him before the judge; the court will not interfere with the exercise of the discretion of the judge under this clause.—*R.* v. *Bray*, 3 *B. & S.* 255; 9 *Cox*, 215.

The provisions of the above statute must be complied with in respect to every count of an indictment to which they are applicable, and any count in which they have not been complied with must be quashed.—*R.* v. *Fuidge*, *L. & C.* 390; 9 *Cox*, 430; *R.* v. *Bradlaugh*, 15 *Cox*, 156. So if an indictment contains one count for obtaining money by false pretences on the 26th of September, 1873, and another count for obtaining money by false pretences on the 29th of September, 1873, though the false pretences charged be the same in both cases, the second count must be quashed, if the defendant appears to have been committed only for the offence of the 26th September.

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

Where it is made clear, either on the face of an indictment or by affidavit, that it has been found without jurisdiction, the court will quash it on motion of the defendant, even after he has pleaded; but in a doubtful case, they will leave him to his writ of error.—*R.* v. *Heane*, 4 *B. & S.* 947; 9 *Cox*, 433.

A prosecutor who has required the magistrates to take his recognizances to prosecute under sec. 80 of the Procedure Act, when the magistrates have refused to commit or to bail for trial the person charged, must either go on with the prosecution or have his recognizances forfeited, as it would defeat the object of the statute if he was allowed to move to have his recognizances discharged.—*R.* v. *Hargreaves*, 2 *F. & F.* 790.

Held, that where one of the preliminary formalities mentioned in this section is required, the direction by a Queen's counsel, then acting as crown prosecutor, for and in the name of the attorney-general is not sufficient. The attorney-general or solicitor-general alone can give the direction.—*Abrahams* v. *The Queen*, 6 *S. C. R.* 10.

A person prosecuting under sec. 140 of the Procedure Act, has no right to be represented by any other counsel than the representative of the attorney general.—*R.* v. *St. Amour*, 5, *R. L.* 469.

Attempting to obtain money by false pretences does not come within this section.—*R.* v. *Burton*, 13 *Cox*, 71.

As to the interpretation of sub-sec. 2 of the said section, see *R.* v. *Bradlaugh*, 15 *Cox*, 156; also *R.* v. *Bell*, 12 *Cox*, 37.

PLEAS.

141. No person prosecuted shall be entitled as of right to traverse or postpone the trial of any indictment preferred against him in any court, or to imparl, or to have time allowed him to plead or demur to any such indictment; provided always, that if the court, before which

any person is so indicted, upon the application of such person, or otherwise, is of opinion that he ought to be allowed a further time to plead or demur or to prepare for his defence, or otherwise, such court may grant such further time to plead or demur, or may adjourn the receiving or taking of the plea or demurrer and the trial, or, as the case may be, the trial of such person, to a future time of the sittings of the court or to the next or any subsequent session or sittings of the court, and upon such terms, as to bail or otherwise, as the court seem meet, and may, in the case of adjournment to another session or sitting, respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session or sittings, without entering into any fresh recognizances for that purpose.—32-33 *V., c.* 29, *s.* 30.

See secs. 273 and 274, *post*, as to special provisions for Ontario, in cases of misdemeanor.

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

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

The word *traverse* is only applied to an issue taken upon an indictment for a misdemeanor; and it should rather seem applicable to the fact of putting off the trial till a following sessions or assizes, then to the joining of the issue; and, therefore, perhaps, the derivation is from the meaning of the word *transverto*, which, in barbarous Latin, is to go over, *i.e.*, to go from one sessions, etc., to another, and thus it is that the officer of the court asks the party whether he be ready to try then, or will traverse over to the next sessions, etc., but the issue is joined immediately by pleading not guilty.—5 *Burn*, 1019.

To *traverse* properly signifies the general issue or plea of *not guilty.*—4 *Stephens' Comm.* 419.

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

The above section of our Procedure Act is taken from the 60 Geo. III. and 1 Geo. IV., c. 4, ss. 1 and 2, and the 14-15 V., c. 100, s. 27, and abolishes all these distinctions between felonies and misdemeanors.

On the 14-15 V., c. 100, s. 27, *Greaves* says:—

"This section is intended wholly to do away with traverses, which were found to occasion much injustice. A malicious prosecutor could formerly get a bill for any frivolous assault found by the grand jury, and cause the defendant to be apprehended during the sitting of the court; and then he was obliged to traverse till the next session or assizes, as he could not compel the prosecutor to try the case at the sessions or assizes at which the bill was found. This led to the expense of the traverse-book and sundry fees, which operated as a great hardship on the defendant, not unfrequently an innocent person. Again, the defendant, in many instances, has been able to turn his right to traverse into a means of improperly putting the prosecutor to expense and inconvenience. The intention of the section is to abolish traverses altogether, and to put misdemeanors precisely on the same footing in this respect as felonies. In felonies, the prisoner has no *right* to postpone his trial, but the court, on proper grounds, will always postpone the

trial. Under this section, therefore, no defendant in a case of misdemeanor can insist on postponing his trial; but the court in any case, upon proper grounds being adduced, not only may, but ought to, order the trial to be postponed. If therefore, a witness be absent, or ill, or there has not been reasonably sufficient time for the defendant to prepare for his defence, or there exist any other ground for believing that the ends of justice will be better answered by the trial taking place at a future period, the court would exercise a very sound discretion in postponing the trial accordingly."

There are several cases in which, upon a proper application, the court will put off the trial. And it has been laid down that no crime is so great, and no proceedings so instantaneous, but that the trial may be put off, if sufficient reasons are adduced to support the application; but to grant a postponement of a trial on the ground of the absence of witnesses, three conditions are necessary: 1st, the court must be satisfied that the absent witnesses are material witnesses in the case; 2nd, it must be shown that the party applying has been guilty of no laches or neglect in omitting to endeavor to procure the attendance of these witnesses; and, 3rd, the court must be satisfied that there is a reasonable expectation that the attendance of the witnesses can be procured at the future time to which it is prayed to put off the trial.—*R.* v. *D'Eon*, 3 *Burr.* 1514.

But if an affidavit is given that, on cross-examination, one of the absent witnessses for the prosecution who has been bound over to appear, can give material evidence for the prisoner, this is sufficient ground for postponing the trial, without showing that the defence has made any endeavour to procure this witness, attendance as the prisoner was justified in believing that, being bound over, the witness would be present.—*R.* v. *McCarthy*, *C. & M.* 625.

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

The party making an application to postpone a trial, on the ground of the absence of a witness, is not bound in his affidavit to disclose all that the absent witness can testify to, but he must show that the absent witness is likely to prove some fact which may be allowed to go to the jury; he must also show the probability of having the witness at a later term.—*R.* v. *Dougall*, 18 *L. C. J.* 85.

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

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

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

If the application is made by the defendant, he shall be remanded and detained in custody until the next assizes or sessions; but where the application is made by the prosecutor, it is in the discretion of the court either, on conside-

ration of the circumstances of each particular case, to detain the defendant in custody, or admit him to bail, or to discharge him on his own recognizance.—*R.* v. *Beardmore*, 7 *C. & P.* 497; *R.* v. *Parish*, 7 *C. & P.* 782; *R.* v. *Osborn*, 7 *C. & P.* 799; *R.* v. *Bridgman*, *C. & M.* 271. But, as a general rule, after a bill has been found, if the offence be of a serious nature, the court will not admit the prisoner to bail.—*R.* v. *Chapman*, 8 *C. & P.* 558; *R.* v. *Guttridge*, 9 *C. & P.* 228; *R.* v. *Owen*, 9 *C. & P.* 83; *R.* v. *Bowen*, 9 *C. & P.* 509; 5 *Burn*, 1032.

The production of fresh evidence on behalf of the prosecution (not known or forthcoming at the preliminary investigation, and not communicated to the defence a reasonable time before the trial) may be a ground for postponing the trial, on the request of the defence, if it appears necessary to justice.—*R.* v. *Flannagan*, 15 *Cox*, 403.

On the finding of an indictment for perjury, application was made for defendant to appear by counsel and plead:—

Held.—That he should submit to the jurisdiction of the court, and appear himself, before he can be allowed to take any proceedings therein.—*R.* v. *Maxwell*, 10 *L. C. R.* 45.

142. No indictment shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition, of any person offering such plea; but if the court is satisfied, by affidavit or otherwise, of the truth of such plea, the court shall forthwith cause the indictment to be amended according to the truth, and shall call upon such person to plead thereto, and shall proceed as if no such dilatory plea had been pleaded.—32-33 *V.*, *c.* 29, *s.* 31.

This clause is taken from the 7th Geo. IV., c. 64, s. 19 of the Imperial Statutes.

See *post*, sec. 238, where, *inter alia*, a variance in names may be amended.

The name of the prisoner is not a matter of essential

description, because on this subject the prosecutor may have no means of obtaining correct information. If, therefore, the prisoner's name or addition be wrongly described, or if the addition be omitted, the court may correct the error, and call upon the prisoner to plead to the amended indictment.

And now, the total omission of any addition to the name of the defendant is of no consequence, as has been seen *ante*, under sec. 128.

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

The plea in abatement is now very little used, as well in consequence of this section as of sec. 143, see *post*. However, if pleaded, it must be remembered that it is always required to be framed with the greatest accuracy and precision, and must point out the objection, so that it may be readily amended or avoided in another prosecution. —*O'Connell* v. *R.*, in error, 11 *C. & F.* 155; so in a plea of misnomer, the defendant must disclose his real name. By sec. 2 of the Procedure Act, see, *ante*, the word "indictment" includes "any plea," so that a plea in abatement may be amended in the same cases where an indictment would be amendable.

By the 4 Anne, c. 16, s. 17, it is enacted that no dilatory plea shall be received, unless the party offering such plea do by affidavit prove the truth thereof; so a plea in abatement to an indictment will be set aside, if not sworn to or accompanied by an affidavit.—*R.* v. *Grainger*, 3 *Burr.* 1617; *R.* v. *Duffy*, 9 *Ir. L. R.* 163.

If the name of the defendant be unknown, and he refuse to disclose it, an indictment against him as "a

person whose name is to the jurors unknown, but who was personally brought before the said jurors by ..... the keeper of ..... prison," will be sufficient.—*R.* v. ——, *R. & R.* 489.

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

As a rule, the plea in abatement must be pleaded before any plea in bar when the prisoner is arraigned; 2 *Hale*, 175. But the court may, in its discretion, allow the withdrawal of the plea of not guilty, so as to allow the prisoner to plead in abatement or to the jurisdiction or to demur: *Kinlock's* case, *Fost.* 16; *R.* v. *Purchase, C. & M.* 617. And this is entirely in the discretion of the judge, who should allow it for the purpose of substantial justice, but not to enable the prisoner to take advantage of a mere technicality.—*R.* v. *Turner*, 2 *M. & Rob*, 214; *R.* v. *Brown*, 1 *Den.* 291; *R.* v. *Odgers*, 2 *M. & Rob.* 479.

Bishop, 1 Cr. Proc. 884, says, that by a plea in abatement, the defendant can avail himself of the objection that the grand jury finding the indictment consisted of more than twenty-three members.

143. Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or motion to quash the indictment, before the defendant has pleaded, and not afterwards; and every court before which any such objection is taken may, if it is thought necessary, cause the indictment to be forthwith amended in such particular, by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared; and no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act.—32-33 *V.*, *c.* 29, *s.* 32.

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

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

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

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

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

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

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

It must not be forgotten that when the clerk of the court, on the grand jury returning the bill, asked them to agree that the court should amend matters of form in the indictment, the grand jury gave their assent, but on the express condition that no matter of substance should be altered. Who are the accusers on an indictment? The grand jury, and to their accusation only has the prisoner to answer. This accusation cannot be changed into another one, at any time, without the consent of the accuser.—1 *Chit.* 298, 324. And if they have brought against the prisoner an accusation of an offence not known in law, the

court cannot turn it into an offence known in law, by *adding* to the indictment.

This section, though the word "formal" is not in it as in the English Act, must be interpreted as obliging the defendant to demur or move to quash before joining issue, for defects apparent on the face of the indictment, *which the court has the power to amend.* In cases where the court has not the power to amend the defect or omission, the motion for arrest of judgment will avail to the defendant as heretofore. And this clause itself supposes cases where the court has not the power to amend, when it says that: "No motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority *of this act*," given certainly to understand that "a motion for arrest of judgment shall be allowed for any defect in the indictment which could not have been taken advantage of by demurrer or amended under the authority *of this act*," leaving the question reduced to: *What are the amendments allowed under the authority of this act?* Which can be, it seems, very easily answered. Of course this clause has no reference to the amendments allowed *on the trial*, by sections 237 and 238, see *post.* These do not relate to defects *apparent on the face of the indictment*, and cannot, in consequence, be the subject of a motion in arrest of judgment. Then the only other clause in the act relating to amendments is this section 143. And it does not authorize amendments in matters of substance or material to the issue. For instance, if the word "feloniously" in an indictment for felony has been omitted, the court cannot allow its insertion. This would be *adding* to the offence charged by the grand jury; it would be a change of its nature and gravity; note *a*, by *Greaves*, 1 *Russ.* 935; *R.* v. *Gray, L. & C.* 365.

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

And even, in the case of a misdemeanor, on an indictment for obtaining money by false pretences, if the words "*with intent to defraud*" are omitted in the indictment, there is no offence charged, and the court cannot allow their insertion by amendment; *R.* v. *James*, 12 *Cox*, 127, per Lush, J.; see *Archbold*, 60. So if a statute makes it an offence to do an act "wilfully" or "maliciously" the indictment is bad if it does not contain these words; *R.* v. *Bent*, 1 *Den.* 157; *R.* v. *Ryan*, 2 *Moo. C. C.* 15; *R.* v. *Turner*, 1 *Moo. C. C.* 239; it does not charge the defendant with a crime.

And whether the defendant takes advantage of an objection of this nature, or not, makes no difference. Nay, even after verdict, even without a motion in arrest of judgment, the court is obliged to arrest the judgment, if the indictment is insufficient.—*R.* v. *Wheatly*, 2 *Burr.* 1127; 1 *Chit.* 303; *R.* v. *Turner*, 1 *Moo. C. C.* 239; *R.* v. *Webb*, 1 *Den.* 338; see also *Sills' Case, Dears.* 132.

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

On these principles, the Court of Queen's Bench, in Quebec, decided *R.* v. *Carr*, 26 *L. C. J.* 61. See, *post*, under sec. 246.

In this case the indictment was under sec. 10, of c. 20, 32-33 V., now sec. 8, c. 162, for an attempt to murder. A verdict of guilty was given, but the court being of opinion that the indictment was defective on its face, and that words material to the constitution of the offence charged were omitted therein, granted a motion to arrest the judgment and quash the indictment, though the prosecutor invoked section 32, now sec. 143 of the Procedure Act, and contended that the prisoner was too late to take the objection. Undoubtedly, if this indictment had been at first demurred to, the Court of Queen's Bench would have quashed it, and would not have allowed it to be amended. Sections 128 and 245 by enacting that, even after verdict an indictment shall not be held insufficient for want of the averment of *any matter not necessary to be proved*, cannot be made to say that an indictment not averring a matter *necessary to be proved* is sufficient, or that a verdict on such indictment will not be quashed.

Section 143 leaves the law of amendments what it is at common law. It leaves to the judge the discretion of allowing or refusing the amendment, and in matter of substance, no such amendment can be allowed. An irregularity may be amendable, but a nullity is incurable, and it has been held, that the court itself, *ex proprio motu*, will refuse to try an indictment on which plainly no good judgment can be rendered.—*R.* v. *Tremearne, R. & M.* 147; *R.* v. *Deacon, R. & M.* 27.

The ruling in the case of *R.* v. *Mason*, 22 *U. C. C. P.* 246, is not a contrary decision. The concluding remarks of Gwynne, J., show that the court in that case never went so far as to hold that no arrest of judgment or reversal on error should, *in any case*, be granted for *any* defect *whatever* in the indictment, apparent on the face thereof. What can be gathered from these remarks, taken together with those of Hagarty, C. J., is, that it was there held that the objections taken would even not have been good grounds of demurrer, or that if they had been raised by demurrer, the court would have had the power to amend the indictment in such particulars, and that, therefore, the defendant was too late to raise these objections after verdict. And this ruling is perfectly right.

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

It is true, as remarked by the learned judge in *R.* v. *Mason*, that the last part of this clause of our statute, taking away, in express words, the motion in arrest of

judgment, is not in the Imperial statute; but it will be seen, *ante*, that Mr. Greaves, who framed the English clause, is of opinion that even without these words, it has the same effect; the words *and not afterwards*, in the English Act, cannot be interpreted otherwise.

Another difference between the two acts consists in the words *before the defendant has pleaded* in the Canadian Act, instead of *before the jury shall be sworn* in the English one. This is not an important change, however. In all cases, a demurrer must be pleaded before the plea of "not guilty," though the same may not strictly be said of the motion to quash.—*R.* v. *Heane*, 9 *Cox*, 433. And the judge may allow a plea of "not guilty" to be withdrawn in order to give the defendant his right to demur or move to quash for any substantial defect. See cases under next section.

Greaves' Note, MSS.—"I altogether concur in the remarks on the omission of 'formal' before 'defect' in the 14-15 V., c. 100, s. 25. If construed according to the terms under the new clause, a man might be hanged for what was really no crime, because he was too ignorant to perceive the defect in the *statement of the offence* in due time."

If the indictment does not charge any offence, the court cannot amend it so as to make it charge an offence. —*R.* v. *Norton*, 16 *Cox*, 59. See *R.* v. *Flynn*, under s. 13, c. 162, p. 163, *ante*.

Indictments may be signed by the clerk of the crown, or by a counsel, prosecuting for the crown "for and in the name of the attorney general of the Province."—*R.* v. *Grant*, 2 *L. C. L. J.* 276; *R.* v. *Downey*, 13 *L. C. J.* 193; *R.* v. *Ouellette*, 7. *R. L.* 222; *R.* v. *Regnier*, *Ramsay's App. Cas.* 188.

A defective indictment may be quashed on motion as well as on demurrer.—*R.* v. *Bathgate*, 13 *L. C. J.* 299.

Everything that is necessary to constitute the offence must be alleged in the indictment.—*R.* v. *Bourdon*, 2 *R. L.* 713.

On an indictment for defrauding a bank, the indictment was amended by adding the words "a body corporate."—*R.* v. *Paquet*, 2 *L. N.* 140.

Defendant was indicted as mistress of a certain girl called *Marie*. At the trial, the indictment was amended by striking out that she was such mistress, and inserting the girl's right name.—*R.* v. *Bissonette*, 23 *L. C. J.* 249. See also *R.* v. *Leonard*, 3 *L. N.* 138.

An indictment for perjury, based on an oath alleged to have been made before the "judge of the general sessions of the peace in and for the said district" instead of "before the judge of the sessions of the peace in and for the city of Montreal," may be amended after plea.—*R.* v. *Pelletier*, 15 *L. C. J.* 146.

It is not a misjoinder of counts to add allegations of a previous conviction for misdemeanor, as counts, to a count for larceny; and the question, at all events, can only be raised by demurrer or motion to quash the indictment, under 32-33 V., c. 29, s. 32. And where there has been a demurrer to such allegations as insufficient in law, and judgment in favor of the prisoner, but he is convicted on the felony count, a court of error will not re-open the matter on the suggestion that there is a misjoinder of counts.

Where a prisoner arraigned on such an indictment pleads "not guilty" and is tried at a subsequent assize when the count for larceny only is read to the jury:

Held, no error, as the prisoner was given in charge on the larceny count only.—*R.* v. *Mason*, 22 *U. C. C. P.* 246.

Defendant was convicted on an indictment charging him with feloniously receiving goods of three different persons (naming them) knowing the same to have been feloniously stolen:

Held, that the defendant, having pleaded to the indictment could not, in arrest of judgment, object that it was bad as charging him with receiving goods not alleged to have been feloniously stolen, as the defect was aided by the verdict under the act of 1869, c. 29, s. 32, and the fact of three different offences being charged in the indictment, if objectionable at all, could not be taken advantage of after verdict.

An order for an extra jury panel under R. S. (N. S.) 3d Ser., c. 92, s. 37, is valid although not signed by a majority of the judges.—*The Queen* v. *Quinn*, 1 *R. & G. (N. S.)* 139.

An indictment charged that the prisoner did steal, take and carry away, etc., without charging that it was done feloniously. Before pleading the prisoner's counsel moved to quash the indictment. After argument the presiding judge allowed the indictment to be amended, under 32-33 V., c. 20, s. 32, by adding the word "feloniously." The prisoner was found guilty upon the amended indictment.

Held, on a case reserved, that the indictment without the word *feloniously* was bad and that it was not amendable under the said section.—*The Queen* v. *Morrison*, 2 *P. & B. (N. B.)* 682.

144. If any person, being arraigned upon any indictment for any indictable offence, pleads thereto a plea of "not guilty," he shall, by such plea, without any further form, be deemed to have put himself upon the country for trial, and the court may, in the usual manner, order a jury for the trial of such person accordingly.—32-33 *V., c. 29, s. 33.*

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

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

Plea of guilty allowed to be withdrawn.—*R.* v. *Huddell*, 20 *L. C. J.* 301. *See R.* v. *Brown*, 1 *Den.* 291, and cases there cited; also, *Kinlock's case*, *Fost.* 16.

145. If any person, being arraigned upon any indictment for any indictable offence, stands mute of malice, or will not answer directly to the indictment, the court may order the proper officer to enter a plea of "not guilty," on behalf of such person, and the plea so entered shall have the same force and effect as if such person had actually pleaded the same.—32-33 *V.*, *c.* 29, *s.* 34.

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

Formerly, to stand mute was to confess, and, if the defendant stood mute of malice, he was immediately sentenced.—4 *Blackstone*, 324, 329. In the case of *R.* v. *Mercier*, 1 *Leach*, 183, the prisoner being arraigned, stood mute. The court ordered the sheriff to return a jury *instanter*, to try whether the prisoner stood mute obstinately, or by the visitation of God. A jury being accordingly returned, the following oath was administered to them: "You shall diligently enquire and true presentment make for and on behalf of Our Sovereign Lord the King, whether Francis Mercier, the now prisoner at the bar, being now here indicted for the wilful murder of David Samuel Mondrey, stands mute fraudulently, wilfully and obstinately, or by the providence and act of God, according to your evidence and knowledge." The jury examined the witness in open court, and returned as their verdict that

the prisoner stood mute of malice, and not by the visitation of God. Whereupon the court immediately passed sentence of death upon the prisoner, who was accordingly executed on the Monday following.

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

A person deaf and dumb was to be tried for a felony; the judge ordered a jury to be empannelled to try whether he was mute by the visitation of God; the jury found that he was so; they were then sworn to try whether he was able to plead, which they found in the affirmative, and the defendant by a sign pleaded not guilty; the judge then ordered the jury to be empannelled to try whether the defendant was now sane or not, and, on this question, directed them to say whether the defendant had sufficient intellect to understand the course of the proceedings to make a proper defence, to challenge the jurors and comprehend the details of the evidence, and that, if they thought he had not, they should find him of non-sane mind.—*R.* v. *Pritchard*, 7 *C. & P.* 303.

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

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

A collateral issue of this kind is always tried *instanter* by a jury empannelled for that purpose. In fact, there is properly speaking no issue upon it; it is an inquest of office. No peremptory challenges are allowed.—*R.* v. *Radcliffe, Fost.* 36, 40. The jury may be chosen amongst the jurors in attendance for the term of court, but must be returned by the sheriff, on the spot, as a special panel. —*Dickenson's Quarter Sessions*, 481. If the jury return a verdict of "mute by the visitation of God," as where the prisoner is deaf or dumb, or both, a plea of not guilty is to be entered, and the trial is to proceed in the usual way, but in so critical a case, great diligence and circumspection ought to be exercised by the court; all the proceedings against the prisoner must be examined with a critical eye, and every possible assistance consistent with the rules of law, given to him by the court.—*R.* v. *Steel*, 1 *Leach*, 451. In the case of *R.* v. *Jones, note*, 1 *Leach*, 452, the jury returned that the prisoner was "mute by the visitation of God." It appearing that the prisoner, who was deaf and dumb, could receive and communicate information by certain signs, a person skilled in those signs was sworn to act as interpreter and the trial then proceeded.

It would seem that now, as whether the prisoner stands mute of malice or by visitation of God, a plea of not guilty is to be entered, the only reason why a jury must be sworn to enquire whether the prisoner stands mute of malice or not is to put the court in a position to know how to act during the trial, as above stated in *Steel's* and *Jones'* cases.—*R.* v. *Berry*, 13 *Cox*, 189.

By section 255 of the Procedure Act, see *post*, it is enacted that: "If any person indicted for any offence be insane, and upon arraignment be so found by a jury empannelled for that purpose, so that such person cannot be tried upon such indictment, or if, upon the trial of any person so indicted, such person appears to the jury charged with the indictment to be insane, the court before whom such person is brought to be arraigned, or is tried as aforesaid, may direct such finding to be recorded, and thereupon may order such person to be kept in strict custody until the pleasure of the Lieutenant Governor be known.

146. In any plea of *autrefois convict* or *autrefois acquit* it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted, as the case may be, of the offence charged in the indictment.—32-33 *V.*, *c.* 29, *s.* 35.

This clause is taken from the 14-15 V., c. 100, s. 28, of the Imperial Statutes.

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

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

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

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

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

It is not necessary that the plea should be written on parchment; sec. 103 of the Procedure Act, *ante.*

If there is more than one count in the indictment it is better to plead to each.—*R.* v. *Westley,* 11 *Cox,* 139. The defendant may, at the same time, plead over to the indictment, in felonies, by adding "*and as to the felony and larceny* (as the case may be) *of which the said J. S. now stands indicted, he, the said J. S., saith that he is not guilty thereof; and of this, he, the said J. S., puts himself upon the country.*" If, however, the defendant pleads *autrefois acquit,* without, at the same time, pleading over to the felony, after his special plea is found against him, he may still plead over to the felony.—*Archbold,* 133. But it seems that in misdemeanors, if the defendant pleads *autrefois acquit* or *autrefois convict,* and the jury find against him on this issue, the verdict operates as a conviction of the offence, and nothing remains to be done but to sentence the prisoner.—*Archbold,* 134; 1 *Chit.* 461, 463; 1 *Bishop, Cr. Proc.* 755, 809, 811, 812, *R.* v. *Bird,* 2 *Den.* 94. As a consequence of this, it has been held, in England, that, in misdemeanors, the defendant cannot, even by separate pleas, at the same time plead *autrefois acquit* or *autrefois convict,* and *not guilty.*—*R.* v. *Charlesworth,* 9 *Cox,* 44; 1 *B. & S.* 460. See also *R.* v. *Taylor,* 3 *B. & C.* 502. Though in a later case of misdemeanor a plea of not guilty seems to have been put in with a plea of *autrefois acquit.*—*R.* v. *Westley,* 11 *Cox,* 139.

In felonies, the jury cannot be charged at the same time with both issues, but must first determine the plea of former acquittal.—1 *Chit.* 460; *R.* v. *Roche,* 1 *Leach,* 134. The prisoner has the right of challenge in the usual way; 2 *Hale, P. C.* 267*d*; *R.* v. *Scott,* 1 *Leach,* 401. See remarks, *post,* under sec. 163, as to challenges. If the verdict is in favor of the prisoner, and finds the plea proved, the prisoner is discharged, and the trial is at an end. If, on the contrary, the jury find the plea "not proved," they are charged again, this time to inquire of the second issue, *i.e.*, on the plea of not guilty, and the trial proceeds as if no plea in bar had been pleaded.—1 *Chit.* 461; 2 *Hale,* 255; *R.* v. *Knight, L. & C.* 378. They need not be sworn *de novo* to try the second issue.—*R.* v. *Key,* 2 *Den.* 347. Formerly when such pleas contained the first indictment, with the judgment, etc., detailed at full length, the prosecutor could demur to it, and then the court pronounced on that demurrer, without the intervention of a jury; but now, with the general form allowed by the statute, the prosecutor meets the plea with a general replication, entered only when the record is made up, after trial, though not necessarily actually pleaded, and the issue must be determined by a jury.—See, however, *R.* v. *Connell,* 6 *Cox,* 178; *Archbold,* 133; *Note by Greaves,* 2 *Russ.* 62. See form and proceedings, *R.* v. *Tancock,* 13 *Cox,* 217.

This replication, and the *similiter* (as to which see sec.

246, *post,)* when so entered upon the record, may be as follows:

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

For a form of plea of *autrefois acquit* or *autrefois convict* to one count only of the indictment, see Lord Campbell's Acts, by Greaves, 88, and *R.* v. *Connell*, 6 *Cox*, 178.

When a man is indicted for an offence and acquitted he cannot afterwards be indicted for the same offence, provided the first indictment were such that he could have been lawfully convicted on it; and if he be thus indicted a second time, he may plead *autrefois acquit*, and it will be a good bar to the indictment. The true test by which the question, whether such a plea is a sufficient bar in any particular case may be tried, is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first.—See *R.* v. *Bulmer*, *post*, under sec. 264; *R.* v. *Sheen*, 2 *C. & P.* 634; *R.* v. *Bird*, 2 *Den.* 94; *R.* v. *Drury*, 3 *C. & K.* 193. Thus an acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for a larceny of the same goods, because upon

the former indictment the defendant might have been convicted of the larceny. But if the first indictment were for a burglary, with intent to commit a larceny, and did not charge an actual larceny, an acquittal on it would not be a bar to a subsequent indictment for the larceny.—2 *Hale*, 245; *R.* v. *Vandercomb*, 2 *Leach*, 716; because the defendant could not have been convicted of the larceny on the first indictment. An acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter, because the defendant could be convicted of the manslaughter on the first indictment. So, an acquittal upon an indictment for manslaughter is, it seems, a bar to an indictment for murder, for they differ only in degree.—2 *Hale*, 246; 1 *Chit.* 455. But see *R.* v. *Tancock*, 13 *Cox*, 217.

Now, also, no one can, after being acquitted on an indictment for felony or misdemeanor, be indicted for an attempt to commit it, for he might have been convicted of the attempt on the previous indictment; s. 183 post. But this applies only to the common law misdemeanor of attempting to commit a crime, for which section 183 allows a verdict, and not when the attempt to commit the offence charged is by a special statutory enactment made a felony. So, upon an indictment for the statutory felony of administering poison with intent to murder, a previous acquittal on an indictment for murder, founded on the same facts, cannot be pleaded in bar.—*R.* v. *Connell*, 6 *Cox*, 178. An acquittal for the murder of a child is a bar to an indictment for concealing the birth of the same child, because by sec. 188, *post*, the defendant upon the first indictment might have been found guilty of concealing the birth.—*R.* v. *Ryland*, note by *Greaves*, 2 *Russ.* 55.

So, a person acquitted of a felony including an assault, and for which assault the defendant might have been convicted upon the trial for the felony, under sec. 191 of the Procedure Act, cannot be subsequently indicted for this assault.—*R.* v. *Smith*, 34 *U. C. Q. B.* 552.

So, also, a person, indicted and acquitted on an indictment for a robbery, cannot afterwards be indicted for an assault with intent to commit it; s. 192, *post*. A person indicted and tried for a misdemeanor, which upon the trial appears to amount in law to a felony, cannot afterwards be indicted for the felony; the statute has the words "*if convicted*," but, by the common law, this rule would extend to a prisoner acquitted on trial, s. 184, *post*. A person indicted and acquitted for embezzlement cannot afterwards be indicted as for a larceny, or if tried and acquitted for a larceny cannot afterwards be indicted as for embezzlement upon evidence of the same facts, s. 195, *post*. A person indicted for larceny and duly acquitted cannot afterwards be indicted on the same facts for obtaining by false pretences, and a person indicted for obtaining by false pretences and acquitted cannot afterwards be prosecuted for larceny on the same facts. Secs. 196- 98, *post*.

And the ruling in *R.* v. *Henderson*, 2 *Moo. C. C.* 192, as cited in *Archbold, p.* 132, is not law here; but a reference to the report shows that there was no such ruling in that case, as given in *Archbold*, and even admitting there had been, it would not have been free from doubt, even in England, where they have not the enactment contained in sec. 198, *post*.—2 *Taylor, Ev. par.* 1516; though see *R.* v. *Adams*, 1 *Den.* 38.

If a man be indicted in any manner for receiving stolen goods, he cannot afterwards be prosecuted again on the

same facts; *secs.* 199, 200, *post*. This rule is equally applicable, though the first indictment be against the defendant jointly with others, and the second against him alone, and upon the first indictment the prisoner has been acquitted, and the others found guilty, because he might have been convicted on the first.—*R.* v. *Dann*, 1 *Moo. C. C.* 424. See *R.* v. *O'Brien*, 15 *Cox*, 29.

But the prisoner must have been put in jeopardy on the first indictment. If by reason of some defect in the record, either in the indictment, the place of trial, the process, or the like, the defendant was not lawfully liable to suffer judgment for the offence charged against him in the first indictment, as it stood at the time of the verdict, he has not been in jeopardy, in the sense which entitles him to plead the former acquittal or conviction in bar of a subsequent indictment.—*R.* v. *Drury*, 3 *C. & K.* 190; *R.* v. *Green, Dears & B.* 113; *R.* v. *Gilmore*, 15 *Cox*, 85.

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

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

the property in the goods in the wrong person, the party may be acquitted, and afterwards tried on another, stating it to be the property of the legal owner."

And even now, that an amendment is allowed in such a case, and that the court, on the first indictment, might have substituted the name of the legal owner for the wrong one first alleged, if the indictment was not, in fact, so amended, the plea of *autrefois acquit* cannot be sustained; the indictment must be considered as it was, not as it might have been made; the court was not bound to amend, and the indictment to be considered is the indictment upon which the jury in the first case gave their verdict.—*R.* v. *Green, Dears. & B.* 113.

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

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

A person was acquitted of an assault with intent to murder, but was convicted of an assault with intent to do

grievous bodily harm, and the prosecutor, having subsequently died, he was indicted for murder, and it was held right.—*R.* v. *Salvi*, 10 *Cox*, 481, *note*.

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

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

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

Then A., at one shot, murders B. and C., though the shot was directed at B. only; has he committed one murder or two murders? If he is tried for the murder of B. and acquitted, can he plead *autrefois acquit* to an indictment

charging him with the murder of C.? Of course not. He is guilty of two murders.

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

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

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

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

If, according to this note, in the case where ten sovereigns are stolen at one and the same time, in the same purse, five belonging to A., five to B., two crimes have been committed by one act, it follows that in the case of the stealing of a bag containing potatoes, if the bag belongs to A., and the potatoes to B., two larcenies may be charged, one for the bag and one for the potatoes.

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

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

But see secs. 230 and 244, *post*, as to proof of a conviction or acquittal.

When the verdict is quashed for informalities, or any other grounds than the real merits of the case, the entry on the record should state it in these words, "and because it appears that the said indictment is not sufficient *(or as the case may be)*, therefore it is considered and adjudged that the defendant go thereof without day," so as to prevent a plea of "*autrefois acquit.*"—1 *Chit.* 719.

Semble.—That a prisoner convicted for manslaughter might be tried again for murder upon the same facts. *R.* v. *Tancock*, 13 *Cox*, 217.

Greaves' MSS. note.—"The next question is, supposing the judges of C. C. R. were to hold that evidence had been improperly received or rejected, and simply determined to arrest or reverse the judgment, could the prisoner be indicted *de novo*, and tried and convicted for the same offence? And it is perfectly clear that he could. Nothing, except a verdict of guilty or not guilty on a valid indictment, and a lawful and still existing judgment on such verdict can afford a bar to another prosecution for the very same offence. See my note, 2 *Russ. C. & M.* 69 *et seq.* *R.* v. *Winsor*, 6 *B. & S.*, 143-7-490. 2 *Hale*, 246. *Vaux's Case*, 4 *Rep.* 44.

I have said on a *valid indictment*. Now an indictment may be either actually valid or valid as against the crown in some cases; for a very material distinction exists between an acquittal and conviction upon a bad indictment. If *autrefois acquit* be pleaded and the former indictment is bad upon the face of it, the plea fails, because the judgment may and is to be supposed to have been upon that defect, as it is simply *quod eat sine die* (3 *Inst.* 214, 2 *Hale*, 248, 394). But if a prisoner be convicted and sentenced on an insufficient indictment a plea of *autrefois convict* will be good unless the judgment has been reversed (2 *Hale*, 247), for the judgment could only be given on the verdict. So if a special verdict be found, and the court erroneously, adjudges it to be no felony, *autrefois acquit* is a good plea as long as that judgment is unreversed on error (2 *Hale*, 246). And in the case of an acquittal, if the judgment has been *quod eat inde quietus*; as the ancient form is in case of acquittal upon not guilty pleaded, that could never refer to the defect of the indictment, but to the very matter of the verdict, and the prisoner could not be indicted again until the judgment had been reversed on error (2 *Hale*, 394).

A strange misapprehension has prevailed in Ireland lately, that a writ of error in a criminal case could not be brought on the part of the crown. There really is not a doubt about it, as it is not only assumed that it may, but relied upon as a ground for decisions in 2 *Hale*, 246, 247, 248, 394, 395; 3 *Inst.* 214; where Lord Coke gives the reason why error must be brought by the crown where there is an erroneous judgment of condemnation; and *Vaux's Case*, 4 *Rep.* 45.

I entertain very considerable doubt whether all writs of error are not the writs of the crown, and that that is the true ground why the A. G's consent is necessary to obtain them for a prisoner. Where a judgment is arrested or reversed under the court of crown cases reserved act, it would appear on the face of the record that there was neither a judgment of acquittal nor of conviction.

Whenever a plea of *autrefois acquit* or *convict* in the short form allowed by the 14-15 *V.*, *c.* 100, *s.* 28, is pleaded, if the former indictment, or other part of the record be bad on the face of it, the question arises whether the replication should not set out the record and conclude with a demurrer. If the objection was the only answer to the plea, it would seem to be the better course. A jury might in such a case err, as they certainly did in *R.* v. *Lea*, 2 *Moo. C. C.* 9, where, against the direction of the judge, and without any reasonable evidence, they found for the prisoners, and it was held that the verdict could not be set aside. A judge might also decide erroneously against the crown; and, if a verdict passed for the prisoner, there would be great doubt whether any remedy existed. A case could not be reserved under the act, for there would not be any conviction, and error would not be available, for the former record could not appear on the subsequent record, and there is grave doubt as to a special verdict in such a case. But if judgment were given against the crown on such a replication as I have suggested, error might remedy the mischief."

147. No plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder is for the same offence as that charged in the indictment.—32-33 *V.*, *c.* 29, *s.* 36. 7-8 *Geo.* 4, *c.* 28, *s.* 4, *Imp.*

Attainder is the stain or corruption of the blood of a criminal capitally condemned; it is the immediate, inseparable consequence, by the common law, of the sentence of death, or of outlawry for a capital offence. Upon the sentence of death or the judgment of outlawry being

pronounced, the prisoner is attaint, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court (but see now sec. 214 of the Procedure Act, *post*), neither is he capable of performing the functions of any other man, for, by anticipation of his punishment, he is already dead in law, *civiliter mortuus*. The consequences of attainder are forfeiture and corruption of blood, 4 *Blackstone*, 380. And at common law, if a man is *attainted*, he may plead such attainder in bar to any subsequent indictment for the same or any other felony. And this because such proceeding on a second indictment cannot be to any purpose, for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he has forfeited what he had; so that it is absurd and superfluous to endeavour to attaint him a second time.—4 *Blackstone*, 336. But now, by the above clause, attainder is no bar, unless for the same offence as that charged in the indictment, and in effect the plea of *autrefois attaint* is at an end.

See, *post*, secs. 36, 37, c. 181, limiting the effects of attainder.

In England, now, by the 33-34 V., c. 23, all attainders, corruption of blood, or forfeiture of property are abolished.

LIBEL.

For secs. 148, 149, 150, 151, 152, 153, 154, see *ante*, under c. 163. "*An act concerning Libel*," p. 227.

CORPORATIONS.

155. Every corporation against which a bill of indictment for a misdemeanor is found, at any court having criminal jurisdiction, shall appear by attorney in the court in which such indictment is found, and plead or demur thereto.—46 *V.*, c. 34, *s.* 1.

156. No writ of *certiorari* shall be necessary to remove any such indictment into any superior court with the view of compelling the defendant to plead thereto; nor shall it be necessary to issue any writ of *distringas*, or other process, to compel the defendant to appear and plead to such indictment.—46 *V.*, c. 34, *s.* 2.

157. The prosecutor, when any such indictment is found against any corporation, or the clerk of the court, when such indictment is founded on a presentment of the grand jury, may cause a notice thereof to be served on the mayor or chief officer of such corporation, or upon the clerk or secretary thereof, stating the nature and purport of such indictment, and that, unless such corporation appears and pleads thereto in two days after the service of such notice, a plea of not guilty will be entered thereto for the defendant by the court, and that the trial thereof will be proceeded with in like manner as if the said corporation had appeared and pleaded thereto.—46 *V.*, c. 34, *s.* 3.

158. If such corporation does not appear, in the court in which the indictment has been found, and plead or demur thereto within the time specified in the said notice, the judge presiding at such court may, on proof to him by affidavit of the due service of such notice order the clerk or proper officer of the court to enter a plea of "not guilty" on behalf of such corporation; and such plea shall have the same force and effect as if such corporation had appeared by its attorney and pleaded such plea.—46 *V.*, c. 34, *s.* 4.

159. The court may, whether such corporation appears and pleads to the indictment, or whether a plea of "not guilty" is entered by order of the court, proceed with the trial of the indictment in the absence of the defendant, in the same manner as if the corporation had appeared at the trial and defended the same; and, in case of conviction, may award such judgment and take such other and subsequent proceedings to enforce the same as are applicable to convictions against corporations.—46 *V.*, c. 34, *s.* 5.

JURIES AND CHALLENGES.

160. Every person qualified and summoned as a grand juror or as a petit juror, according to the laws in force for the time being in any province of Canada, shall be and shall be held to be duly qualified to serve as such grand or petit juror in criminal cases in that province, whether such laws were in force or were or are enacted by the Legislature of the Province before or after such province became a part of Canada, but subject always to any provision in any act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such act.—32-33 *V.*, c. 29, *s.* 44. 46 *V.*, c. 10, *s.* 3.

The Jurors and Juries acts of Ontario and Quebec, and sec. 160 of the Dominion Criminal Law Procedure act, are constitutional.—*R.* v. *Provost, M. L. R.*, 1 *Q. B.* 477; *R.* v. *Bradshaw*, 38 *U. C. Q. B.* 564; *R.* v. *O'Rourke*, 1 *O. R.* 464.

The defendant in a criminal case has no right to a communication of the petit jury list.—*R.* v. *Maguire*, 13 *Q. L. R.* 99.

161. No alien shall be entitled to be tried by a jury *de medietate linguæ*, but shall be tried as if he was a natural born subject.—32-33 *V.*, *c.* 29, *s.* 39. 44 *V.*, *c.* 13, *s.* 8.

Ever since the 28 Ed. III, c. 13, aliens, under our criminal law, have been entitled to be tried by a jury composed of one half of citizens and one-half of aliens or foreigners, if so many of these could be had. It seems to have been thought necessary, in *R.* v. *Vonhoff*, 10 *L. C. J.* 292, that these six aliens should be natives of the country to which the defendant alleged himself to belong, but the better opinion seemed to be that six aliens were required, without regard to what nationality they were of. Sec. 2 of 28 Ed. III, c. 13, says "the other half of aliens."

However, this is now of historical interest only, and by the above clause aliens, all through the Dominion when indicted before a criminal court are on the same footing as British subjects, as to the composition of the jury.

In England also now, an alien is not entitled to a jury *de medietate linguæ*.—33 *V.*, *c.* 14, *Imp.*

162. Any quaker or other person allowed by law to affirm instead of swearing in civil cases, or solemnly declaring that the taking of any oath is, according to his religious belief, unlawful, who is summoned as a grand or petit juror in any criminal case, shall, instead of being sworn in the usual form, be permitted to make a solemn affirmation beginning with the words following: "I, A. B., do solemnly, sincerely and truly affirm," and then may serve as a juror as if he had been sworn, and his declaration or affirmation shall have the same effect as an oath to the like effect; and in any record or proceeding relating to the case, it may be stated that the jurors were sworn or affirmed; and in any indictment, the words "upon their oath present" shall be understood to include the affirmation of any juror affirming instead of swearing.—32-33 *V.*, *c.* 29, *s.* 43.

This clause extends to jurors the provisions of sec. 219 (see *post*), allowing to witnesses, in certain cases, to make an affirmation instead of an oath. In England, a similar enactment is contained in 30-31 V., c. 35, s. 8.

163. If any person arraigned for treason or felony challenges peremptorily a greater number of persons returned to be of the jury than twenty, in a case of indictment for treason or felony punishable with death, or twelve in a case of indictment for any other felony, or four, in a case of indictment for misdemeanor, every peremptory challenge beyond the number so allowed in the said cases respectively shall be void, and the trial of such person shall proceed as if no such challenge had been made; but nothing herein contained shall be construed to prevent the challenge of any number of jurors for cause.—32-33 *V.*, *c.* 29, *s.* 37.

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

In England, thirty-five peremptory challenges are allowed in cases of high treason, twenty in all felonies, and none in misdemeanors. Sec. 163 of our Procedure Act, *ante*, applies only to treason felony not to high treason.

By the common law, if the prisoner challenged peremptorily more of the jury than he was allowed, this was deemed a refusal to be tried, and, therefore, the prisoner, if he would not retract his illegal challenge, stood convicted, as in cases where he refused to plead. And, even after the 22 Hen. VIII., c. 14, had enacted that "no person arraigned for felony can be admitted to make any more than twenty peremptory challenges," it was doubtful

whether, if the prisoner challenged twenty-one, he was to stand convicted without trial, or if the trial was to proceed the illegal challenge being disregarded and overruled. —4 *Blackstone*, 354. This explains the phraseology of the above clause, which, to remove all doubts, had to, and does provide for the consequences of a peremptory challenge over the number allowed, at the same time as it enacts what is the number allowed in all cases.

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

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

The ground of the challenge may be either that some fact exists inconsistent with the impartiality of the sheriff, or other officer returning the panel, or that some fact exists which makes it improbable that he should be impartial, or that some fact exists which does, in fact, interfere with his impartiality.

The challenge must be in writing, and must set forth the fact on which it is grounded. The court must decide whether the alleged fact is in itself a good cause of challenge, in which case it is called a principal challenge, or whether it is merely a fact from which partiality may or may not be inferred, in which case it is called a challenge to the favor, or that the sheriff has been guilty of some default in returning the panel.

If the court holds that the alleged fact is a good cause for a principal challenge, and the alleged fact is denied, or if the court holds that the alleged fact is good as a challenge to the favor, and either the fact or the partiality sought to be inferred from it, or both, are denied, two

triers must be appointed by the court to try the facts in dispute.

If the triers find in favor of the challenge, the panel is quashed, and a new one is ordered to be returned by the coroners or other officers. If they find against the challenge the panel is affirmed.—*Stephens' Cr. Proc. Art.* 280.

Held, in an indictment against R. M. that it was ground of principal challenge to the array that the prisoner's husband had an action pending against the sheriff for an assault committed on the prisoner.—*The Queen* v. *Rose Milne*, 4 *P. & B. (N. B.)* 394.

A challenge to the polls is an exception to some one or more individual juror or jurors. It may be made orally. After issue joined between the crown and the prisoner, when the jury is called and before they are sworn, is the only time when the right of challenge can be exercised.—*R.* v. *Key*, 2 *Den.* 347; *R.* v. *Shuttleworth*, 2 *Den.* 351. *In R.* v. *Giorgetti*, 4 *F. & F.* 546, it was held that the challenge must be made before the book is given into the hands of the juror, and before the officer has recited the oath, and it comes too late afterwards, though made before the juror has kissed the book. In *R.* v. *Frost*, 9 *C. & P.* 136, it was held that the challenge of a juror, either by the crown or by the prisoner, must be before the oath is commenced. The moment the oath has begun it is too late. The oath is begun by the juror taking the book, having been directed by the officer of the court to do so. But if the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby. But a juror may be challenged even after being sworn if the prosecutor consents.—*Bacon's Abr. Verb. Juries*, 11; 1 *Chit.* 545; *R.* v. *Mellor*, *Dears. & B.* 494, per Wightman, J.

It is obvious that each juror must be sworn separately, in misdemeanors as well as in felonies, when peremptory challenges are allowed in misdemeanors.

The accused is to be informed before the swearing of the jurors, that if he will challenge them or any of them, he must challenge them as they come to the book to be sworn and before they are sworn; the following is the usual form: "Prisoner, these good men, whose names you shall now hear called, are the jurors who are to pass between our Sovereign Lady the Queen and you upon your trial *(in a capital case, upon your life and death)*; if, therefore, you would challenge them or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard." —1 *Chit.* 531.

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

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

A challenge to the polls is either peremptory or for cause; a peremptory challenge is such as is allowed to be made to a juror without assigning any cause; the number of these challenges allowed in each particular case is settled by secs. 163 and 164 of the Procedure Act.

Peremptory challenges are not allowed upon any collateral issue.—*R.* v. *Ratcliffe, Fost.* 40; *Barkstead's* case, *Kelyng's C. C., Stevens & Haynes* reprint, 16; *Johnsons'* case, *Fost.* 46; *R.* v. *Paxton*, 10 *L. C. J.* 213.

Hale, 2 *P. C.*, 267*d*, says that no peremptory challenges are allowed to the defendant "if he had pleaded any foreign

plea in bar or in abatement, which went not to the trial of the felony, but of some collateral matter only." And it is added, in *Bacon's Arb. Verb. Juries*, 9, that "this peremptory challenge seems by the better opinion to be only allowable when the prisoner pleads the general issue." This would seem to take away the right of peremptorily challenging on the trial of pleas of "*autrefois acquit*," or "*autrefois convict*." But it is not so; the issue on a plea of this kind is not a collateral issue. And it is said in 2 *Hale, loc. cit.*, that if a man plead not guilty, or *plead any other matter of fact triable by the same jury*, and plead over to the felony, he has his peremptory challenges. By collateral issues, must be understood, for instance, where a criminal *convict* pleads any matter allowed by law in bar of execution, as pregnancy, pardon, an act of grace, or, as in *Ratcliffe's* case, above cited, when a person brought to the bar to receive his sentence says that he is not the same person that was convicted; the issues in these cases being always tried by a jury *instanter*.

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

So, in *Charnock's* case, 3 *Salk.* 80 (in many books

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

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

It is said in *Archbold,* 156: "The defendant in treason or felony may, for cause shown, object to all or any of the jurors called, *after* exhausting his peremptory challenges of thirty-five or twenty." If this means that the prisoner must first exhaust all his peremptory challenges, before being allowed to challenge for cause, it is an error, and was so held by the Court of Queen's Bench, in Ontario, in *R.* v. *Whelan,* 28 *U. C. Q. B.* 2, confirmed by the Court of Appeal, 28 *U. C. Q. B.* 108; in which case, it was unanimously held that the prisoner is entitled to challenge for cause before exhausting his peremptory challenges, Richards, C. J., concurring, though he had at first at the trial, on *Archbold's* passage above cited, ruled that the prisoner, before being allowed to challenge for cause, must first have exhausted his peremptory challenges.

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

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

The most important causes of a *principal* challenge to the polls are: 1. *Propter defectum,* on account of some personal objection, as alienage, minority, old age, insanity, present state of drunkenness, deafness, or a want of the property qualifications required by law. 2. *Propter affectum,* on the ground of some presumed or actual partiality in the juror, who is objected to; as if he be of affinity to either party, or in his employment, or is interested in the event, or if he has eaten or drunk at the expense of one of the parties, if the juror has expressed his wishes as to the result of the trial, or his opinion of the guilt or innocence of the defendant, also if he was one of the grand jurors who found the indictment upon which the prisoner is then arraigned, or any other indictment against him on the same facts. 3. *Propter delictum,* on the ground of infamy as where the juror has been convicted of treason, felony, perjury, conspiracy, or any other infamous offence.

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

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

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

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

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

No challenge of triers is admissible.—1 *Chit.* 549.

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

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

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

But as soon as two jurors have been found indifferent and have been sworn, then the office of the first two triers

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

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

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

The challenging party first addresses the triers, and calls his witnesses; then the opposite party addresses them, and calls witnesses if he sees fit, in which case the challenger has a reply. But in practice there are no addresses in such cases. The judge sums up to the triers, who then say if the juror challenged stands indifferent or not: this verdict is final. *Roscoe*, 197, 198. But a juror challenged on one side and found to be indifferent may still be challenged by the other.—1 *Chit.* 545.

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

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

The following case was brought before the Court of

Criminal Appeal, in England, in 1858.—*R.* v. *Mellor*, *Dears. & B.* 468.—On a trial for murder, the panel of petit jurors returned by the sheriff contained the names of two persons,—*Joseph Henry Thorne* and *William Thorniley.* The name of *Joseph Henry Thorne* was called from the panel as one of the jury to try the case of Aaron Mellor; and *Joseph Henry Thorne*, as was supposed, went into the box and was duly sworn as *Joseph Henry Thorne* without challenge or objection. It was, however, discovered the next day, and after the prisoner had been convicted, that *William Thorniley* had, by mistake, answered to the name of *Joseph Henry Thorne*, when this one was called, and had gone into the box and been sworn as *Joseph Henry Thorne*, the prisoner having been offered his challenge when the person called *Joseph Henry Thorne*, but who was really *William Thorniley*, came to the book to be sworn. Upon being informed of these facts, the judge who had presided at the trial respited the execution of the sentence, and reserved the case for the consideration of the Court of Criminal Appeal. It was held in this court, by Lord Campbell, C. J., Cockburn, C. J., Coleridge, J., Wightman, J., Martin, B., and Watson, B. (six), that there had been a mis-trial; by Erle, Crompton, Crowder, Willes and Byles, J. J., and Channell, B. (six), that this was not a mis-trial, but only ground of challenge; and by Pollock, C. B., and Williams, J., that this was not a question of law arising at the trial, which could have been reserved for the Court of Criminal Appeal. The conviction was therefore affirmed by eight against six. But the report shows clearly that upon a writ of error the conviction would have been quashed. And it was undoubtedly illegal; the challenge is to the person called, not to the person who appears. When

addressed by the clerk of the court, as the jurors were to be called, the prisoner has been told, "These good men that *you shall now hear called* are the jurors who are to pass between our Sovereign Lady the Queen and you upon your trial; if, therefore, you would challenge *them*, or any of *them* (*i. e.*, that are called), you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard." Of course, this address supposes that the person who comes to be sworn is the person called. But that very supposition demonstrates clearly that if the contrary takes place it is a cause of absolute nullity. When *Joseph Henry Thorne* was called, the prisoner shut his eyes, and felt confident that *Joseph Henry Thorne* would be sworn as one of the jurors who were to try him. Why should he have challenged? He did not desire to challenge *Joseph Henry Thorne.* And supposing he desired to challenge him for cause, it is clear that it is cause of challenge against *Joseph Henry Thorne* that he would have brought forward, not those against *William Thorniley.* And then, suppose again, he had challenged when *Joseph Henry Thorne* was called, would not the entry on the record have been that *Joseph Henry Thorne* had been challenged? Who would think of an entry that "*Joseph Henry Thorne*, etc., *being called*, etc., *William Thorniley* was challenged?" Upon this challenge to *Joseph Henry Thorne's name*, *William Thorniley* would have withdrawn; then, if *William Thorniley's* name had been later called, would not the prisoner have had to challenge him, if he objected to him? Would he not then have had to challenge *twice* to get rid of *one* man? Would he not, then, have been deprived of one of the peremptory challenges he was entitled to?

On a trial for forgery, the panel of petit jurors contained the names of Robert Grant and Robert Crane. Robert Grant as was supposed was called and went into the box. After conviction, and before the jury left the box, it was discovered that Robert Crane had by mistake answered to the name of Robert Grant, and that Robert Crane was really the person who had served on the jury. *Held*, a mistrial.—*R.* v. *Feore*, 3 *Q. L. R.* 219.

The prisoner should challenge before the juror takes the book in his hand, but the judge, in his discretion, may allow the challenge afterwards before the oath is fully administered.—*R.* v. *Kerr*, 3 *L. N.* 299. (This decision is unsupported by authority.)

164. In all criminal trials, four jurors may be peremptorily challenged on the part of the crown; but this shall not be construed to affect the right of the crown to cause any juror to stand aside until the panel has been gone through, or to challenge any number of jurors for cause.—32-33 *V.*, *c.* 29, *s.* 38.

165. The right of the crown to cause any juror to stand aside until the panel has been gone through, shall not be exercised on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel.—37 *V.*, *c.* 38, *s.* 11.

At common law, the crown might, it seems, have challenged peremptorily any number of jurors, without alleging any other reason than "*quod non boni sunt pro rege.*" But this power was taken away, in the year 1305, by 33 Ed. I. (re-enacted *for England*, by 6 Geo. IV., c. 50.) An abuse had arisen in the administration of justice by the crown assuming an unlimited right of challenging jurors without assigning cause, whereby "inquests remained untaken." In this way, the crown could in an arbitrary manner, on every criminal trial, challenge so many of the jurors returned on the panel by the sheriff that twelve did not remain to form a jury, and the trial might be indefinitely postponed *pro defectu juratorum.* To prevent the trial going off for want of jurors by the peremptory challenges of the crown, this statute enacts that no peremptory challenge by the crown can be allowed, so that the "inquest remains untaken." The crown, however, is not bound to show any cause of challenge, or for the order to "stand aside," until the panel has been *gone through*, and it appears that there will not be jurors enough to try the defendant, if the peremptory challenges are allowed to prevail. And the panel is not to be considered as being gone through for this purpose, until it has been, not only once called over, but *exhausted (épuisée* is the word used in the French version of the Procedure Act, for *gone through;)* that is, until according to the usual practice of the court, and what may reasonably be expected, the fact is ascertained that there are no more jurors in the panel whose attendance may be procured, and so that unless the crown be put to show its cause of challenge, "the inquest would remain untaken." —*Mansell* v. *R.* (in error), *Dears. & B.* 375.

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

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

The case of *R.* v. *Lacombe*, 13 *L. C. J.* 259, was decided on the same principles, in Montreal, in 1869, by the full Court of Queen's Bench upon a case reserved by Mr. Justice Mackay, as follows:

"The prisoner was tried before me on the 3rd July, 1869 ..... At the commencement of the trial, while the petit jury were being formed, and the jurors called for this trial, numbers of jurors were ordered to 'stand aside,' on the prayer of the crown prosecutor. So many jurors had been so made 'stand aside,' and so many had been challenged peremptorily by the prisoner, that before a complete jury was formed the whole list was gone through once; resort had then to be had to those who, just before, had been made 'stand aside.' I ordered them to be called in order. On the first of these, namely Adolphe Masson, being called, he answered, and was advancing to the jury box, when he was ordered to 'stand aside' by the crown prosecutor; the prisoner's counsel objected, insisting that Masson should be sworn, unless the crown had cause for challenging him, and did then state sufficient cause. This the crown refused to do. I ruled in favor of the crown, and Masson was ordered to 'stand aside,' and he was not sworn. Others were called afterwards, sworn, and the trial proceeded ....." The prisoner was convicted, and the Court of Queen's Bench maintained the conviction.

"However, it is held that the King need not assign his cause of challenge till all the panel is gone through, *and unless* there cannot be a full jury without the persons so challenged. And then, *and not sooner*, the King's counsel must shew his cause, otherwise the juror shall be sworn." —4 *Blackstone*, 353.

And it is said in 2 *Hawkins*, 569:

"However, if the King challenge a juror before a panel is perused, it is agreed that he need not show any cause of his challenge till the whole panel be gone through, *and* it appear that there will not be a full jury without the person so challenged." See also *Bacon's Abr. Verb.* "*Juries*," *E.* 10.

In 1 *Chit.*, 547, it is said: "The King need not show the cause until the whole panel in exhausted, and if one of the jurors was not present, but appear before his default is recorded, the King's counsel, if he has previously challenged another juror, need not assign his cause of challenge till after such defaulter has been sworn."

In the case of *R.* v. *Geach*, 9 *C. & P.* 499, Parke, B., is reported to have held that: "if on the trial of a case of felony, the prisoner peremptorily challenges some of the jurors, and the counsel for the prosecution also challenges so many that a full jury cannot be had, the proper course is to call over the whole of the panel in the same order as before, only omitting those who have been peremptorily challenged by the prisoner, and, as each juror then appears, for the counsel for the prosecution to state their cause of challenge; and if they have not sufficient cause, and the prisoner does not challenge, for such juror to challenge."

Upon this case, Lord Campbell, C. J., in *Mansell's case*, *supra*, remarks: "There can be no doubt that the course pointed out by the learned judge was, under the circumstances, the proper course; but is there any reason to suppose that if, after the panel had been once called over, and before any further step had been taken for the formation of the jury, jurors on the panel who had been called and did not at first answer had come into court in sufficient number to make a full jury, they would have been rejected, and the crown would have been put to assign cause for its challenges? ..... No doubt it may be assumed, *primâ facie*, that all the jurors on the panel are in court when the panel is called over, and if, when it has been once called over, there is not a full jury made, the usual course would be immediately to call the names over again, and to put the crown upon assigning cause of challenge..... but there is no decision nor *dictum* to the effect that the panel may not be called over again, with a view to see whether there may not be some of the jurors in the panel who may have come into court, and who may make up a full jury, without putting the crown to assign cause of challenge."

On a public prosecution for libel by order of the attorney general, sec. 165 does not apply.—*R.* v. *Maguire*, 13 *Q. L. R.* 99. But in all trials for libels upon private individuals, this section applies, even when the prosecution is conducted by a counsel appointed by and representing the attorney general.—*R.* v. *Patteson*, 36 *U. C. Q. B.* 129.

166. In those districts in the Province of Quebec, in which the sheriff is required by law to return a panel of petit jurors, composed one half of persons speaking the English language, and one half of persons speaking the French language, he shall, in his return, specify separately those jurors whom he returns as speaking the English language, and those whom he returns as speaking the French language respectively; and the names of the jurors so summoned shall be called alternately from such lists:

2. Whenever any person accused of treason or felony elects to be tried by a jury composed one half of persons skilled in the language of the defence, the number of peremptory challenges to which he is entitled shall be divided, so that he shall only have the right to challenge one half of such number from among the English speaking jurors and one half from among the French speaking jurors:

3. This section applies only to the Province of Quebec.—32-33 *V.*, *c.* 239, *s.* 40.

The right to a *medietate linguæ* jury exists in misdemeanors as in felonies.—*R.* v. *Maguire*, 13 *Q. L. R.* 96.

Sub-sec. 2 of sec. 7, 27-28 V., c. 41 (1864,) clearly gives that right to *any* prosecuted party. And though the Quebec legislature, by the 46th V., c. 16, s. 62 (1883,) has repealed the said act, this particular clause, giving the right to a mixed jury, must be considered as still in force, the Quebec legislature not having had the right to

repeal it. Otherwise, there is no statute in the Province giving the right to a mixed jury, in any case whatever, sec. 166 of the Procedure Act, merely taking it for granted that the right exists. If the Quebec legislature had the power to repeal that clause, the Dominion Parliament had not the right to enact for Manitoba section 167 of the Procedure Act.

By sub-sec. 2 of the aforesaid section 166 of the Procedure Act, the number of peremptory challenges to which the prisoner is entitled is divided equally between the jurors of the two languages; but, in misdemeanors, the defendant has the right to exercise all or any part of his peremptory challenges indifferently, and without regard to the language of the jurors.

Where in a case of felony, in which one half of the jury, on the application of the prisoner, were sworn as being skilled in the French language, it was discovered after verdict, that one of such French half was not so skilled in the French language. *Held*, that the trial and verdict were null and void.—*R.* v. *Chamaillard*, 18 *L. C. J.* 149.

The right to have a jury, composed of at least one half of persons skilled in the language of the defence, must, undoubtedly, both in Manitoba and Quebec, be exercised *upon arraignment.* Immediately after arraignment, the *venire* is presumed to have issued, and if it issues without this order, the jurors must be summoned in the usual manner, that it to say, without regard to language.

In *R.* v. *Dougall*, 18 *L. C. J.* 85, it was held by Mr. Justice Ramsay: 1st. That where the defendant has asked for a jury composed one half of the language of the defence, six jurors speaking that language *may* first be put into the box, before calling any juror of the other language; 2nd. That the right of the crown to tell jurors "to stand aside,"

exists for misdemeanors as well as for felonies; 3rd. That when to obtain six jurors speaking the language of the defence, all speaking that language have been called, the crown is still at liberty to challenge to stand aside, and is not held to show cause until the whole panel is exhausted. Mr. Justice Ramsay said that the calling the jurors' names alternately from the English and French lists, mentioned in section 40, now section 166 of the Procedure Act, is only directory, and applies only to the calling of the jury in ordinary cases, where no order has been given for a jury composed of one half English and one half French. The case was reserved, by the learned judge, for the consideration of the full court, but only on the one point thirdly above mentioned, given in the summary of the report of the decision of the court, at page 242, 18 L. C. J., as follows: "Where, to obtain six jurors speaking the language of the defence (English,) the list of jurors speaking that language was called, and several were ordered by the crown to stand aside; and the six English-speaking jurors being sworn, the clerk re-commenced to call the panel alternately from the lists of jurors speaking the English and French languages, and one of those (English) previously ordered to "stand aside" was again called: *Held*, that the previous "stand aside" stood good until the panel was exhausted by all the names on both lists being called."

This was the only point reserved and the only one decided, and that could be decided by the full court. As said by Mr. Justice Ramsay, "Be the question reserved difficult or not, the court has no authority to go beyond it, and any excursion into other matters is totally uncalled for and without jurisdiction." A reference to such "excursions" in *Dougall's* case would lead to the inference that the majority of the judges were of opinion that, in all such

cases, the jurors should be called alternately from the two lists, and that, if by consent of the parties, six jurors of one language have first been called and sworn from one of the lists, as in this case, then the calling from that list should go on from the sixth juror sworn, and not begin the said list over again. It does not appear by any of the remarks of the learned judges in this case why, when a jury composed of six English and six French has been ordered (the defence, say, being English,) the list of the English jurors is not first called till six English jurors are sworn, and why the list of the French jurors is not then called over till six French jurors are also sworn.

167. Whenever any person, who is arraigned before the Court of Queen's Bench for Manitoba, demands a jury composed for the one half at least of persons skilled in the language of the defence, if such language is either English or French, he shall be tried by a jury composed for the one half at least of the persons whose names stand first in succession upon the general panel, and who, on appearing, and not being lawfully challenged, are found in the judgment of the court to be skilled in the language of the defence:

2. Whenever, from the number of challenges, or any other cause, there is, in any such case, a deficiency of persons skilled in the language of the defence, the court shall fix another day for the trial of such case, and the sheriff shall supply the deficiency by summoning, for the day so fixed, such additional number of jurors skilled in the language of the defence as the court orders, and as are found inscribed next in succession on the list of petit jurors:

3. Whenever a person accused of treason or felony elects to be tried by a jury composed one half of persons skilled in the language of the defence, the number of peremptory challenges to which he is entitled shall be divided, so that he shall have the right to challenge one half of such number from among the English speaking jurors, and one half from among the French speaking jurors:

4. This section applies only to the Province of Manitoba.—34 *V.*, *c.* 14, *ss.* 3, 4 *and* 5.

See remarks under preceding section.

168. Whenever, in any criminal case, the panel has been exhausted by challenge, or by default of jurors by non-attendance or not answering when called, or from any other cause, and a complete jury for the trial of such case cannot be had by reason thereof, then, upon request made on behalf of the Crown, the court may, in its discretion, order the sheriff or other proper officer forthwith to summon such number of good men of the district, county or place, whether on the roll of jurors or otherwise qualified as jurors or not, as the court deems necessary and directs, in order to make up a full jury:

2. Such sheriff or officer shall forthwith summon by word of mouth or in writing, the number of persons he is so required to summon, and add their names to the general panel of jurors returned to serve at that court, and, subject to the right of the Crown and of the accused respectively, as to challenge or direction to stand aside, the persons whose names are so added to the panel shall, whether otherwise qualified or not, be deemed duly qualified as jurors in the case, and so until a complete jury is obtained, and the trial shall then proceed as if such jurors were originally returned duly and regularly on the panel; and if, before such order, one or more persons have been sworn or admitted unchallenged on the jury, he or they may be retained on the jury, or the jury may be discharged, as the court directs:

3. Every person so summoned as a juror shall forthwith attend and act in obedience to the summons, and if he makes default shall be punishable in like manner as a juror summoned in the usual way; and such jurors so newly summoned shall be added to the panel for such case only.—32-33 *V.*, *c.* 29, *s.* 41. 6 *G.* 4, *c.* 50, *s.* 37, *Imp.*

It is only *upon request made on behalf of the Crown*, that the court is authorized to give the order mentioned in this section, and even then, whether this order will be given or not is left to the discretion of the court. This clause specially enacts that such jurors summoned as therein provided for shall be added to the panel only for the case in which such order has been given.

169. In all criminal cases, less than felony, the jury may, in the discretion of the court, and under its direction as to the conditions, mode and time, be allowed to separate during the progress of the trial. —32-33 *V.*, *c.* 29, *s.* 57.

On a trial for felony, the jury cannot be allowed to separate during the progress of the trial, and where such separation takes place, it is a mis-trial, and the court may direct

that the party convicted be tried again, as if no trial had been had in such case.—*R.* v. *Derrick*, 23 *L. C. J.* 239.

It is a general rule that upon a criminal trial there can be no separation of the jury after the prisoner is given in their charge, and before a verdict is given. The above enactment restricts the rule to felonies; in fact, it seems to have always been admitted that in misdemeanors the jury might be allowed to separate during the trial.— *R.* v. *Woolf*, 1 *Chitty's Rep.* 401; *R.* v. *Kinnear*, 2 *B. & Al.* 462.

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

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

how long they should be kept together, and his determination on the subject cannot be reviewed in any way.—*R.* v. *Charlesworth*, 2 *F. & F.* 326; 1 *B. & S.* 460; *Winsor* v. *R.* (in error), 7 *B. & S.* 490; 10 *Cox*, 276.

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

If a juryman is taken ill, so as to be incapable of attending through the trial, the jury may be discharged, and the trial and examination of witnesses begun over again, another juror being added to the eleven; but in that case the prisoner should be offered his challenges over again, as to the eleven, and the eleven should be sworn *de novo*.—*R.* v. *Edwards*, *R. & R.* 224; see also *R.* v. *Scalbert*, 2 *Leach*, 620; *R.* v. *Beere*, 2 *M. & Rob*, 472; *R.* v. *Gould*, 3 *Burn*, 98.

In *R.* v. *Murphy*, 2 *Q. L. R.* 283, after the prisoner had been given in charge to the jury, the case was adjourned for one day, on account of his counsel's illness.

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

Although each juryman may apply to the subject before him that general knowledge which any man may be supposed to have, yet if he be personally acquainted with any material particular fact, he is not permitted to mention the circumstance privately to his fellows, but he must submit to be publicly sworn and examined, though there is no necessity for his leaving the box, or declining to interfere in the verdict.—*R.* v. *Rosser*, 7 *C. & P.* 648; 2 *Taylor, Ev. par.* 1244; 3 *Burn*, 96.

A juror was summoned in error, but not returned in the panel, and in mistake was sworn to try a case, during the progress of which these facts were discovered. The jury were discharged, and a fresh jury constituted.—*R.* v. *Phillips*, 11 *Cox*, 142. It is not necessary when a jury are discharged without giving a verdict to state on the record the reason why they were so discharged.—*R.* v. *Davison*, 2 *F. & F.* 250; 8 *Cox*, 360.

The rule is that the right to discharge the jury without giving a verdict ought not to be exercised, except in some case of physical necessity, or where it is hopeless that the jury will agree, or where there have been some practices to defeat the ends of justice. If, after the prisoner is given in charge, though before any evidence is given, it is discovered that a material witness for the prosecution is not acquainted with the nature of an oath, it is not a sufficient ground for discharging the jury, so that the witness might be instructed before the next assizes upon that point, and a verdict of acquittal must be entered if the prosecution has no other sufficient evidence.—*R.* v. *Wade*, 1 *Moo. C. C.* 86.—*R.* v. *White*, 1 *Leach*, 430, seems a contrary decision, but is now overruled by the above last cited case. Where, during the trial of a felony, it was discovered that the prisoner had a relation on the jury, Erskine, J., after consulting Tindal, C. J., held that he had no power to discharge the jury but that the trial must proceed.—*R.* v. *Wardle, C. & M.* 647.

If it appear, during a trial, that the prisoner, though he has pleaded not guilty, is mad, the judge may discharge the jury of him, that he may be tried after the recovery of his understanding.—1 *Hale*, 34; see *post*, sections 252 *et seq.* of the Procedure Act, and remarks thereunder.

In *Kinloch's* case, *Fost.* 16, 23 *et seq.*, it was held that a jury can be lawfully discharged in order to allow the defendant to withdraw his plea of "not guilty," and to plead in bar.

On a writ of error the record showed that, on the trial the judge discharged the jury after they were sworn, in consequence of the disappearance of a witness for the crown, and the prisoner was remanded. *Held*, that the judge had a discretion to discharge the jury which a court of error could not review; that the discharge of the jury without a verdict was not equivalent to an acquittal, and that the prisoner might be put on trial again.—*Jones* v. *R.*, 3 *L. N.* 309.

A jury had been sworn on the previous day, to try the prisoner on an indictment for murder. In the course of the trial, one of the jurors was discharged because he came from a house where there was small-pox. The case being resumed before a new jury, the prisoner contended that having been once put in jeopardy of his life, no new trial could be had. The court overruled the objection.—*R.* v. *Considine*, 8 *L. N.* 307.

170. Nothing in this act shall alter, abridge or affect any power or authority which any court or judge has when this act takes effect, or any practice or form in regard to trials by jury, jury process, juries or jurors, except in cases where such power or authority is expressly altered by or is inconsistent with the provisions of this act.—32-33 *V., c.* 29, *s.* 42.

A juror may be a witness. He is then sworn without leaving the jury box.—2 *Taylor, Ev., par.* 1244. See *R.* v. *Rosser*, under preceding section. Under this clause, it is probable that the whole of sect. 7 of the 27-28 V., c. 41 (1864), is still in force in the Province of Quebec (see remarks under sect. 166, *ante,)* except sub-secs. 8 and 9 thereof, which are repealed by 49 V., c. 4 (D.)

VIEW.

171. Whenever it appears to any court having criminal jurisdiction or to any judge thereof, that it will be proper and necessary that the jurors, or some of them, who are to try the issues in such case, should have a view of the place in question, in order to their better understanding the evidence that may be given upon the trial of such issues, whether such place is situate within the county or united counties in which the venue in any such case is laid, or without such county or united counties, in any other county, such court or judge may order a rule to be drawn up, containing the usual terms,—and, if such court or judge thinks fit, also requiring the person applying for the view to deposit in the hands of the sheriff of the county or united counties in which the venue in any such case is laid, a sum of money to be named in the rule, for payment of the expenses of the view.—29-30 *V. (Can.), c.* 46, *s.* 1.

172. All the duties and obligations now imposed by law on the several sheriffs and other persons when the place to be viewed is situate in the county or united counties in which the venue in any such case is laid, shall be imposed upon and attach to such sheriffs and other persons when the place to be viewed is situate out of the county or united counties in which the venue in any such case is laid.—29-30 *V. (Can.), c.* 46, *s.* 2. 6 *Geo.* 4, *c.* 50, *s.* 23, *Imp.*

The original statute, 1866, extended only to Upper Canada. It was passed to give the power of ordering a view *out of the* county in which the venue is laid. See *R.* v. *Whalley*, 2 *C. & K.* 376; *R.* v. *Martin*, 14 *Cox*, 633; and *R.* v. *Martin*, 12 *Cox*, 204.

SWEARING WITNESSES BEFORE GRAND JURY.

173. It shall not be necessary for any person to take an oath in open court in order to qualify him to give evidence before any grand jury.—*C. S. U. C., c.* 109, *s.* 1.

174. The foreman of the grand jury and any member of the grand jury, who may, for the time being, act on behalf of the foreman in the examination of witnesses, may administer an oath to every person who, under the circumstances hereinafter enacted, appears before such grand jury to give evidence in support of any bill of indictment; and every such person may be sworn and examined upon oath by such grand jury touching the matters in question.—*C. S. U. C., c.* 109, *ss.* 2 *and* 6, *part; C. S. L. C., c.* 105, *s.* 2.

175. The name of every witness examined, or intended to be so examined, shall be endorsed on the bill of indictment; and the foreman of the grand jury, or any member of the grand jury so acting for him, shall write his initials against the name of each witness sworn by him and examined touching such bill of indictment.—*C. S. U. C., c.* 109, *s.* 3.

176. The name of every witness intended to be examined on any bill of indictment shall be submitted to the grand jury by the officer prosecuting on behalf of the crown, and no others shall be examined, by or before such grand jury, unless upon the written order of the presiding judge.—*C. S. U. C., c.* 109, *s.* 4.

177. Nothing in this act shall affect any fees by law payable to any officer of any court for swearing witnesses, but such fees shall be payable as if the witnesses had been sworn in open court.—*C. S. U. C., c.* 109, *s.* 5.

Secs. 173, 174 and 175 are re-enactments of the Imperial Act 19-20 V., c. 54. Sec. 176 would probably be held not to apply to private prosecutions, *sed quære?*

The omission by the foreman to write his initials against the name of each witness sworn *and* examined would give to the prisoner the right, before plea, to ask that the indictment be sent back to the grand jury with a direction to the foreman to so initial the names of the witnesses examined. In a case in Illinois, under a similar enactment, it was held that the statute requiring the foreman of the grand jury to note on the indictment the names of the witnesses upon whose evidence the same is found, is manda-

tory, and that a disregard of this requirement would, no doubt, be sufficient ground to authorize the court, upon a proper motion, to quash the indictment.—*Andrews* v. *The People*, 117 *Ill.* 195.

See *Thompson on Juries*, 724.

Under sec. 143 of the Procedure Act, a motion to quash the indictment upon such a ground must be made before plea, and upon such a motion the court would send the indictment back to the grand jury to remedy the defect. If the grand jury has been discharged, the indictment it seems, must be quashed. It is the practice, on many circuits in England, and a very proper one it is, not to formally discharge the grand jury till the end of the assizes, so that, if necessary, they may be called back, at any time, during the term.

With the grand jury's consent, the witnesses before them are examined by the crown prosecutor or clerk of the crown, or by the private prosecutor or his solicitor. But the grand jury must be alone during their deliberations.—1 *Chit.* 315; 3 *Burn*, 36; *charge to grand jury, Drummond, J.*, 4 *R. L.* 364. *Stephen's Cr. Proc. Art.* 190.

Not more than twenty-three grand jurors should be sworn in. But any number from twelve to twenty-three constitutes a legal grand jury. At least twelve of them must agree to find a true bill. If twelve do not so agree, they must return "not found," or "not a true bill," or "*ignoramus*"; this last form, however, is not now often used.—4 *Stephen's Bl.* 375 *(10th Edit.)*; 1 *Chit.* 322; 2 *Burr.* 1089; 3 *Burn*, 37; *R.* v. *Marsh*, 6 *A. & E.* 236; *Dickenson's Quarter Sess.* 183; *Stephen's Cr. Proc. Art.* 186; *Low's case*, 4 *Greenl. Rep. (Maine)* 439; 3 *Whart. Cr. L. pars.* 463, 497.

The court will not inquire whether the witnesses were properly sworn before the grand jury. The grand jury are at liberty to find a bill upon their own knowledge only.—*R.* v. *Russell, C. & M.* 247; *Stephen's Cr. Proc. Art.* 185.

The court will not receive an affidavit of a grand juror as to what passed in the grand jury room upon the subject of the indictment.—*R.* v. *Marsh*, 6 *A. & E.* 236; nor allow one of them to be called as a witness to explain the finding.—*R.* v. *Cooke*, 8 *C. & P.* 582.

On the trial of Alexander Gillis for murder, his counsel called the foreman of the grand jury which found the bill against him to prove that a witness's evidence before the grand jury was different from that given by the witness on the trial. The counsel for the crown objected that a grand juror could not be allowed to give evidence of what took place in the grand jury room:

Held, that a grand juror's obligation to keep secret what transpired before the grand jury only applied to what took place among the grand jurors themselves, and did not prevent his being called to prove what a witness had said.—*R.* v. *Gillis*, 6 *C. L. T.* 203.

On this point, see *Taylor, Ev.*, par. 863. Also, *Stephen, Ev., art.* 114, where it is said: "It is also doubtful whether a grand juror may give evidence as to what any witness said when examined before the grand jury."

TRIAL.

178. Every person tried for any indictable offence shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel learned in the law.—32-33 *V., c.* 29, *s.* 45, *part.*

179. Upon the trial the addresses to the jury shall be regulated as follows: the counsel for the prosecution, in the event of the defendant or his counsel not announcing, at the close of the case for the prosecution, his intention to adduce evidence, shall be allowed to

address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the accused, or his counsel, shall then be allowed to open his case and also to sum up the evidence, if any is adduced for the defence; and the right of reply shall be according to the practice of the courts in England: Provided always, that the right of reply shall be always allowed to the attorney general or solicitor general, or to any Queen's counsel acting on behalf of the crown.—32-33 *V.*, *c.* 29, *s.* 45, *part.*

The law, as it stood formerly, did not allow a prisoner to be defended by counsel in any felony except high-treason. On this, *Blackstone* says (Vol. IV. 355):

"But it is a settled rule at common law that no counsel shall be allowed a prisoner upon his trial upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated. A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner, that is, shall see that the proceedings against him are legal and strictly regular,) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecution for every petty trespass?"

In England, the 6-7 William IV., c. 114, was the first statute passed to "enable persons indicted for felony to make their defence by counsel or attorney," and the addresses of counsel to the jury in felonies and misdemeanors are now regulated by the 28 V., c. 18, s. 2, as follows:

"If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants, and upon every trial for felony or misdemeanor, whether the prisoners, or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded, to sum up the evidence respectively; and the right of reply and practice and course of proceedings, save as hereby altered, shall be as at present." See *R.* v. *Kain*, 15 *Cox*, 388.

It will be seen that the only difference between the English and the Canadian clause is, that in the former, it is only *when the prisoner is defended by counsel* that the counsel for the prosecution is allowed to address the jury a second time, after his evidence is over, when the counsel for the defence does not declare that he intends to adduce any evidence, *which it is the duty of the presiding judge to ask him at the close of the case for the prosecution*; whilst in the Canadian clause this right is given, whether the defendant be assisted by counsel or not, and he or his counsel are required to announce at the close of the case for the prosecution their intention to adduce evidence or not, without the clause making it obligatory on the presiding judge to ask the question, though in practice it is obvious

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that the judge will always ascertain the intention of the defence on that point, before allowing the prosecutor to sum up when he desires to do so.

The addresses of counsel, as regulated by this clause 179 of the Procedure Act, are therefore to take place as follows:—

First case: When no evidence for the defence.

Address of counsel for the crown, opening the case; crown's evidence; *defendant or his counsel declares that they have no evidence to adduce*; counsel for the crown sums up; defendant or his counsel addresses jury; reply of counsel for the crown, but only if attorney or solicitor-general, or Queen's counsel, acting on behalf of the crown.

Second case: Where the defence adduces evidence.

Crown prosecutor opens the case; evidence of the crown; defendant or his counsel addresses the jury; defendant's evidence; defendant or his counsel sums up; reply of prosecution in all cases.

In the first case supposed, the counsel for the prosecution never in practice exercises both the rights of summing up and replying; if the counsel is not the attorney-general or solicitor-general, or a Queen's counsel acting on behalf of the crown, he has to sum up the evidence, after it is over, as he is not allowed to reply; if he is the attorney-general or solicitor-general, or a Queen's counsel acting on behalf of the crown, he, in practice, does not sum up, as he is entitled to reply, whether the defendant adduces evidence or not, though in England this right is very seldom exercised, where no evidence, or evidence as to character only is offered; see *post*.

In the second case supposed, in practice the defence adresses the jury only after its evidence is over; two addresses would generally have no other result but to lengthen the trial, and fatigue court, counsel, and jury.

Opening of the counsel for the prosecution.—A prisoner charged with felony, whether he has been on bail or not, must be at the bar, viz., in the dock during his trial, and cannot take his trial at any other part of the court, even with the consent of the prosecutor.—*R.* v. *St. George*, 9 *C. & P.* 485. A merchant was indicted for an offence against the act of parliament prohibiting slave-trading (felony). His counsel applied to the court to allow him to sit by him, not on the ground of his position in society, but because he was a foreigner, and several of the documents in the case were in a foreign language, and it would, therefore, be convenient for his counsel to have him by his side, that he might consult him during his trial: *Held*, that the application was one which ought not to be granted.—*R.* v. *Zulueta*, 1 *C. & K.* 215; 1 *Cox*, 20. A similar application by a captain in the army was also refused in *R.* v. *Douglas*, *C. & M.* 193. But in misdemeanors, a defendant who is on bail and surrenders to take his trial need not stand at the bar to be tried.—*R.* v. *Lovett*, 9 *C. & P.* 462. A prosecutor conducting his case in person, and who is to be examined as a witness in support of the indictment, has no right to address the jury as counsel; *R.* v. *Brice*, 2 *B. & A.* 606; *R.* v. *Stoddart*, *Dickinson's Quarter Sessions*, 152; *R.* v. *Gurney*, 11 *Cox*, 414, where a note by the reporter, supported by authorities, says that such is the law, whether the prosecutor is to be a witness or not.

Sergeant *Talfourd*, in *Dickinson's Quarter Sessions*, 495, on the duties of the counsel for the prosecution, says:—"When the counsel for the prosecution addresses the jury in a case of felony, he ought to confine himself to a simple statement of the facts which he expects to prove; but in cases where the prisoner has no counsel he should particularly refrain from stating any part of the facts, the

proof of which from his own brief appears doubtful, except with proper qualification; for he will either produce on the minds of the jurors an impression which the mere failure of the evidence may not remove in instances where the prisoner is unable to comment on it with effect; or may awaken a feeling against the case for the prosecution, which in other respects it may not deserve. The court, too, if watchful, cannot fail, in the summing up, to notice the discrepancy between the statement and the proof. But in all cases, as well of felony as misdemeanor, where a prisoner has counsel, not only may the facts on which the prosecution rests be stated, but they may be reasoned on, so as to anticipate any line of defence which may probably be adopted. For as counsel for parties charged with felony may now address the jury in their defence, as might always have been done in misdemeanor, the position of parties charged with either degree of offence is thus assimilated in cases where they have counsel, and it is no longer desirable for the prosecutor's counsel to abstain from observing generally on the case he opens, in such manner as to connect its parts in any way he may think advisable to demonstrate the probability of guilt and the difficulty of an opposite conclusion. But even here he should refrain from indulging in invective, and from appealing to the prejudices or passions of the jury; for it is neither in good taste nor right feeling to struggle for a conviction as an advocate in a civil cause contends for a verdict."

On the duties of counsel, in opening the case for the prosecution, it is said in *Archbold*, 159 :—"In doing so he ought to state *all* that it is proposed to prove, as well declarations of the prisoners as facts, so that the jury may see if there be a discrepancy between the opening statements of counsel and the evidence afterwards adduced in

support of them : per Parke, B., *R.* v. *Hartel*, 7 *C. & P.* 773; *R.* v. *Davis*, 7 *C. & P.* 783; unless such declarations should amount to a *confession*, where it would be improper for counsel to open them to the jury; *R.* v. *Swatkins*, 4 *C. & P.* 548. *R.* v. *Davis*, 7 *C. & P.* 783. The reason for this rule is that the circumstances under which the confession was made may render it inadmissible in evidence. The general effect only of any confession said to have been made by a prisoner ought, therefore, to be mentioned in the opening address of the prosecutor's counsel."

Mr. Justice Blackburn, in *R.* v. *Berens*, 4 *F. & F.* 842, 853, said that the position of prosecuting counsel in a criminal case is not that of an ordinary counsel in a civil case, but that he is acting in a *quasi* judicial, capacity, and ought to regard himself as part of the court: that while he was there to conduct his case, he was to do it at his discretion, but with a feeling of responsibility, not as if trying to obtain a verdict, but to assist the judge in fairly putting the case before the jury, and nothing more.

In *R.* v. *Puddick*, 4 *F. & F.* 497, per Crompton, J., the counsel for the prosecution "are to regard themselves as ministers of justice, and not to struggle for a conviction as in a case at *nisi prius*; nor be betrayed by feelings of professional rivalry to regard the question at issue as one of professional superiority, and a contest for skill and pre-eminence."

Summing up by counsel for the prosecution, where the defence brings no evidence.—It has already been remarked that in practice, if the counsel for the prosecution has the right of reply and intends to avail himself of it, it would be waste of time for him to sum up; but if the counsel has not the right of reply (as to which see *post*, under heading

"reply,") he will perhaps find it useful to review the evidence as it has been adduced, and give some explanations to the jury. But it has been held in *R.* v. *Puddick*, 4 *F. & F.* 497, that the counsel for the prosecution ought not, in summing up the evidence, to make observations on the prisoner's not calling witnesses, unless at all events it has appeared that he might be fairly expected to be in a position to do so, and that neither ought counsel to press it upon the jury, that if they acquit the prisoner they may be considered to convict the prosecutor or prosecutrix of perjury. Nor is it the duty of counsel for the prosecution to sum up in every case in which the prisoner's counsel does not call witnesses. The statute gives him the right to do so, but that right ought only to be exercised in exceptional cases, such as where erroneous statements have been made and ought to be corrected, or when the evidence differs from the instructions. The counsel for the prosecution is to state his case before he calls the witnesses, then, when the evidence has been given, either to say simply, "I say nothing," or "I have already told you what would be the substance of the evidence, and you see the statement which I made is correct;" or in exceptional cases, as if something different is proved from what he expected, to address to the jury any suitable explanation which may be required.—*R.* v. *Berens*, 4 *F. & F.* 842, *reporter's note*. *R.* v. *Holchester*, 10 *Cox*, 226; *R.* v. *Webb*, 4 *F. & F.* 862.

The defence.—The defendant cannot have the assistance of counsel in examining and cross-examining witnesses, and reserve to himself the right of addressing the jury.—*R.* v. *White*, 3 *Camp.* 98; *R.* v. *Parkins*, 1 *C. & P.* 548. But see *post* as to statements by him to the jury. But if the defendant conducts his own case, counsel will be allowed to address the court for him on points of law arising in the

case.—*Idem.* Not more than two counsels are entitled to address the court for a prisoner during the trial upon a point of law.—*R.* v. *Bernard*, 1 *F. & F.* 240. The rule is that if the prisoner's counsel has addressed the jury, the prisoner himself will not be allowed to address the jury also.—*R.* v. *Boucher*, 8 *C. & P.* 141; *R.* v. *Burrows*, 2 *M. & Rob.* 124; *R.* v. *Rider*, 8 *C. & P.* 531. The counsel for the defendant may comment on the case for the prosecution. He may adduce evidence to any extent, and even introduce new facts, provided he can establish them by witnesses. He cannot, however, assume as proved that which is not proved. Nor will he be allowed to state anything which he is not in a situation to prove, or to state the prisoner's story as the prisoner himself might have done.—*R.* v. *Beard*, 8 *C. & P.* 142; *R.* v. *Butcher*, 2 *M. & Rob.* 228.

Bishop says, 1 Cr. Proc. 311: "No lawyer ought to undertake to be a witness for his client, except when he testifies under oath, and subjects himself to cross-examination, and speaks of what he personally knows. Therefore, the practice, which seems to be tolerated in many courts, of counsel for defendants protesting in their addresses to the jury that they believe their clients to be innocent, should be frowned down and put down, and never be permitted to show itself more. If a prisoner is guilty and he communicates the facts fully to counsel in order to enable the latter properly to conduct the defence, then, if the counsel is an honest man, he cannot say he believes the prisoner innocent; but, if he is a dishonest man, he will as soon say this as anything. Thus a premium is paid for professional lying. Again, if the counsel is a man of high reputation, a rogue will impose upon him by a false story, to make him an "innocent agent" in communicat-

ing a falsehood to the jury. Lastly, a decent regard for the orderly administration of justice requires that only legal evidence be produced to the jury, and the unsworn statement of the prisoner's counsel, that he believes the prisoner innocent, is not legal evidence. It is the author's cherished hope, that he may live to see the day when no judge, sitting where the common law prevails, will ever, in any circumstances, permit such a violation of fundamental law, of true decorum, and of high policy to take place in his presence, as is involved in the practice of which we are now speaking."

On the same subject, it is said in 3 *Wharton's Cr. L.*, 3010: "Nor is it proper for counsel in any stage of the case to state their personal conviction of their client's innocence. To do so is a breach of professional privilege, well deserving the rebuke of the court. The defendant is to be tried simply by the legal evidence adduced in the case; and to intrude on the jury statements not legal evidence is an interference with public justice of such a character that, if persisted in, it becomes the duty of the court, in all cases where this can be done constitutionally, to discharge the jury and continue the case. That which would be considered a high misdemeanor in third parties cannot be permitted to counsel. And where the extreme remedy of discharging the jury is not resorted to, any undue or irregular comment by counsel may be either stopped at the time by the court, or the mischief corrected by the judge when charging the jury."

Summing up by the defence.—The counsel for the prisoner or the prisoner himself is now entitled by sec. 179 of the Procedure Act, at the close of the examination of his witnesses, to sum up the evidence.—*R.* v. *Wainwright*, 13 *Cox*, 171. In practice, it is the only time when the

counsel for the prisoner addresses the jury, and what has just been said on the defence generally applies to the address to the jury, whether made before or after the examination of witnesses.

A person on his trial defended by counsel is not entitled to have his explanation of the case to the jury made through the mouth of his counsel, but may, at the conclusion of his counsel's address, himself address the jury and make such statements subject to this, that what he says will be treated as additional facts laid before the court, and entitling the prosecution to the reply.—*R.* v. *Shimmin*, 15 *Cox*, 122. See reporter's note.

In *R.* v. *Weston*, 14 *Cox*, 346, the prisoner's counsel was allowed to make a statement on behalf of his client.

Per Stephen J.—A prisoner may make a statement to the jury, provided he does so before his counsel's address to the jury.—*R.* v. *Masters*, 50 *J. P.* 104.

A prisoner on his trial defended by counsel may, at the conclusion of his counsel's address, make a statement of facts to the jury, but the prosecution will be entitled to reply.—*The Queen* v. *Rogers*, 2 *B. C. L. R.* 119.

In *R.* v. *Taylor*, 15 *Cox*, 265, the prisoners were allowed to address the jury after their counsel. See *R.* v. *Millhouse*, 15 *Cox*, 622, where the judge said that could be allowed only where the prisoner called no witnesses.

The Reply.—If the defendant brings no evidence, the counsel for the prosecution is not allowed to reply, except if he be, according to sec. 179 of the Procedure Act, the attorney general or solicitor general, or a Queen's counsel acting on behalf of the crown. And in the interpretation of this clause, these words "acting on behalf of the crown" must be read as applying to the attorney-general or solicitor-general, as well as to a Queen's counsel, so that, if not act-

ing on behalf of the crown in a case, the attorney general or solicitor general would not be entitled to a reply, if no evidence is adduced by the defence.—*3 Russ.* 354, *note.*

On this privilege to reply, in cases instituted by the crown, it is said in 1 *Taylor, Ev., par.* 312: "But as this is a privilege, or rather a prerogative which stands opposed to the ordinary practice of the courts, the true friend of justice will do well to watch with jealousy the parties who are entitled to exercise it. Mr. Horne, so long back as the year 1777, very properly observed that the attorney-general would be grievously embarrassed to produce a single argument of reason or justice on behalf of his claim, and, as the rule which precludes the counsel for the prosecution from addressing the jury in reply, when the defendant has called no witnesses, has been very long thought to afford the best security against unfairness in ordinary trials, this fact raises a natural suspicion that a contrary rule may have been adopted, and may still be followed in State prosecutions, for a different and less legitimate purpose. It is to be hoped that ere long this question will receive the consideration which its importance demands, and that the Legislature, by an enlightened interference, will introduce one uniform practice in the trial of political and ordinary offenders."

If the defendant gives any evidence, whether written or parol, the counsel for the prosecution has a right to reply. If witnesses are called merely to give evidence to character, the counsel for the prosecution is strictly entitled to reply, though in England, in such cases, the practice is not to reply.

In *R.* v. *Bignold*, 4 *D. & R.* 70, Lord Tenderden revived an important rule, originally promulgated by Lord Kenyon, and by which a reply is allowed to the counsel

for the prosecution, if the counsel for the defendant, in his address to the jury, states any fact or any document which is not already in evidence, although he afterwards declines to prove the fact or put it in writing.—5 *Burn*, 357. *See R.* v. *Trevelli*, 15 *Cox*, 289; *R.* v. *Stephens*, 11 *Cox*, 669; *R.* v. *Burns*, 16 *Cox*, 195.

Evidence in reply.—Whenever the defendant gives evidence to prove new matter by way of defence, which the crown could not foresee, the counsel for the prosecution is entitled to give evidence in reply to contradict it, but then he does not address the jury in reply before going into that evidence. The general rule is that the evidence in reply must bear directly or indirectly upon the subject-matter of the defence, and ought not to consist of new matter unconnected with the defence, and not tending to controvert or dispute it. This is the general rule, made for the purpose of preventing confusion, embarrassment and waste of time; but it rests entirely in the discretion of the judge whether it ought to be strictly enforced or remitted, as he may think best for the discovery of truth and the administration of justice.—2 *Phillips' Ev.* 408; *R.* v. *Briggs*, 2 *M. & Rob.* 199; *R.* v. *Frost*, 9 *C. & P.* 159. Where the counsel for the crown has, *per incuriam*, omitted to put in a piece of evidence before commencing his reply, and the course of justice might be interfered with if the evidence were not given, the court may permit the evidence to be given.—*R.* v. *White*, 2 *Cox*, 192. If evidence of his good character is given on behalf of a prisoner, evidence of his bad character may be given in reply: *R.* v. *Rowton, L. & C.* 520, overruling *R.* v. *Burt*, 5 *Cox*, 284.

Defendant's reply on evidence adduced in answer to his own.—When evidence is adduced for the prosecution in reply to the defendant's proof, the defendant's counsel

has a right to address the jury on it, confining himself to its bearings and relations, before the general replying address of the prosecution.—*Dickinson's Quart. Sess.* 565.

Witnesses may be recalled.—*R.* v. *Lamere*, 8 *L. C. J.* 380; *R.* v. *Jennings*, 20 *L. C. J.* 291. 2 *Taylor, Ev.* 1331.

Charge by the judge to the jury.—It is the duty of the president of the court, the case on both sides being closed, to sum up the evidence. His address ought to be free from all technical phraseology, the substance of the charge plainly stated, the attention of the jury directed to the precise issue to be tried, and the evidence applied to that issue. It may be necessary, in some cases, to read over the whole evidence, and, when requested by the jury, this will, of course, be done; but in general, it is better merely to state its substance.—5 *Burn*, 357; 1 *Chit.* 632.

In 12 Cox, 549, the editors reported a case from the United States, preceding it with the following remarks: "Although an American case, the principles of the criminal law being the same as in England, and the like duties and powers of the judge being recognized, a carefully prepared judgment on an important question that may arise here at some time has been deemed worthy of a place for any future reference."

The case is *Commonwealth* v. *Magee*, Philadelphia, December, 1873, decided by Pierce, J., who held that a judge may, where the evidence is clear and uncontradicted, and the character of the witnesses unimpeached and unshaken, tell the jury in a criminal case that it is their duty to convict.

For the same reason which induced the editors of Cox's Reports to insert this case in their columns, the full report thereof is given here.

"This was a motion for a new trial and in arrest of judgment on the ground of misdirection in the charge to the jury.

"Pierce, J., in his judgment, said: The evidence against the defendant was clear and explicit by two witnesses, who testified to having bought and drunk liquors at the defendant's place within this year. The defendant offered no testimony.

"There was nothing in the manner or matter of the witnesses to call in question their veracity, or in the slightest degree to impugn their evidence; the counsel for the defence did not in any manner question the truth of their evidence, but confined his address to the jury to an attack upon the law and the motives of the prosecutors. Were the jury, under these circumstances, at liberty to disregard their oaths and acquit the defendant? They had been solemnly sworn to try the case according to the evidence, and a regard to their oaths would lead them but to one conclusion, the guilt of the defendant. The counsel for the Commonwealth states the charge to have been: 'The judge declared that he had no hesitation in saying, that, under the evidence, it was the duty of the jury to render a verdict of guilty under the bill of indictment.' But no matter which form of expression was used, it was the evidence to which I had just called their attention that indicated their duty, and in view of which the remark was made. I perceive no error in this. It was not a direction to the jury to convict the defendant. It was simply pointing them to their duty. Jurors are bound to observe their oaths of office, whether it will work a conviction or acquittal of a defendant, and they are not at liberty to disregard uncontradicted and unquestioned testimony at their mere will and pleasure. Where, however, the testimony is contra-

dicted by testimony on the other side, or a witness is impeached in his general character, or by the improbability of his story, or his demeanor, it would be an unquestionable error in a judge to assume that the facts testified to by him had been proved.

In 3 *Wharton's Cr. L., par.* 3280, it is said: "Can a judge direct a jury peremptorily to acquit or convict if, in his opinion, this is required by the evidence? Unless there is a statutory provision to the contrary, this is within the province of the court, supposing that there is no disputed fact on which it is essential for the jury to pass." See, also, 1 *Wharton Cr. L., par.* 82*a*.

See Mr. Justice Ramsay's charge to the jury in *R.* v. *Dougall*, 18 *L. C. J.* 90.

In *R.* v. *Wadge (July 27th,* 1878*)*, for murder, Denman, J., remarked that "he had to take exception to the request made to the jury by the counsel for the defence, that, 'if they had any doubt about the case, they should give the prisoner the benefit of it.' That was an expression frequently employed by counsel in defending prisoners, but it was a fallacious and an artful one, and intended to deceive juries. The jury had no right to grant any benefit or boon to any one, but only to be just and do their duty."

In *R.* v. *Glass* (Montreal, Q. B., March, 1877*)*, the counsel for the defence after the judge's charge asked him to instruct the jury with regard to any doubt they might have in the case. Ramsay, J., answered, "No, I shall not, when there is no doubt."

When the judge has summed up the evidence he leaves it to the jury to consider of their verdict. If they cannot agree by consulting in their box they withdraw to a convenient place, appointed for the purpose, an officer being

sworn to keep them, as follows: "You shall well and truly keep this jury without meat, drink, or fire, candle light excepted; you shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask them if they are agreed on their verdict. So help you God."—1 *Chit.* 632; 5 *Burn*, 357.

But this formality need not appear on the face of the record. The precautions taken for the safe keeping of the jury are noted by the clerk in the register, but they form no part of what is technically known as the record. Consequently the regularity or sufficiency of this part of the proceedings cannot be questioned upon a writ of error.—*Duval dit Barbinas* v. *R.*, 14 *L. C. R.* 52.

In *R.* v. *Winsor*, 10 *Cox*, 276, Chief Justice Cockburn said that there was no authority for allowing refreshments to the jury after they have retired to deliberate upon their verdict, and that he doubted exceedingly whether a judge would be justified in putting the rule aside by a simple act of his discretionary authority in ordering them refreshments during their deliberation.

In England a statute has been passed altering the common law rule on the subject, 33-34 V., c. 77, but in Canada, the law is yet as above stated in *R.* v. *Winsor*, except in New Brunswick, where it is provided by sec. 3 of 21 V., c. 22, that "when the judge deems it necessary that the jury shall be confined to the precincts of the court house during the progress or until the completion of any long trial for a criminal offence, the sheriff shall provide them necessary refreshment, the expense of which shall be paid by the county treasury out of the funds of the county, on the order of the presiding judge."

The jury coming back to the box, the prisoner is brought to the bar. The clerk then calls the jurors over by their

names, and asks them whether they agree on their verdict; if they reply in the affirmative, he then demands who shall say for them, to which they answer, their foreman. He then addresses them as follows: "Gentlemen, are you agreed on your verdict; how say you, is the prisoner at the bar *(or naming him if the trial is for a misdemeanor, and the defendant bailed)* guilty of the felony *(or as the case may be)* whereof he stands indicted, or not guilty?" If the foreman says guilty, the clerk of the court addresses them as follows: "Hearken to your verdict as the court recordeth it: you say that the prisoner at the bar *(or as the case may be)* is guilty *(or "not guilty," if such is the verdict received)* of the felony *(or as the case may be)* whereof he stands indicted; that is your verdict, and so you say all." The verdict is then recorded. The assent of all the jury to the verdict pronounced by their foreman in their presence is to be conclusively inferred. But the court may, before recording the verdict, either *proprio motu*, or, on demand of either party, poll the jury, that is to say, demand of each of them successively if they concur in the verdict given by their foreman.—2 *Hale*, 299; *Bacon's* Abr. *Verb.* juries, p. 768; 1 *Bishop, Cr. Proc.* 1003.

The mere entry, by the clerk, of the verdict, does not necessarily constitute a final recording of it. If it appear promptly, say after three or four minutes, that it is not recorded according to the intention of the jury, it may be vacated and set right.—*R.* v. *Parkin*, 1 *Moo. C. C.* 45; even if the prisoner has been discharged from the dock, he will be immediately brought back, on the jury which had not left the box saying that "not guilty" has been entered by mistake, and that "guilty" is their verdict.—*R.* v. *Vodden, Dears.* 229.

A judge is not bound to receive the first verdict which the jury gives, but may send them to reconsider it. Pollock, C. B., said, in *R.* v. *Meany, L. & C.* 213: "A judge has a right, and in some cases it is his bounden duty, whether in a civil or a criminal cause, to tell the jury to reconsider their verdict. He is not bound to receive their verdict unless they insist upon his doing so; and where they reconsider their verdict, and alter it, the second, and not the first, is really the verdict of the jury." See *R.* v. *Smith*, 1 *Russ.* 749; *Archbold*, 166; *Bacon's* Abr. *Verb.* "verdict;" 5 *Burn*, 358; 1 *Chit.* 647.

A recommendation to mercy by the jury is not part of their verdict.—*R.* v. *Trebilcock, Dears. & B.* 453; *R.* v. *Crawshaw, Bell, C. C.* 303.

The saying that "a judge is bound to be counsel for the prisoner" is erroneous.—Per Wills, J., in *R.* v. *Gibson*, 16 *Cox*, 181.

180. Every person under trial shall be entitled, at the time of his trial, to inspect, without fee or reward, all depositions, or copies thereof, taken against him, and returned into the court before which such trial is had.—32-33 *V., c.* 29, *s.* 46.

This is the 6-7 Will. IV., c. 114, sec. 4 of the Imperial Statutes.

See the two next sections, and sec. 74, *ante.*

181. Every person indicted for any crime or offence shall, before being arraigned on the indictment, be entitled to a copy thereof, on paying the clerk ten cents per folio for the same, if the court is of opinion that the same can be made without delay to the trial, but not otherwise.—32-33 *V., c.* 29, *s.* 47.

By usage, in Canada, one hundred words form a folio.

At common law, the prisoner was not entitled to a copy of the indictment in cases of treason or felony.—1 *Chit.* 403.

182. Every person indicted shall be entitled to a copy of the

depositions returned into court on payment of ten cents per folio for the same, provided, if the same are not demanded before the opening of the assizes, term, sittings or sessions, the court is of opinion that the same can be made without delay to the trial, but not otherwise; but the court may, if it sees fit, postpone the trial on account of such copy of the depositions not having been previously had by the person charged.—32-33 *V.*, *c.* 29, *s.* 48; 11-12 *V.*, *c.* 42, *s.* 27, *Imp.*

See sec. 74, *ante.*

VERDICT OF ATTEMPT, ETC.

183. If, on the trial of any person charged with any felony or misdemeanor, it appears to the jury, upon the evidence, that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the indictment; and no person tried as lastly mentioned shall be liable to be afterwards prosecuted for committing or attempting to commit the felony or misdemeanor for which he was so tried. —32-33 *V.*, *c.* 29, *s.* 49.

This clause is taken from sec. 9 of 14-15 V., c. 100, of the English statutes, upon which *Greaves* has the following remarks:

"As the law existed before the passing of this act (except in the case of the trial for murder of a child, and the offences falling within the 1 V., c. 85, s. 11,) (sec. 191 *post*), there was no power upon the trial of an indictment for any felony to find a verdict against a prisoner for anything less than a felony, or upon the trial of an indictment for a misdemeanor to find a verdict for an attempt to commit such misdemeanor.—(See *R.* v. *Catherall*, 13 *Cox*, 109; *R.* v. *Woodhall*, 12 *Cox*, 240; *R.* v. *Bird*, 2 *Den.* 94; 1 *Chit.* 251, 639). At the same time the general principle of the common law was, that upon a charge of

felony or misdemeanor composed of several ingredients, the jury might convict of so much of the charge as constituted a felony or misdemeanor.—*R.* v. *Hollingbury*, 4 *B. & C.* 329. The reason why, upon an indictment for felony, the jury could not convict of a misdemeanor, was said to be that thereby the defendant would be deprived of many advantages; for if he was indicted for the misdemeanor he might have counsel, a copy of his indictment, and a special jury.—*R.* v. *Westbeer*, 2 *Str.* 1133; 1 *Leach*, 12. The prisoner is now entitled, in cases of felony, to counsel, and to a copy of the depositions, and though not entitled to a copy of the indictment, yet as a matter of courtesy his counsel is always permitted to inspect it. With regard to a special jury, in the great majority of cases a prisoner would not desire it, and it can in no case be obtained unless the indictment has been removed by *certiorari*. Very little ground, therefore, remained for objecting to the jury being empowered to find a verdict of guilty of an attempt to commit a felony upon an indictment for such felony, and the prisoner obviously gains one advantage by it, as where he is charged with a felony, he may peremptorily challenge jurymen, which he could not do if indicted for a misdemeanor. No prejudice, therefore, being likely to arise to the prisoner, and considerable benefit in the administration of criminal justice being anticipated by the change, the jury are now empowered, upon the trial of any indictment for a felony to convict of an attempt to commit that particular felony, and upon the trial of any indictment for a misdemeanor to convict of an attempt to commit that particular misdemeanor."

In *R.* v. *McPherson*, *Dears. & B.* 197, the prisoner was indicted for breaking and entering a dwelling-house, and stealing therein certain goods specified in the indictment,

the property of the prosecutor. At the time of the breaking and entering the goods specified were not in the house, but there were other goods there the property of the prosecutor. The jury acquitted the prisoner of the felony charged, but found him guilty of breaking and entering the dwelling-house of the prosecutor, and *attempting to steal his goods therein: Held*, by the court of criminal appeal, that the conviction was wrong, as there was no attempt to commit the "*felony charged*" within the meaning of the aforesaid section.

Cockburn, C. J., said: "The effect of the statute is, that if you charge a man with stealing certain specified goods, he may be convicted of an attempt to commit 'the felony or misdemeanor charged,' but can you convict him of stealing other goods than those specified? If you indict a man for stealing your watch, you cannot convict him of attempting to steal your umbrella. I am of opinion that this conviction cannot be sustained. The prisoner was indicted for breaking and entering the dwelling-house of the prosecutor, and stealing therein certain specified chattels. The jury found specially that, although he broke and entered the house with the intention of stealing the goods of the prosecutor, before he did so, somebody else had taken away the chattels specified in the indictment; now, by the recent statute it is provided, that where the proof falls short of the principal offence *charged*, the party may be convicted of an attempt to commit the *same*. The word attempt clearly conveys with it the idea, that if the attempt had succeeded, the offence charged would have been committed, and therefore the prisoner might have been convicted if the things mentioned in the indictment or any of them had been there; but attempting to commit a felony is clearly distinguishable from intending to commit it. An attempt

must be to do that which, if successful, would amount to the felony charged; but here the attempt never could have succeeded, as the things which the indictment charges the prisoner with stealing had been already removed, stolen by somebody else. The jury have found him guilty of attempting to steal the goods of the prosecutor, but not the goods specified in the indictment."

An attempt to commit a felony can only be made out where, if no interruption had taken place, the felony itself could have been committed. The prisoner was indicted for attempting to commit a felony by putting his hand into A's pocket, with intent to steal the property in the said pocket then being. The evidence was that he was seen to put his hand into a woman's pocket; but there was no proof that there was anything in the pocket: *Held*, that on the assumption that there was nothing in the pocket, the prisoner could not be convicted of the attempt charged; *R.* v. *Collins*, *L. & C.* 471; though he was guilty of an assault with intent to commit a felony.—*Stephen's Cr. L., p.* 39, *note. (4th Edit.)*

Greaves says, referring to these cases: "There can be no doubt that this and the preceding decision were right upon the grounds that the indictment in the former alleged the goods to be in the house, which was disproved, and in the latter to be in the pocket, which was not proved."—*Attempts to commit crimes, by Greaves, Cox & Saunders' Cons. Acts, cix.*

But the case of *R.* v. *Goodhall*, 1 *Den.* 187, where it was held that on an indictment for using an instrument with intent to procure the miscarriage of a woman, the fact of the woman not being pregnant is immaterial, Greaves admits, is a direct authority that a man may be convicted of an intent to do that which it was impossible to do.—

Idem, cxi. And if a person administers any quantity of poison, however small, however impossible that it could have caused death, yet if it were done with the intent to murder, the offence of administering poison with intent to murder is complete: *R.* v. *Cluderay* 1 Den. 514; 1 *Russ.* 901, *note by Greaves.* And this rests on a distinction between an *intent* and an *attempt* to commit a crime; it seems that a man may be convicted of doing an act with *intent* to commit a crime, although it be impossible to commit such crime, but that a man cannot be convicted of an *attempt* to commit a crime unless the attempt might have succeeded.—*Greaves, "Attempts," Cox & Saunders' Cons. Acts, cxii.*

It was held in *R.* v. *Johnson, L. & C.* 489, that an indictment for an attempt to commit larceny, which charges the prisoner with attempting to steal the goods and chattels of A., without further specifying the goods intended to be stolen is sufficiently certain. And in *R.* v. *Collins, L. & C.* 471, above referred to, the indictment charged the defendant with attempting to steal "the property of the said woman in the said gown pocket then being," without further specifying the goods attempted to be stolen.

In *R.* v. *Cheeseman, L. & C.* 140, Blackburn, J., said: "If the actual transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime."

In *R.* v. *Roebuck, Dears. & B.* 24, the prisoner was indicted for obtaining money by false pretences. It appeared that the prisoner offered a chain in pledge to a pawnbroker, falsely and fraudulently stating that it was a silver chain, whereas in fact it was not silver, but was made of a composition worth about a farthing an ounce. The pawnbroker tested the chain, and finding that it withstood the test, he, relying on his own examination and test of the chain, and not placing any reliance upon the prisoner's statement, lent the prisoner ten shillings, the sum he asked, and took the chain as a pledge; the jury found the prisoner guilty of the attempt to commit the misdemeanor charged against him. *Held,* that the conviction was right.

It is said in 2 *Russ.* 599, on this right given to convict the defendant of the attempt to commit the offence charged: "There are some offences which may be attempted to be committed, whilst there are others which cannot be so attempted. It is obvious that where an offence consists in an act that is done, there may be an attempt to do that act which will be an attempt to commit that offence. But where an offence consists in an omission to do a thing, or in such a state of things as may exist without anything being done, it should seem that there can be no attempt to commit such offence. Thus if an offence consists in omitting or neglecting to turn the points of a railway, it may well be doubted whether there could be an attempt to commit that offence. And a very nice question might perhaps be raised on an indictment on the 9-10 Will. III., c. 41, s. 2, for *having possession* of marked stores, where the evidence failed to prove that the stores actually came into the prisoner's possession though an attempt to get them into his possession, as in *R.* v. *Cohen,* 8 *Cox,* 41, and knowledge of their being marked, might be proved; for in order to constitute the offence of having possession of anything, it is not necessary to prove any act done, and, therefore, it would be open to contend that there could not be an attempt to commit such an offence."

It is to be observed, however, that the 50-51 V., c. 45, s. 6, of our statutes corresponding to the 9-10 W. III, c. 41, s. 2, (Imp.), has the words "receives, possesses;" and on

a count charging the receiving of stores, there seems no reason to doubt that there might be a conviction of an attempt to receive; for receiving clearly includes an act done. Thus in *R.* v. *Wiley*, 2 *Den.* 37, where a prisoner went into a coach office and endeavoured to get possession of stolen fowls which had come by a coach, there seems no reason why she might not have been convicted of an attempt to receive the fowls.

Can there be an attempt to commit an assault? Greaves says: "In principle there seems no satisfactory ground for doubting that there may be such an attempt. Although an assault may be an attempt to inflict a battery on another, as where A. strikes at B. but misses him, yet it may not amount to such an attempt, as where A. holds up his hand in a threatening attitude at B., within reach of him, or points a gun at him without more. Is not the true view this—that every offence must have its beginning and completion, and is not whatever is done which falls short of the completion an attempt, provided it be sufficiently proximate to the intended offence? Pointing a loaded gun is an assault. Is not raising the gun in order to point it an attempt to assault?

In *R.* v. *Ryland*, 11 *Cox*, 101, it was held that under an indictment for unlawfully assaulting and having carnal knowledge of a girl between ten and twelve years of age, the prisoner may be convicted of the attempt to commit that offence, though the child was not unwilling that the attempt should be made.

In *R.* v. *Hapgood*, 11 *Cox*, 471, H. was indicted for rape, and W. for aiding and abetting. Both were acquitted of felony, but H. was found guilty of attempting to commit the rape, and W. of aiding H. in the attempt, The conviction was affirmed both as to W. and H. See *R.* v. *Bain*, *L. & C.* 129, *and note a thereto*.

It was held in *R.* v. *Connell*, 6 *Cox*, 178, that upon a trial for felony the jury under the above clause can only convict of an attempt which is a misdemeanor, and not of an attempt which is made felony by statute. Thus, on an indictment for murder with poison, the prisoner cannot be convicted of feloniously administering poison to the deceased with intent to murder him. But it is doubtful if, in Canada, this ruling would be followed in view of the enactment contained in section 185, *post*.

The attempt to commit a felony or a misdemeanor is, at common law, a misdemeanor, punishable by fine or imprisonment, or both. See *post*, s. 31, c. 181.

But many cases of attempts to commit indictable offences must fall under s. 34, c. 162, p. 184, *ante*, which provides for the punishment of the common law misdemeanor of any one who assaults any person with intent to commit any indictable offence.

An assault with intent to commit a crime is an attempt to commit that crime; though see reporter's note in *R.* v. *Dungey*, 4 *F. & F.* 99.

An attempt to commit a crime is an intent to commit such crime by some overt act, and in cases of rape, etc., necessarily includes an assault.—*Stephen's Cr. L. art.*, 49.

Upon an indictment for rape or for assaulting and having carnal knowledge of a girl between ten and twelve years of age, the prisoner may be convicted of the attempt.—*R.* v. *Ryland*, 11 *Cox*, 101. Also, *R.* v. *Hapgood*, *ubi supra*; *R.* v. *Mayers*, 12 *Cox*, 311; *R.* v. *Barratt*, 12 *Cox*, 498; *R.* v. *Dungey*, 4 *F. & F.*, 99.

The prisoner wrote a letter to a boy of fourteen, inciting him to commit an unnatural offence: *Held*, that this was an attempt to incite to commit a crime, and a misdemeanor. An attempt to commit a misdemeanor is a misdemeanor. To incite, solicit or do any act with intent to induce

another person to commit a felony is a misdemeanor.—*R.* v. *Ransford*, 13 *Cox*, 9. See *R.* v. *Gregory*, 10 *Cox*, 459, and 1 *Burn*, 342.

184. If, upon the trial of any person for any misdemeanor, it appears that the facts given in evidence, *while they include such misdemeanor*, amount in law to a felony, such person shall not, by reason thereof, be entitled to be acquitted of such misdemeanor, unless the court before which such trial is had thinks fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony,—in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor; and the person tried for such misdemeanor, *if convicted*, shall not be liable to be afterwards prosecuted for felony on the same facts.—32-33 *V.*, *c.* 29, *s.* 50.

The above clause is taken from the 14-15 V., c. 100, s. 12 of the Imperial Acts. The words in *italics* are not in the English Act, but the clause has always been interpreted, in England, as if these words were actually in it.

Greaves says on this clause; "This section was introduced to put an end to all questions as to whether on an indictment for a misdemeanor, in case upon the evidence it appeared that a felony had been committed, the defendant was entitled to be acquitted, on the ground that the misdemeanor merged in the felony.—*R.* v. *Neale*, 1 *C. & K.* 591; 1 *Den.* 36; *R.* v. *Button*, 11 *Q. B.* 929. The discretionary power to discharge the jury is given in order to prevent indictments being collusively or improperly preferred for misdemeanors where they ought to be preferred for felonies, and also to meet those cases where the felony is liable to so much more severe a punishment than the misdemeanor, that it is fitting that the prisoner should be tried and punished for the felony. For instance, if on an indictment for attempting to commit a rape, it clearly appeared that the crime of rape was committed, it would be right to discharge the jury."

Formerly, where upon a indictment for an assault with intent to commit a rape, a rape was actually proved, an acquittal would have been directed, on the ground that the misdemeanor was merged in the felony.—*R.* v. *Harmwood*, 1 *East, P. C.* 430; *R.* v. *Nicholls*, 2 *Cox*, 182; though in *R.* v. *Neale*, 1 *Den.* 36, cited, *ante*, by Greaves, it was held before this enactment that where a prisoner was indicted for carnally knowing a girl between ten and twelve years of age, and it was proved that he had committed a rape upon her, he was not thereby entitled to be acquitted. The above section removes all doubt on the matter, but it must not be lost sight of, that by its express terms the facts proved, though amounting in law to a felony, *must also, include the misdemeanor charged.* For instance, if upon an indictment for having carnal knowledge of a girl above the age of ten years and under the age of twelve years, it appears that in fact the girl was under the age of ten years, this section does not apply, and the prisoner must be acquitted; the offence charged against him is not proved; quite another and totally different offence is proved, and this offence as proved does not include the misdemeanor charged.—*R.* v. *Shott*, 3 *C. & K.* 206, is a ruling to this effect, in England, though there the words "while they include such misdemeanor" are not in the corresponding clause.

But the clause fully applies where, upon an indictment for false pretences, the facts prove that the false pretences have been affected by a forgery; in such a case, though a forgery be proved, the prisoner may nevertheless be convicted of the misdemeanor charged, if such is also proved.

185. No person shall be tried or prosecuted for an attempt to commit any felony or misdemeanor, who has been previously tried for committing the same offence.—32-33 *V.*, *c.* 29, *s.* 52.

There is no principle so well established in the English criminal law, and in fact, in every system of jurisprudence,

that "no man is to be brought into jeopardy of his life more than once for the same offence:" 4 *Blackstone*, 335; or as expressed by Lord Campbell, in *R.* v. *Bird*, 2 *Den.* 216, in other terms: "No one ought to be twice tried for the same cause," a rule, in the civil law, contained in the words, "*nemo bis vexari debet pro eadem causâ.*"

It was laid down by Mr. Justice Buller, in *R.* v. *Vandercomb*, 2 *Leach*, 708, and has never been since doubted, that the true criterion to ascertain whether an indictment "puts any one twice in jeopardy for the same offence," is whether the facts charged in the second indictment would have been sufficient to support a conviction upon the first indictment; and by the words *a conviction upon the first indictment*, is not meant only *a conviction of the crime expressly charged in the first indictment* but *any conviction allowed by law upon the first indictment.*

The above clause is not in the Imperial Acts. The last part of sec. 183, *ante*, seems to cover it, and if *R.* v. *Connell*, 6 *Cox*, 178, *ubi supra*, under sec. 184, is to be followed, this clause 185 should be repealed.

186. If the facts or matters alleged in an indictment for any felony under the "*Act respecting Treason and other Offences against the Queen's authority*," amount in law to treason, such indictment shall not, by reason thereof, be deemed void, erroneous or defective; and if the facts or matters proved on the trial of any person indicted for felony under the said Act amount in law to treason, such person shall not, by reason thereof, be entitled to be acquitted of such felony; but no person tried for such felony shall be liable to be afterwards prosecuted for treason upon the same facts.—31 *V.*, *c.* 69, *s.* 8. 11-12 *V.*, *c.* 12, *s.* 7, *Imp.*

See c. 146, p. 30, *ante.*

187. The jury empanelled to try any person for treason or felony shall not be charged to inquire concerning his lands, tenements or goods, nor whether he fled for such treason or felony.—32-33 *V.*, *c.* 29, *s.* 53.

This is the 7-8 Geo. IV., c. 28, s. 5 of the Imperial Statutes.

By the old English law, flight by any one accused of a crime was an offence, and in treason and felony, if the jury found that the prisoner "had fled for it," this finding carried the forfeiture of his goods and chattels, whether found guilty or acquitted of the crime charged. Long before being specially abolished by Parliament, the question "did he fly for it" had become a mere form of no consequence, as the jury always found against the flight.—4 *Blackstone*, 387; 1 *Chit.* 731.

188. If any person tried for the murder of any child is acquitted thereof, the jury by whose verdict such person is acquitted may find, in case it so appears in evidence, that the child had recently been born, and that such person did, by some secret disposition of such child or of the dead body of such child, endeavor to conceal the birth thereof, and thereupon the court may pass such sentence as if such person had been convicted upon an indictment for the concealment of birth.—32-33 *V.*, *c.* 20, *s.* 61, *part.* 24-25 *V.*, *c.* 100, *s.* 60, *Imp.*

See p. 221, *ante*, under s. 49 of c. 162.

Cases have not unfrequently occurred where endeavors have been made to conceal the birth of children, and there has been no evidence to prove that the mother participated in those endeavors, though there has been sufficient evidence that others did so, and under the former enactments, under such circumstances, all must have been acquitted. The present clause is so framed as to include every person who uses any such endeavor, and it is quite immaterial under it whether there be any evidence against the mother or not.

Under the former enactments a person assisting the mother in concealing a birth would only have been indictable as an aider or abettor; but a person so assisting would come within the terms of this clause as a principal.

The terms of the former enactments were "by secret

burying or otherwise disposing of the dead body," and on these terms many questions had arisen. See *R.* v. *Snell*, 2 *M. & Rob.* 44; *R.* v. *Watkins*, 1 *Russ.* 777; *R.* v. *Ash*, 2 *M. & Rob.* 294; *R.* v. *Bell*, ib.; *R.* v. *Halton*, ib.; *R.* v. *Jones*, ib.; *R.* v. *Goldthorpe*, 2 *Moo. C. C.* 240; *R.* v. *Perry*, *Dears.* 471. Under this clause "any secret disposition" is sufficient.

Under the former enactments the mother alone could be convicted of this offence where she was tried for the murder of her child. Under this clause any person tried for the murder of a child may be convicted of this offence, whether the mother be convicted or not.—*Greaves' note to this section and to s.* 49 *of c.* 162, p. 221, *ante.*

189. If, upon the trial of any indictment for any felony, except in cases of murder or manslaughter, the indictment alleges that the accused did wound *or inflict grievous bodily harm* on any person with intent to maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, or with the intent to resist or prevent the lawful apprehension or detainer of any person, and the jury is satisfied that the accused is guilty of the wounding, or inflicting grievous bodily harm, charged in the indictment, but is not satisfied that the accused is guilty of the felony charged in such indictment, the jury may acquit of the felony, and find the accused guilty of unlawfully and maliciously wounding, *or inflicting grievous bodily harm;* and such accused shall be liable to three years' imprisonment.—32-33 *V. c.* 20, *s.* 19, *part.* 14-15 *V., c.* 19, *s.* 5, *Imp.*

The words in *italics* are not in the Imperial Act.

In *R.* v. *Ward*, 12 *Cox*, 123, the indictment charged a felonious wounding with intent to do grievous bodily harm. The jury returned a verdict of unlawful wounding, under 14-15 V., c. 19, s. 5 (s. 189, *supra*). Upon a case reserved, it was held that the words "*maliciously and*" must be understood to precede the word unlawfully in this section, and that to support the verdict the act must have been done maliciously as well as unlawfully.

Greaves, in an article on this case, 1 *Law Magazine* 379, censures severely this ruling. According to him, a new offence, that of unlawful wounding, was created by that clause, and the word *maliciously* has been purposely omitted from it. In a preceding number of the same magazine, p. 269, an anonymous writer attacks the decision in *Ward's Case* from another point of view. The shooting was certainly proved not to have been intended to strike the prosecutor, but the court, by twelve judges against three, found that there was proof of malice sufficient to support the conviction. On this appreciation of the facts of the case, this anonymous writer censures the judgment, at the same time admitting its correctness, so far as the court held the *maliciously* as necessary as the *unlawfully* under this clause, though the word *maliciously* had been dropped in the statute. It thus appears that the question is not very well settled in England, so far.

This enactment applies to a robbery with wounding under s. 34 of the Larceny Act, p. 331, *ante.*—*R.* v. *Miller*, 14 *Cox*, 356, has no application in Canada.

The defendant may also be found guilty of a common assault or of attempting to commit the offence charged.—See remarks under s. 14, c. 162, p. 163, *ante.*

On motion to discharge a prisoner convicted before a Police Magistrate, on habeas corpus, where the conviction charged that the prisoner did "unlawfully and maliciously cut and wound one Mary Kelly, with intent then and there to do her grevious bodily harm."

Held, that the addition of the words "with intent to do grevious bodily harm" did not vitiate the conviction, and that the prisoner might be lawfully convicted of the statutory misdemeanor of malicious wounding.

Held, also, that imprisonment at hard labor for a year

was properly awarded under 38 V., c. 47.—*The Queen* v. *Boucher*, 8 *P. R. (Ont.)* 20. *Affirmed on appeal*, 4 *Ont. App. R.* 191.

190. If, upon the trial of any person for unlawfully and maliciously administering to or causing to be administered to or taken by any other person, any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, the jury is not satisfied that such person is guilty of such felony, but is satisfied that he is guilty of the misdemeanor of unlawfully and maliciously administering to, or causing to be administered to or taken by such person, any poison or other destructive or noxious thing, with intent to injure, aggrieve or annoy such person, the jury may acquit the accused of such felony, and find him guilty of such misdemeanor; and thereupon he shall be punished in the same manner as if convicted upon an indictment for such misdemeanor.—32-33 *V., c.* 20, *s.* 24. 24-25 *V., c.* 100, *ss.* 23, 24, 25, *Imp.*

See p. 167, *ante*, remarks under secs. 17, 18, c. 162.

191. If, upon the trial of any person for any felony whatsoever, the crime charged includes an assault against the person, although an assault is not charged in terms, the jury may acquit of the felony, and find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding, and the person so convicted shall be liable to five years' imprisonment.—32-33 *V., c.* 29, *s.* 51.

See sec. 248, *post*.

From 1837 to 1851, the statute book in England contained an enactment similar to this one, the 7 Will. IV. and 1 V., c. 85, s. 11; but it was found there, that such great difficulties had arisen in its construction, that it was repealed by the 14-15 V., c. 100, s. 10.

On this repealing clause, Greaves says:—

"This section repeals the 11th sec. of the 1 V., c. 85, which had not only led to difficulties in determining to what cases it applied, but had been applied to cases to which it is extremely questionable whether it was ever intended to apply. The power to convict of an attempt to commit

a felony given by the last section (sec. 183 of our Procedure Act), and the power to convict of unlawfully cutting, stabbing, or wounding, given by the 14-15 V., c. 19, s. 5 (section 189, *ante*), are much better calculated to prove beneficial than the repealed section."

In the case of *R.* v. *Bird*, 2 *Den.* 94, on the interpretation of the repealed clause, fourteen judges of the court of Exchequer were divided eight to six, and the Chief Justice of England, Lord Campbell, who was one of the minority, closed his remarks on the case by saying: "I hope I may, without impropriety, express a wish that the Legislature will speedily repeal or explain the enactment which has caused such confusion. Of course, I am ready to abandon the construction of it for which I have been contending, and most respectfully and submissively to be governed by the opinion of my learned brethren who differ from me; but I have not been able to gather from them any clear and certain rule for my future guidance, and I am afraid that without the interference of Parliament, notwithstanding our best efforts to be unanimous, we ourselves, as well as others, may again find it difficult to anticipate the result of our deliberations."

This was on the 12th February, 1851, and on the 7th August of the same year, Parliament repealed the objectionable clause. In Ontario, it has been held that under this clause a verdict of assault upon an indictment for murder or manslaughter is not legal: *R.* v. *Ganes*, 22 *U. C. C. P.* 185; *R.* v. *Smith*, 34 *U. C. Q. B.* 552, whilst in Quebec, in *R.* v. *Carr*, 1872, a verdict of assault in a case of manslaughter has been given, and received by Chief Justice Duval.

The following are the most important decisions in England on the interpretation of this clause.

In a joint indictment for felony, one may be found guilty of the felony, and the other of assault under this clause.—*R.* v. *Archer*, 2 *Moo. C. C.* 283. In an indictment for felony, a conviction cannot be given under this clause of an assault completely independent and distinct, but only of such an assault as was connected with the felony charged.—*R.* v. *Gutteridge*, 9 *C. & P.* 471; and this interpretation was admitted as undoubtedly right in *R.* v. *Phelps*, 2 *Moo. C. C.* 240 (see *post*), and by the fourteen judges in *R.* v. *Bird*. The case of *R.* v. *Pool*, 9 *C. & P.* 728, where Baron Gurney held that if a felony was charged and a misdemeanor of an assault proved, the defendant might be convicted of the assault, although that assault should not be connected with the felony, stands, therefore, overruled. In *R.* v. *Boden*, 1 *C. & K.* 395, it was held that on an indictment for assaulting with intent to rob, if that intent is negatived by the jury, the prisoner may be convicted of assault under this enactment. In *R.* v. *Birch*, 1 *Den.* 185, upon a case reserved, it was held that upon an indictment for robbery, the defendant, under this clause, may be found guilty of a common assault. The judges thought, upon consulting all the authorities, that this enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault. See also *R.* v. *Ellis*, 8 *C. & P.* 654. But they were of opinion that, in order to convict of an assault under this section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the crown prosecutes as a felony by the indictment. And it was suggested that it would be prudent that all indictments for felony including an assault, should state the assault in the indictment. Our clause, however, has the words "although an assault be not charged in terms" which were not in the English act.

In *R.*v. *Greenwood*, 2 *C. & K.* 339, it was held by Wightman, J., that if on an indictment for robbery with violence the robbery was not proved, the prisoner could not be found guilty of the assault only, under this clause, unless it appeared that such assault was committed, in the progress of something which, when completed, would be, and with intent to commit, a felony.

In *R.* v. *Reid*, 2 *Den.* 88, it was held by five judges that the verdict of assault allowed by this clause must be for an assault as a misdemeanor, and not for a felonious assault, and this has never since been doubted.

In *R.* v. *St. George*, 9 *C. & P.* 491, the prisoner was charged with attempting to fire a pistol with intent, etc. The question was whether the prisoner could be convicted of an assault committed with his hand prior to having drawn out the pistol. Baron Parke held that the prisoner could only be found guilty of that assault which was involved in and connected with firing the pistol.

In *R.* v. *Phelps*, 2 *Moo. C. C.* 240, the prisoner with others was indicted for murder. It was proved that Phelps, in a scuffle, struck the deceased once or twice and knocked him down; that after this, Phelps went away to his own home and took no further part in the affray; that, about a quarter of an hour afterwards, the deceased, on the same spot, was again assaulted by other parties, and received then an injury of which he died on the spot. On these facts the jury acquitted Phelps of the felony, and found him guilty of the assault. But the judges were unanimously of opinion that the conviction was wrong, as for a

verdict of assault under the clause mentioned, the assault must be such as forms one constituent part of the greater charge of felony, not a distinct and separate assault as this was.

In *R.* v. *Crumpton, C. & M.* 597, Patteson, J., held that, in manslaughter, a jury should not convict a prisoner of an assault unless it conduced to the death of the deceased, even though the death itself was not manslaughter. See also *R.* v. *Connor*, 2 *C. & K.* 518.

In the case of *R.* v. *Bird*, 2 *Den.* 94, already cited, as the final blow to the enactment in question, in England, the court, on the following division, decided that on an indictment for murder or manslaughter, the prisoner, under the said clause, cannot be convicted of an assault :

Against the conviction.	*For the conviction.*
Pollock, C. B.	Lord Campbell, C. J.
Patteson, J.	Jervis, C. J.
Coleridge, J.	Parke, B.
Wightman, J.	Alderson, B.
Cresswell, J.	Maule, J.
Erle, J.	Martin, B.
V. Williams, J.	
Talfourd, J.	

In the case of *R.* v. *Ganes*, 22 *U. C. C. P.* 185, already cited, the court followed the rule laid down by the majority in *R.* v. *Bird*, and decided that, under the said section (191) of our Procedure Act, a verdict of assault cannot be given upon an indictment for murder or manslaughter. It may be remarked that, in this case, Chief Justice Hagarty distinctly said that his own individual opinion was wholly with that of the minority in *R.* v. *Bird*, viz. that, in such cases, a verdict of assault is legal. See also *R.* v. *Smith*, 34 *U. C. Q. B.* 552.

In Quebec, in the cases of *R.* v. *Carr* (2nd case,) *R.* v. *Wright*, *R.* v. *Taylor*, and upon indictments charging either murder or manslaughter, verdicts of "guilty of assault" have been given, and received, unquestioned.

In *R.* v. *Walker (Salacia case,)* Quebec, 1875, for manslaughter, Dorion, C. J., charged the jury that they were at liberty to return a verdict of common assault.

Upon an indictment for rape or for an assault with intent to commit rape, under secs. 37, 38, of c. 162, see p. 197, *ante*, a boy under the age of fourteen years may be convicted of an assault under the said section 191 of the Procedure Act.—*R.* v. *Brimilow*, 2 *Moo. C. C.* 122.

Upon an indictment, under sec. 8, c. 162, p. 147, *ante*, for feloniously assaulting with intent to murder, a verdict of common assault may be given under the said section of the Procedure Act.—*R.* v. *Cruse*, 2 *Moo. C. C.* 53; *R.* v. *Archer*, 2 *Moo. C. C.* 283. If a man has carnal knowledge of a woman by a fraud which induces her to suppose it is her husband, upon an indictment for rape, he must be acquitted of the felony, but may, under the said section of the Procedure Act, be convicted of an assault.—*R.* v. *Saunders*, 8 *C. & P.* 265; *R.* v. *Williams*, 8 *C. & P.* 287. (This is rape now in England by statute of of 1885.)

But to authorize such a verdict, the felony *charged* must necessarily include an assault on the person, and, for instance, on an indictment for administering poison with intent to murder, a verdict of assault cannot be given under this clause. Nor can it be given on an indictment for burglary with intent to ravish.—*R.* v. *Watkins*, 2 *Moo. C. C.* 217; *R.* v. *Dilworth*, 2 *M. & Rob.* 531; *R.* v. *Draper*, 1 *C. & K.* 176; but such a verdict may be given, if the indictment charges an assault, and the wilfully administering of deleterious drugs.—*R.* v. *Button*, 8 *C. & P.* 660.

The authorities on the question are sufficiently clear as to one point, viz., that, under this section of the Procedure Act, in *all* cases of felonies, which include an assault against the person, although an assault be not charged in terms, the jury may acquit of the felony, if such is not proved, and find a verdict of assault against the defendant, if the evidence warrants it; that is to say, if an assault forming part of the very act or transaction which the crown prosecutes as a felony by the indictment has been proved.

It is true that as to indictments for murder or manslaughter, *R.* v. *Phelps* and *R.* v. *Bird*, in England, and *R.* v. *Ganes*, in Ontario, are given by the reporters as ruling, as an abstract principle, that in *no case* of murder or manslaughter a verdict of assault can be given under this section; but a careful consideration of these cases will show that they do not bear such an interpretation.

In the first of these cases, *R.* v. *Phelps*, as already stated, it was decided that, upon an indictment for murder, the defendant cannot, under this clause, be convicted of an assault entirely separate and distinct from the felony charged; it was there proved that when the deceased was killed, when the murder was committed, the defendant was away from the spot and had been gone for a quarter of an hour; the judges decided that, upon this evidence, the defendant could not be convicted of an assault, though an assault had been proved to have been committed by him on the deceased a quarter of an hour before the murder took place. And this ruling has never since been questioned; it is not because a felony involves an assault that the defendant can be convicted of any assault whatever, committed on the same person; if in the course of the evidence, the witnesses happen to disclose crimes

entirely distinct and disconnected from the offence charged, the jury are not thereby authorized to adjudge on anything else but the facts forming part of the crime laid in the indictment. The assault which can be found cannot be any other assault than the one necessarily accompanying the crime charged, and forming an integral part of it, as in *R.* v. *Brimilow; R.* v. *Cruse; R.* v. *Birch, etc., ante.* So much for *R.* v. *Phelps*, which is clearly far from supporting the proposition that a verdict for assault cannot, under any circumstances, be found in cases of murder or manslaughter.

Then comes *R.* v. *Bird.* It is an error to cite this case as deciding anything else than the case of *R.* v. *Phelps.* It is based on the following facts: The prisoners were indicted for the murder of Mary Ann Parsons, by striking and beating her. It was proved on the trial that Mary Ann Parsons' death, on the 4th of January, 1850, was caused *exclusively* by one particular blow on the head, inflicted shortly before her death, but there being no evidence that the fatal blow had been struck by either of the prisoners, they were acquitted; during the course of the trial, it had been proved that the prisoners had committed different assaults on the deceased in the two months preceding her death, but that none of these assaults were connected with her death. The majority of the court held, that on these facts, a verdict of assault could not be given against the prisoners. And why? Because the assaults committed by them on Mary Ann Parsons during the two months preceding her death were not included in the crime charged in the indictment, but were totally different and distinct offences; because the only assault included in the indictment was the particular blow which had caused her death, and as they were found not guilty of having

given that particular blow, they were entitled to a full acquittal, and the jury had not the right to say: "It is true that the assault which caused Mary Ann Parsons' death has not been proved to have been committed by the prisoners, but other assaults previously committed by them on the deceased have been proved, and we will take this occasion to find the defendants guilty of these, though they were only accused, in this case, of the particular blow which caused the death."

It is obvious that this would be trying a man for one offence, and finding him guilty of another. That is what the court refused to do in that case of *R.* v. *Bird*, and a reference, as *infra*, to the remarks of the following judges who form part of the majority will show that they followed *Phelps'* case, without going an inch further:

Talfourd,	2 Den.	pp.	147, 148
Williams,	"	"	157, 158
Cresswell,	"	"	164, 165
Wightman,	"	"	168, 169
Coleridge,	"	"	180, 181
Patteson,	"	"	183, 187

None of these learned judges said that a verdict for assault can never be given on an indictment for murder or manslaughter. Indeed, it will be found that they all appear to think such a result possible.

Wightman, J., distinctly says: "If in the present case, it had appeared that, at the time the mortal injury was received, the prisoners were with the deceased, and had assaulted and beaten her immediately before, but that the evidence raised a doubt whether the mortal injury was occasioned by blows, or by a fall which might be attributed to accident, and on that ground the jury had acquitted the

prisoners of felony, I should think that they might be convicted of assault under the statute, for in that case, the assault proved would have been involved in, and formed part of the act or transaction charged as a felony in the indictment, and prosecuted as such."

And Jervis, C. J. *(one of the minority,)* says: "If it had been proved that the child had not died, it is admitted that the prisoners might have been convicted of assault upon this indictment for murder. If the death resulted from natural causes, it is admitted that the prisoners might have been convicted of assault upon this indictment for murder."

In the Ontario case of *R.* v. *Ganes*, see *ante*, the facts were almost similar to those in *R.* v. *Bird*, and the only ruling in the case is that where upon an indictment for murder, the prisoners are proved to have, at different times *before* the death of the deceased, committed on him various assaults, yet they cannot be found guilty of *these* assaults, and must be acquitted, altogether, if it is proved that these assaults were not connected with the death of the deceased; but, on the contrary, that the deceased died from a burning, with which the prisoners were not connected. Here, as in *Phelps'* and *Bird's* cases, the only question decided is that upon an indictment for murder or manslaughter, the defendant cannot be found guilty of any offence not included in the crime charged, viz., of an assault committed *at another time* than the offence charged, of any other assault than the one which the prosecution *charged as a felony.*

And the judges, who formed the minority in *Bird's* case, did not intend to overrule *R.* v. *Phelps*, but thought one case distinguishable from the other.

But it is said, and this reasoning is adopted by Mr.

Justice Gwynne, in *R.* v. *Ganes*, that, as in murder or manslaughter, the only assault charged in the indictment is the one which conduced to the death of the deceased, if the prisoner is guilty of an assault, he is guilty of the felony, and cannot, in respect of that assault, be convicted of assault merely; and that if the assault proved does not conduce to the death, it is distinct from and independent thereof, and is, therefore, not included in the crime charged; and, therefore, that no verdict of assault can be rendered upon an indictment for homicide, in respect of such an assault.

When different assaults are brought out by the prosecution, in the course of the evidence, as supposed by Erle, J., in his remarks in Bird's case, and as was the case in *R.* v. *Phelps*, *R.* v. *Bird*, and *R.* v. *Ganes*, this opinion seems to be unassailable. But when the defendant is accused of having, on a certain occasion, killed a person, by, for instance, striking him in the chest, cannot the jury say: "We find that, on the occasion specified, the defendant did strike the deceased, but we do not think it proved by the prosecution that the deceased died of this blow." How can it be said that the *crime charged* is the assault connected with the death, and that of the assault connected with the death only the prisoner can be found guilty, or else be acquitted altogether? This reasoning would render the clause wholly inoperative in cases of homicide. And when the clause says "for *any* felony *whatever*," it expressly includes murder or manslaughter. Moreover this interpretation would make the clause say that when a felony is proved, a verdict of assault *can* be returned. This would be absurd, and the law does not say it; quite the contrary, such a finding is allowed only, *if the evidence warrants it.* The clause must be read, in

cases of homicide, as if it said: "On the trial of any person for murder or manslaughter, where the homicide charged includes an assault against the person, although an assault be not charged in terms (and no assault is now, in such cases, charged in terms), the jury may acquit of the felony, and find a verdict of guilty of assault against the defendant, if the defendant's act which the prosecution called a felony has been proved to be only an assault." The clause, indeed, says, in express terms, that in such a case, there must be an acquittal for a part, *i.e.*, "may acquit of the felony," and a conviction for another part, *i.e.*, "may find a verdict of assault," showing the operation it authorizes, of first divesting the act charged against the defendant of the felonious character which the prosecution endeavoured to put upon it, if the evidence warrants it, and secondly, of finding the same act to be an assault, if the evidence warrants it.

Any other interpretation gives to the clause an absurd sense, and the rule is that of two possible interpretations of a statute, the one which gives it a reasonable and practicable sense is to be preferred to any other, which would make it absurd and inoperative.

In a case of *R.* v. *Dingman*, 22 *U. C. Q. B.* 283, it was held that, under s. 66, c. 99, of the Consolidated Statutes of Canada, there could be no conviction for an assault, unless the indictment charged an assault in terms, or a felony necessarily implying an assault; but the insertion of the words "*although an assault be not charged in terms,*" in sec. 191 of the Procedure Act, renders this ruling now inapplicable, if it was ever correct.

In New Brunswick, the repealed statute, 1 Rev. Stat., c. 149, s. 20, enacted that: "Whoever, on a trial for murder or manslaughter, or any other felony which shall

include an assault, shall be convicted of an assault only, shall be imprisoned for any term not exceeding three years, or fined at the discretion of the court."

In *R.* v. *Cregan*, 1 *Hannay*, 36, on an indictment for murder, the jury found the prisoner guilty of an assault only, but that such assault did not conduce to the death of the deceased. The court held this conviction illegal, and not sustained by the above statute.

In *R.* v. *Cronan*, 24 *U. C. C. P.*, 106, the Ontario Court of Common Pleas held that upon an indictment for shooting with a felonious intent, the prisoner, if acquitted of the felony, may be convicted of a common assault, and that to discharge a pistol loaded with powder and wadding, at a person, within such a distance that he might have been hit, is an assault.

In *R.* v. *Goadby*, 2 *C. & K.* 782, it appears to have been held that a verdict of assault cannot be received on an indictment for feloniously stabbing with intent to do grievous bodily harm, but this case seems very questionable, says *Greaves, note d*, 2 *Russ.* 63.

The case of *R.* v. *Dungey*, 4 *F. & F.* 99, where it was held that after an acquittal upon an indictment for rape, the prisoner may be indicted for a common assault, is not law in Canada, under sec. 191 of the Procedure Act.

Held, by Weldon, Wetmore and King, J. J., (Allen, C. J., and Duff, J., dis.), that on an indictment for murder in the short form given in schedule A. to c. 29 of 32-33 V., a prisoner cannot be convicted of an assault under s. 51 of that chapter.

Held, also, by all the judges, that the fact of the prisoner's counsel having, at the trial, consented that he could be convicted, and requested the judge so to direct the jury, did not preclude him from afterwards objecting to the

validity of the conviction on this ground.—*The Queen* v. *Mulholland*, 4 *P. & B. (N. B.)* 512.

Greaves' note to R. v. *Phillips*, 3 *Cox*, 226.

"It may admit of some doubt whether the construction of s. 11 of the 1 V., c. 85, is finally settled. The framer of the clause probably intended that the clause should apply to those cases where, upon an indictment for a felony, including an assault, the jury should acquit on the ground that the felony, although attempted, was not completed. But if such were the intention, the words do not so clearly express it as they ought, as they authorize the jury to convict 'of assault' on any indictment for felony 'where the crime charged shall include an assault.' These words are so general that they might include any assault, whether at the time of the felony charged or not; and the learned judges have therefore been obliged to put some limitation upon them, and the proper limitation seems to be that which has been put upon them by the very learned Baron in *R.* v. *St. George*, namely that the assault must be an assault involved in and connected with the felony charged; and it is submitted that it must be such an assault as is essential to constitute part of the crime charged. A felony including an assault may be said to consist of the assault, the intent to commit the felony, and the actual felony. Thus in robbery there is the assault, the intent to rob, and the actual robbery; and in such a case it is submitted the assault, of which the prisoner may be convicted, must be such an assault as constitutes one step towards the proof of the robbery. Upon this the question arises whether an assault, where the jury negative any intention to commit a felony, is within the section, and it is submitted that it is not, as such an assault cannot be said to be involved in or connected with the felony charged in any manner what-

soever. It is true that an assault is included in the felony but it is an assault coupled with an intent, and if the jury negative the intent, such an intent in no way tends to prove the felony; and it certainly would be a great anomaly if the prisoner were indicted for a felony, and the jury found he had no intention of committing a felony, that he might be sentenced to three years imprisonment and hard labor, while if he had been indicted for the offence of which he was really guilty, he could only be sentenced to three years imprisonment without hard labor *R.* v. *Ellis* (8 *C. & P.* 654), therefore seems deserving of reconsideration, and the more so as it was decided before *R.* v. *Guttridge* (9 *C. & P.* 471), *R.* v. *St. George*, (9 *C. & P.* 483), *R.* v. *Phelps (Gloucester Sum. Ass. M. S. cited* 1 *Russ.* 731). The intention, no doubt, was to punish attempts to commit felonies, including assaults, and it is to be regretted that the provision, instead of being what it is, was not that upon any indictment for felony, if the jury should think that the felony was not completed, they might find the prisoner guilty of an attempt to commit the felony charged in the indictment."

In that case of *R.* v. *Phillips*, four persons were indicted for a felony. Three were found guilty of the felony, and one of common assault.

Under s. 36, c. 162, p. 184, *ante*, common assault is punishable with one year's imprisonment. Under the above sec. 191 of the Procedure Act, an assault found upon an indictment for felony is punishable with five years' imprisonment.

192. If, upon the trial of any person upon an indictment for robbery, it appears to the jury, upon the evidence, that the accused did not commit the crime of robbery, but that he did commit an assault with intent to rob, the accused shall not, by reason thereof, be entitled to be acquitted, but the jury may find him guilty of an assault with intent to rob; and thereupon he shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried, as is herein lastly mentioned, shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried.—32-33 *V., c.* 21, *s.* 40. 24-25 *V., c.* 96, *s.* 41, *Imp.*

See secs. 32-33 of *Larceny Act*, p. 315 *ante*. Under such a verdict, the punishment is as provided for in sec. 33 of the *Larceny Act*, or sec. 34, thereof, if the indictment is under the said clause. See page 331, *ante*.

This clause was introduced in consequence of the case of *R.* v. *Reid*, 2 *Den.* 88. There seems no doubt that on an indictment properly framed, that is to say, charging an assault with intent to rob and a robbery, that the defendant might have been convicted of the assault with intent to rob, just in the same way as upon an indictment for burglary charging a breaking with intent to steal and stealing the defendant may be convicted of breaking with intent to steal. But it was thought better to provide for this case by express enactment, in order to prevent any doubt on the matter—*Greaves' note.*

See *R.* v. *Mitchell*, 2 *Den.* 468; *Dears.* 19.

193. Every one who is indicted for any burglary, where the breaking and entering are proved at the trial to have been made in the day-time, and no breaking out appears to have been made in the night-time, or where it is left doubtful whether such breaking and entering or breaking out took place in the day or night-time, shall be acquitted of the burglary, but may be convicted of the offence of breaking and entering the dwelling-house with intent to commit a felony therein.—32-33 *V., c.* 21, *s.* 57.

This clause is not in the English Act.

See sec. 42, *Larceny Act*, *p.* 365, *ante*.

194. It shall not be available, by way of defence, to a person charged with the offence of breaking and entering any dwelling-house, church, chapel, meeting-house or other place of divine worship, or

any building within the curtilage, school-house, shop, warehouse or counting-house, with intent to commit any felony therein, to show that the breaking and entering were such as to amount in law to burglary: Provided, that the offender shall not be afterwards prosecuted for burglary upon the same facts; but it shall be opened to the court before which the trial for such offence takes place, upon the application of the person conducting the prosecution, to allow an acquittal on the ground that the offence, as proved, amounts to burglary; and if an acquittal takes place on such ground, and is so returned by the jury in delivering its verdict, the same shall be recorded together with the verdict, and such acquittal shall not then avail as a bar or defence upon an indictment for such burglary. —32-33 *V., c.* 21, *s.* 58.

This clause is not in the Imperial Act.

See sec. 42 of *Larceny Act, p.* 365, *ante.*

195. If, upon the trial of any person indicted for embezzlement or fraudulent application or disposition of any chattel, money or valuable security, it is proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury may acquit the accused of embezzlement or fraudulent application or disposition, and find him guilty of simple larceny or larceny as a clerk, servant or person employed for the purpose or in the capacity of a clerk or servant, or as a person employed in the public service, as the case may be, and thereupon the accused shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if, upon the trial of any person indicted for larceny, it is proved that he took the property in question in any such manner as to amount in law to embezzlement or fraudulent application or disposition as aforesaid, he shall not, by reason thereof, be entitled to be acquitted, but the jury may acquit the accused of larceny, and find him guilty of embezzlement or fraudulent application or disposition, as the case may be, and thereupon the accused shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, fraudulent application or disposition; and no person so tried for embezzlement, fraudulent application or disposition, or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny, fraudulent application or disposition, or embezzlement upon the same facts.—32-33 *V., c.* 21, *s.* 74. 24-25 *V., c.* 96, *s.* 72, *Imp.*

See remarks under sec. 52 of *Larceny Act, p.* 383, *ante.*

Also *Stephens' Cr. L., XXXIX*, and *R.* v. *Rudge*, 13 *Cox*, 17.

The distinction between embezzlement and larceny by a servant is so fine that it was thought proper by this section to prevent an acquittal in case upon the trial of an indictment for the one if it should turn out that the offence amounted in point of law to the other. The distinction between the two offences is this, if the servant received the property and converted it to his own use before it came to the possession of the master, the offence is embezzlement. If the property had come to the possession of the master, and the servant afterwards converted it to his own use, it is larceny. Thus, if a shopman received money and converted it to his own use immediately, this was embezzlement; but if he put it in the till or other depository, and afterwards abstracted it, this was larceny. *R.* v. *Grove*, 1 *Moo. C. C.* 447. It is somewhat singular that it should never have been decided whether, upon an indictment for larceny, the defendant might not be convicted of embezzlement; inasmuch as the 7-8 Geo. 4, c. 29, s. 47, enacts, that every person guilty of embezzling any property "shall be deemed to have feloniously stolen the same:" which would seem well to have warranted a conviction for embezzlement upon a count for larceny as a servant.—*Greaves' Note.*

196. If, upon the trial of any person indicted for obtaining from any other person, by any false pretence, any chattel, money or valuable security, with intent to defraud, it is proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts. —32-33 *V., c.* 21, *s.* 93, *part.* 24-25 *V., c.* 96, *s.* 88, *Imp.*

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

any building within the curtilage, school-house, shop, warehouse or counting-house, with intent to commit any felony therein, to show that the breaking and entering were such as to amount in law to burglary: Provided, that the offender shall not be afterwards prosecuted for burglary upon the same facts; but it shall be opened to the court before which the trial for such offence takes place, upon the application of the person conducting the prosecution, to allow an acquittal on the ground that the offence, as proved, amounts to burglary; and if an acquittal takes place on such ground, and is so returned by the jury in delivering its verdict, the same shall be recorded together with the verdict, and such acquittal shall not then avail as a bar or defence upon an indictment for such burglary. —32-33 *V., c.* 21, *s.* 58.

This clause is not in the Imperial Act.

See sec. 42 of *Larceny Act, p.* 365, *ante.*

195. If, upon the trial of any person indicted for embezzlement or fraudulent application or disposition of any chattel, money or valuable security, it is proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury may acquit the accused of embezzlement or fraudulent application or disposition, and find him guilty of simple larceny or larceny as a clerk, servant or person employed for the purpose or in the capacity of a clerk or servant, or as a person employed in the public service, as the case may be, and thereupon the accused shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if, upon the trial of any person indicted for larceny, it is proved that he took the property in question in any such manner as to amount in law to embezzlement or fraudulent application or disposition as aforesaid, he shall not, by reason thereof, be entitled to be acquitted, but the jury may acquit the accused of larceny, and find him guilty of embezzlement or fraudulent application or disposition, as the case may be, and thereupon the accused shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, fraudulent application or disposition; and no person so tried for embezzlement, fraudulent application or disposition, or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny, fraudulent application or disposition, or embezzlement upon the same facts.—32-33 *V., c.* 21, *s.* 74. 24-25 *V., c.* 96, *s.* 72, *Imp.*

See remarks under sec. 52 of *Larceny Act, p.* 383, *ante.*

Also *Stephens' Cr. L., XXXIX*, and *R.* v. *Rudge*, 13 *Cox*, 17.

The distinction between embezzlement and larceny by a servant is so fine that it was thought proper by this section to prevent an acquittal in case upon the trial of an indictment for the one if it should turn out that the offence amounted in point of law to the other. The distinction between the two offences is this, if the servant received the property and converted it to his own use before it came to the possession of the master, the offence is embezzlement. If the property had come to the possession of the master, and the servant afterwards converted it to his own use, it is larceny. Thus, if a shopman received money and converted it to his own use immediately, this was embezzlement; but if he put it in the till or other depository, and afterwards abstracted it, this was larceny. *R.* v. *Grove*, 1 *Moo. C. C.* 447. It is somewhat singular that it should never have been decided whether, upon an indictment for larceny, the defendant might not be convicted of embezzlement; inasmuch as the 7-8 Geo. 4, c. 29, s. 47, enacts, that every person guilty of embezzling any property "shall be deemed to have feloniously stolen the same:" which would seem well to have warranted a conviction for embezzlement upon a count for larceny as a servant.—*Greaves' Note.*

196. If, upon the trial of any person indicted for obtaining from any other person, by any false pretence, any chattel, money or valuable security, with intent to defraud, it is proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts. —32-33 *V., c.* 21, *s.* 93, *part.* 24-25 *V., c.* 96, *s.* 88, *Imp.*

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

197. If, upon the trial of any person for any misdemeanor, under any of the provisions of sections sixty to seventy-six both inclusive, of "*The Larceny Act*," it appears that the offence proved amounts to larceny, he shall not by reason thereof be entitled to be acquitted of the misdemeanor.—32-33 *V.*, *c.* 21, *s.* 92, *part.* 20-21 *V.*, *c.* 54, *s.* 14, *Imp.* (repealed).

This clause is not in the Imperial Act.

See sect. 184 of this act, *ante*, which covers this same enactment.

198. If, upon the trial of any person for larceny, it appears that the property taken was obtained by such person by fraud, under circumstances which do not amount to such taking as constitutes larceny, such person shall not by reason thereof be entitled to be acquitted, but the jury may acquit the accused of larceny, and find him guilty of obtaining such property by false pretences, with intent to defraud, if the evidence proves such to have been the case, and thereupon the accused shall be punished in the same manner as if he had been convicted upon an indictment for obtaining property by false pretences, and no person so tried for larceny as aforesaid shall be afterwards prosecuted for obtaining property by false pretences upon the same facts.—32-33 *V.*, *c.* 21, *s.* 99.

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

Sec. 196, *ante*, is the converse of this Sec. 198.

This very important clause is not in the English Act. It was in the 14-15 V., c. 100, as the bill was introduced, but was struck out. In *R.* v. *Adams*, 1 *Den.* 38, the judges held the conviction wrong, because the indictment was for larceny, and the facts established an obtaining by false pretences; now, under the above clause, the jury, in such a case, may find the defendant guilty of the obtaining by false pretences.

See *Stephens' Cr. L.*, *XXXIX*.

199. If any indictment containing counts for feloniously stealing any property, and for feloniously receving the same, or any part or parts thereof, knowing the same to have been stolen, has been preferred and found against any person, the prosecutor shall not be put to his election, but the jury may find a verdict of guilty, either of stealing the property or of receiving the same, or any part or parts thereof, knowing the same to have been stolen; and if such indictment has been preferred and found against two or more persons, the jury may find all or any of the said persons guilty either of stealing the property or receiving the same, or any part or parts thereof, knowing the same to have been stolen, or may find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same, or any part or parts thereof, knowing the same to have been stolen.—32-33 *V.*, *c.* 21, *s.* 101, *part.* 24-25 *V.*, *c.* 96, *s.* 92, *Imp.*

See sec. 82, *et seq.* of Larceny Act, p. 443, *ante*.

The prisoner was convicted of receiving stolen goods on an indictment containing two counts, one for stealing the goods and the other for receiving them knowing them to have been stolen. He had, on a former day in the same circuit, been indicted for stealing the same goods as those which he was charged with stealing by the first count of the present indictment. A jury was impannelled and the trial of the prisoner begun, but in consequence of it appearing by the testimony that the prisoner could not be convicted for larceny, the clerk of the crown, who was conducting the prosecution by direction of the attorney general, entered a *nolle pros.*, and then sent another bill before the grand jury containing a count for receiving, being the indictment on which the conviction took place, and on the second trial he consented that the prisoner should be acquitted of the charge of stealing alleged in the first count, and he was acquitted accordingly,—

Held, on a case reserved.

1. That the clerk of the crown had authority to enter a *nolle pros.*

2. That a *nolle pros.* being entered prisoner could be again indicted for the same offence.

3. Even admitting that the clerk of the crown had no authority to enter a *nolle pros.*, a conviction upon the count for receiving would be good, each count being a separate indictment by itself.—The *Queen* v. *Thornton*, 2 *P. & B. (N. B.)* 140.

200. If, upon the trial of two or more persons indicted for jointly receiving any property, it is proved that one or more of such persons separately received any part or parts of such property, the jury may convict, upon such indictment, such of the said persons as are proved to have received any part or parts of such property.—32-33 *V.*, *c.* 21, *s.* 103. 24-25 *V.*, *c.* 96, *s.* 94, *Imp.*

See sec. 82 *et seq.* of Larceny Act, p. 443, *ante.*

201. See under sec. 85, of Larceny Act, p. 452, *ante.*

202. If, upon the trial of any indictment for larceny, it appears that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor or counsel for the prosecution shall not, by reason thereof, be required to elect upon which taking he will proceed, unless it appears that there were more than three takings, or that more than six months elapsed between the first and the last of such takings; and in either of such last mentioned cases the prosecutor or counsel for the prosecution shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six months from the first to the last of such takings.—32-33 *V.*, *c.* 21, *s.* 6. 24-25 *V.*, *c.* 96, *s.* 6, *Imp.*

The word "month" in this clause means a calendar month. Interpretation Act, c. 1, Rev. Stat.

The effect of the above and the preceding section is to restrain the power of the court with respect to the doctrine of election. The court cannot now put the prosecutor to his election where the indictment charges three acts of larceny within six months, or where the evidence shows that the property was not stolen at more than three different times, and that no more than six months had elapsed between the first and last of such times. But, on the other

hand, the court is not bound by the above section to put the prosecutor to his election in other cases, but is left to its discretion, according to the old practice at common law. —*R.* v. *Jones*, 2 *Camp.* 131; *R.* v. *Heywood*, *L. & C.* 451.

By means of a secret junction pipe with the main of a gas company, a mill was supplied with gas, which did not pass through the gas meter, and which was consumed without being paid for. This continued to be done for some years. *Held*, on an indictment for stealing 1000 cubic feet of gas on a particular day, the entire evidence might be given, as there was one continuous act of stealing all the time, and that section 6 of the Larceny Act, section 202, *supra*, as to the prosecutor's electing on three separate takings within six months, did not apply.—*R.* v. *Firth*, 11 *Cox* 234.

An indictment charged an assistant to a photographer with stealing on a certain day divers articles belonging to his employer. It did not appear when the articles were taken, whether at one or more times, but only that they were found in the prisoner's possession on the 17th of January, 1870, and that one particular article could not have been taken before March, 1868; but the prosecution abandoned the case as to this article: *Held*, that this was not a case in which the prosecutor should be put to elect upon which articles to proceed, under this section.—*R.* v. *Henwood*, 11 *Cox*, 526.

On this clause, Greaves remarks:

"Formerly it very often happened on the trial of an indictment alleging the stealing of a number of articles at the same time, that it turned out that they had been taken at different times, in which case the prosecutor was usually compelled to elect some single taking; such election being required to be made on the spur of the moment sometimes

led to improper acquittals. The present section is intended to afford a remedy for such cases, and to place such cases in the same position as the cases provided for by the previous section. When, therefore, it appears on the trial of an indictment for stealing a number of goods at the same time, that the goods were taken at different times, the prosecutor is not to be put to elect to proceed on any particular taking, unless it appear that there were more than three takings, or that more than six calendar months intervened between the first and last of such takings, in which case he is to elect such takings, not exceeding three, within the period of six calendar months from the first to the last of such takings. A suggestion has been made, that in some extraordinary cases this may unduly limit the evidence on the part of the prosecution, as it is said that evidence of only three takings will be admissible. This is a fallacy; the clause confines the prosecutor to *proceeding to obtain a conviction* for three takings, but it does not at all interfere with the admissibility of any evidence that may in the opinion of the court tend to explain the nature and character of any of the takings. If, therefore, a case should occur where a doubt arose whether the evidence as to one or more takings shewed that it was felonious, there can be no doubt that evidence of other takings would be admissible for the purpose of removing such doubt precisely in the same way as heretofore, but not otherwise. *See R.* v. *Bleasdale*, 2 *C. & K.* 765. In fact the clause empowers the prosecutor to proceed for three takings instead of one, without in any respect otherwise altering the evidence that may be admissible."

When it appears by the evidence that the felonious receiving was one continuous act during a certain period of time, extending over two years, the court will not compel the prosecutor to elect, even if it be proved that some of the articles received by the accused were so received at divers fixed dates extending over more than six months, and on more than three occasions.—*R.* v. *Suprani*, 13 *R. L.* 577, 6 *L. N.* 269.

203. When proceedings are taken against any person for having received goods, knowing them to be stolen, or for having in his possession stolen property, evidence may be given, at any stage of the proceedings, that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property which forms the subject of the proceedings taken against him to be stolen: Provided, that not less than three days' notice in writing has been given to the person accused, that proof is intended to be given of such other property stolen within the preceding period of twelve months, having been found in his possession; and such notice shall specify the nature or description of such other property, and the person from whom the same was stolen.—40 *V.*, *c.* 26, *s.* 3. 34-35 *V.*, *c.* 112, *s.* 19, *Imp.*

See remarks under secs. 82, 83, 84 of *Larceny Act*, p. 443, *ante*.

The cases of *R.* v. *Oddy*, 2 *Den.* 264; *R.* v. *Dunn*, 1 *Moo. C. C.* 146; *and R.* v. *Davis*, 6 *C. & P.* 177, are not now law since the above enactment.

Upon an indictment for receiving stolen goods, evidence may be given under this section that there was found in the possession of the prisoner other property stolen within the preceding twelve months, although such other property is the subject of another indictment against him.—*R.* v. *Jones*, 14 *Cox*, 3.

In order to show guilty knowledge, under this section, it is not sufficient merely to prove that "other property stolen within the preceding period of twelve months" had at some time previously been dealt with by the prisoner but it must be proved that such "other property"

was found in the possession of the prisoner at the time when he is found in possession of the property which is the subject of the indictment.—*R.* v. *Drage*, 14 *Cox*, 85; *R.* v. *Carter*, 15 *Cox*, 448.

204. When proceedings are taken against any person for having received goods, knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession,—then if such person has, within five years immediately preceding, been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen: Provided, that not less than three days' notice in writing has been given to the person accused, that proof is intended to be given of such previous conviction; and it shall not be necessary, for the purposes of this section, to charge in the indictment the previous conviction of the person so accused.—49 *V.*, *c.* 26, *s.* 4. 34-35 *V.*, *c.* 112, *s.* 19, *Imp.*

See *Larceny Act*, secs. 82, 83, 84, *p.* 443, *ante*, and remarks under preceding section.

205. See p. 535, *ante*, under c. 167, "*offences relating to the coin.*"

206. See p. 37, *ante*, c. 147, "*An act respecting riots, etc.*

PROCEEDINGS WHEN PREVIOUS OFFENCE CHARGED.

207. The proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows, that is to say: the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he pleads not guilty, or if the court orders a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if the jury finds him guilty, or if, on arraignment, he pleads guilty, he shall then, and not before, be asked whether he was so previously convicted, as alleged in the indictment, and if he answers that he was so previously convicted, the court may proceed to sentence him accordingly, but if he denies that he was so previously convicted, or stands mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall, for all purposes be deemed to extend to such last mentioned inquiry: Provided, that if upon the trial of any person for any such subsequent offence, such person gives evidence of his good character, the prosecutor may, in answer thereto, give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty is returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.—32-33 *V.*, *c.* 29, *s.* 26, *part.*

See R. v. *Harley*, 8 *L. C. J.* 280.

Also R. v. *Martin*, 11 *Cox*, 343.

R. v. *Thomas*, 13 *Cox*, 52, and remarks under s. 139, *ante*, also, s. 230, *post*.

IMPOUNDING DOCUMENTS.

208. Whenever any instrument which has been forged or fraudulently altered is admitted in evidence, the court or the judge or person who admits the same may, at the request of any person against whom the same is admitted in evidence, direct that the same shall be impounded and be kept in custody of some officer of the court or other proper person, for such period, and subject to such conditions, as to the court, judge or person admitting the same, seems meet.—32-33 *V.*, *c.* 19, *s.* 36.

This clause is not in the Imperial Act. It was taken from the Consolidated Statutes for Upper Canada, *c.* 101, *s.* 2.

DESTROYING COUNTERFEIT COIN.

209. If any false or counterfeit coin is produced in any court, the court shall order the same to be cut in pieces in open court, or in the presence of a justice of the peace, and then delivered to or for the lawful owner thereof, if such owner claims the same.—32-33 *V.*, *c.* 18, *s.* 28.

Not in the Imperial Act.

It applies to all courts, civil and criminal.

WITNESSES AND EVIDENCE.

210. Every witness duly subpœnaed to attend and give evidence at any criminal trial before any court of criminal jurisdiction shall be bound to attend and remain in attendance throughout the trial.—39 *V.*, *c.* 36, *s.* 1.

211. Upon proof to the satisfaction of the judge, of the service of the subpœna upon any witness who fails to attend or remain in attendance, and that the presence of such witness is material to the ends of justice, he may, by his warrant, cause such witness to be apprehended and forthwith brought before him to give evidence and to answer for his disregard of the subpœna; and such witness may be detained on such warrant before the judge or in the common gaol, with a view to secure his presence as a witness, or, in the discretion of the judge, he may be released on a recognizance with or without sureties, conditioned for his appearance to give evidence and to answer for his default in not attending or not remaining in attendance; and the judge may, in a summary manner, examine into and dispose of the charge against such witness, who, if he is found guilty thereof, shall be liable to a fine not exceeding one hundred dollars, or to imprisonment, with or without hard labor, for a term not exceeding ninety days, or to both.—39 *V.*, *c.* 36, *s.* 2.

As to re-calling witnesses, see *R.* v. *Lamère*, 8 *L. C. J.* 181; *R.* v. *Jennings*, 20 *L. C. J.* 291; 2 *Taylor, Ev.*, *par.* 1331.

212. If any witness in any criminal case, cognizable by indictment in any court of criminal jurisdiction at any term, sessions or sittings of any such court in any part of Canada, resides in any part thereof, not within the ordinary jurisdiction of the court before which such criminal case is cognizable, such court may issue a writ of subpœna, directed to such witness, in like manner as if such witness was resident within the jurisdiction of the court; and if such witness does not obey such writ of subpœna, the court issuing the same may proceed against such witness for contempt or otherwise, or bind over such witness to appear at such days and time as are necessary, and upon default being made in such appearance, may cause the recognizances of such witness to be estreated, and the amount thereof to be sued for and recovered by process of law, in like manner as if such witness was resident within the jurisdiction of the court.—32-33 *V.*, *c.* 29, *s.* 59.

213. When the attendance of any person confined in any penitentiary or in any prison or gaol in Canada, or upon the limits of any gaol, is required in any court of criminal jurisdiction in any case cognizable therein by indictment, the court before whom such prisoner is required to attend may, or any judge of such court, or of any superior court or county court, may, before or during any such term or sittings at which the attendance of such person is required, make an order upon the warden of the penitentiary, or upon the sheriff, gaoler or other person having the custody of such prisoner, to deliver such prisoner to the person named in such order to receive him; and such person shall, at the time prescribed in such order, convey such prisoner to the place at which such person is required to attend, there to receive and obey such further order as to the said court seems meet.—32-33 *V.*, *c.* 29, *s.* 60.

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

Sec. 213 renders unnecessary, in criminal matters, the writ of *habeas corpus ad testificandum*. It seems to go very far, and might lead to serious consequences; it, for instance, authorizes a judge of the court of quarter sessions, or of the county court in any part of the Dominion, to order the removal of a prisoner from any other part of the Dominion. Moreover, this removal is not, as in England, to be made under the same care and custody as if the prisoner was brought under a writ of *habeas corpus*, and

by the officer under whose custody the witness is, but by any other person named by the judge in his order, thereby, against all notions on the subject, releasing for a while a prisoner from the custody of his gaoler, who, of course, ceases, *pro tempore*, to be responsible for his safe keeping. The Imperial act on the subject is the 16-17 V., c. 30, s. 9. Though our statute does not expressly require it, an affidavit stating the place and cause of confinement of the witness, and further that his evidence is material, and that the party cannot, in his absence, safely proceed to trial, should be given in support of the application. And if the prisoner be confined at a great distance from the place of trial, the judge will, perhaps, require that the affidavit should point out in what manner his testimony is material. —2 *Taylor, Ev., par.* 1149.

214. No person offered as a witness shall, by reason of any alleged incapacity from crime or interest, be excluded from giving evidence on the trial of any criminal case, or in any proceeding relating or incidental to such case.—32-33 *V., c.* 29, *s.* 62, *and c.* 19, *s.* 54, *part.*

215. Every person so offered shall be admitted and be compellable to give evidence on oath, or solemn affirmation, where an affirmation is receivable, notwithstanding that such person has or may have an interest in the matter in question, or in the event of the trial in which he is offered as a witness, or of any proceeding relating or incidental to such case, and notwithstanding that such person so offered as a witness has been previously convicted of a crime or offence.—32-33 *V., c.* 29, *s.* 63.

These two clauses are taken from the 6-7 V., c. 85, s. 1, of the Imperial statutes.

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

In *R.* v. *Clements* *Toronto*, 1876) for murder, the crown called as a witness a man who had been sentenced to death, but whose sentence had been commuted to one for Penitentiary for life, which he was then serving. Galt, J., (after consulting Hagarty, J.,) admitted his evidence, saying that he would reserve the objection to it, but the prisoner was acquitted.

In the case of *R.* v. *Webb*, 11 *Cox*, 133, Lush, J., *held*, that, notwithstanding the last part of section 215, *ante*, a person under sentence of death is incapable of being a witness. The evidence of such a witness cannot in any case be of much weight, since he is not liable to the temporal punishments attached to perjury. See 2, *Taylor Ev., par.* 1169, *note.*

Where several prisoners are jointly indicted, and one of them is convicted, either on his own confession or by verdict, and sentenced before the trial of the other is concluded, the prisoner so sentenced is rendered competent for or against the other.—*R.* v. *Jackson*, 6 *Cox*, 525; *R.* v. *Gallagher*, 13 *Cox*, 61.

In *R.* v. *Winsor*, 10 *Cox*, 276, it was held that where two persons are jointly indicted, but separately tried, one of them may be called as a witness against the other, although the one so called as a witness has not been tried, nor acquitted, nor pleaded guilty to the indictment, nor discharged on a *nolle prosequi*. So in *R.* v. *Payne*, 12 *Cox*, 121, Chief Justice Cockburn said that if prisoners jointly indicted are tried separately, there can be no objection to calling one prisoner as witness for another. See *R.* v. *Jerrett*, 22 *U. C. Q. B.* 499.

In *R.* v. *Deeley*, 11 *Cox*, 607, Mellor, J., allowed two of the prisoners to be called as witnesses on behalf of the third, though they were jointly indicted and tried together.

But this case is overruled, and in *R.* v. *Payne*, 12 *Cox*, 118, it was held, by sixteen judges, that after several prisoners, jointly indicted and tried, are given in charge to the jury, one, whilst in such charge, cannot be called as a witness for another. And in *R.* v. *Thompson*, 12 *Cox*, 202, upon the same principle, it was held that the wife of a prisoner, jointly indicted and given in charge to the jury with other prisoners, cannot be called as a witness by one of the other prisoners whilst the husband is so in charge with them.—*See R.* v. *Boulton*, 12 *Cox*, 87; *R.* v. *Bradlaugh*, 15 *Cox*, 217.

Whenever, therefore, the crown or the defendant intend to call as a witness one of the co-defendants they should ask for a separate trial: if it is only after the defendants have jointly been given in charge to the jury that the evidence of one of the defendants is discovered to be necessary, then, if for the crown, a *nolle prosequi* may be entered, or a verdict of acquittal may be taken, in the discretion of the court, if no evidence has been given against the party who is sought to be made a witness. Then the discharged prisoner becomes competent to testify either for the crown, or for his former co-defendants.—2 *Taylor, Ev., par.* 1223.—*R.* v. *Hambly*, 16 *U. C. Q. B.* 617.

If, on a first trial of two prisoners jointly indicted and tried together, the jury are discharged without giving a verdict, there is nothing to prevent the prosecution from trying only one of the prisoners on the *venire de novo*, and then, on this second trial, to call as a witness, on this issue, the other prisoner.—*R.* v. *Winsor*, 10 *Cox*, 276. See 1 *Starkie, Ev.*, 143, *and* 2 *Starkie*, 797.

As to necessity for evidence of an accomplice to be corroborated.—*R.* v. *Andrews*, 12 *O. R.* 184; following *R.* v. *Stubbs*, 7 *Cox*, 48; *Dears.* 555, and *R.* v. *Beckwith*, 8 *U. C. C. P.* 274.

On a trial for murder the widow of the deceased was the principal witness for the crown, and she testified that prisoner had told her he was planning the murder. There was other evidence of her improper intimacy with the prisoner. The prisoner having been convicted:

Held, that whether she was an accomplice or not the verdict should not be disturbed.—*R.* v. *Smith*, 38 *U. C. Q. B.* 218.

A. and B. were tried together on a joint indictment for assault on a peace officer, and the wife of A. was offered as a witness to disprove the charge against B.:

Held, that her evidence was properly rejected, but had the husband not been on his trial she would have been a competent witness.—*The Queen* v. *Thompson*, 2 *Han. (N. B.)* 71.

216. On the summary or other trial of any person upon any complaint, information or indictment, for common assault, or for assault and battery, the defendant shall be a competent witness for the prosecution or on his own behalf:

2. On any such trial the wife or husband of the defendant shall be a competent witness on behalf of the defendant:

3. If another crime is charged, and the court having power to try the same is of opinion, at the close of the evidence for the prosecution, that the only case apparently made out is one of common assault, or of assault and battery, the defendant shall be a competent witness for the prosecution or on his own behalf, and his wife or her husband, if the defendant is a woman, shall be a competent witness on behalf of the defendant, in respect of the charge of common assault, or assault and battery:

4. Except as in the next preceding sub-section mentioned, this section shall not apply to any prosecution in which any other crime than common assault, or assault and battery, is charged in the information or indictment.—43 *V., c.* 37, *s.* 2.

217. Nothing herein contained shall, except as provided in the next preceding section, render any person who is charged, in any criminal proceeding, with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compel-

lable to give evidence for or against himself, or shall render any person compellable to answer any question tending to criminate himself; and nothing herein contained shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband in any criminal proceeding.—*C. S. U. C.*, *c.* 32, *s.* 18. *R. S. N. S.* (3rd *S.*), *c.* 135, *s.* 44, *part.* 19 *V.* (N. B.), *c.* 41, *s.* 2, *part.* 16 *V.* (*P. E. I.*), *c.* 12, *s.* 13, *part.*

On an indictment for assault and battery occasioning actual bodily harm, the defendant is not a competent witness on his own behalf under sec. 216 of the Procedure Act.—*R.* v. *Richardson*, 46 *U. C. Q. B.* 375. *See R.* v. *Bonter*, 30 *U. C. C. P.* 19, *R.* v. *McDonald*, 30 *U. C. C. P.* 21, *note.*

The fraudulent removal of goods under 11 G. 2, c. 19, s. 4, is a crime, and a conviction therefor was quashed with costs against the landlord, because the defendant had been compelled to testify on the prosecution.—*The Queen* v. *Lackie*, 7 *O. R.* 431.

By the Interpretation Act, the word "herein" in sec. 217 means "in this act." So that the last part of the section seems rather a contradiction of parts of sec. 216.

218. The evidence of any person interested or supposed to be nterested in respect of any deed, writing, instrument or other matter given in evidence on the trial of any indictment or information against any person for any offence punishable under the "*Act respecting Forgery*," shall not be sufficient to sustain a conviction for any of the said offences unless the same is corroborated by other legal evidence in support of such prosecution.—32-33 *V.*, *c.* 19, *s.* 54, *part.*

See *R.* v. *Hughes*, 2 *East P. C.* 1002. *R.* v. *Maguire*, *Ibid.* *The Bank prosecutions*, *R. & R.* 378.

There is no such enactment in England. The act 9 Geo. 4, c. 32, s. 2, was the first enactment enabling the party whose name is forged to be a witness for the prosecution.

219. Any quaker or other person allowed by law to affirm instead of swearing in civil cases, or who solemnly declares that the taking of any oath is, according to his religious belief, unlawful, who is required to give evidence in any criminal case shall, instead of taking an oath in the usual form, be permitted to make his solemn affirmation or declaration, beginning with the words following, that is to say: "I, A. B., do solemnly, sincerely and truly declare and affirm;" which said affirmation or declaration shall be of the same force and effect as if such quaker or other person aforesaid had taken an oath in the usual form.—32-33 *V.*, *c.* 29, *s.* 61.

This enactment corresponds with the 24-25 V., c. 66, 32-33 V., c. 68, and 33-34 V., c. 49, of the Imperial Statutes. The declaration required may be given with the affirmation as follows: "I, A. B., do solemnly, sincerely and truly declare and affirm that the taking of any oath is, according to my religious belief, unlawful, and I do also solemnly, sincerely and truly declare and affirm."—2 *Taylor, Ev., pars.* 1253 *and* 1254.

220. Whenever it is made to appear at the instance of the Crown or of the prisoner or defendant, to the satisfaction of a judge of a superior court, or a judge of a county court having criminal jurisdiction, that any person who is dangerously ill, and who, in the opinion of some licensed medical practitioner, is not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, such judge may, by order under his hand, appoint a commissioner to take in writing the statement on oath or affirmation of such person:

2. Such commissioner shall take such statement and shall subscribe the same and add thereto the names of the persons, if any, present at the taking thereof, and if the deposition relates to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same, with the said addition, to the proper officer of the court for trial at which such accused person has been so committed or bailed; and in every other case he shall transmit the same to the clerk of the peace of the county, division or city in which he has taken the same, and such clerk of the peace shall preserve the same and file it of record, and, upon order of the court or of a judge, transmit the same to the proper officer of the court where the same shall be required to be used as evidence:

3. If afterwards, upon the trial of any offender or offence to which the same relates, the person who made the statement is proved to be dead, or if it is proved that there is no reasonable probability that such person will ever be able to attend at the trial to give evidence, such statement may, upon the production of the judge's order appointing such commissioner, be read in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the commissioner by or before whom it purports to have been taken, and if it is proved to the satisfaction of the court that reasonable notice of the intention to take such statement was served upon the person (whether prosecutor or accused) against whom it is proposed, to be read in evidence, and that such person or his counsel or attorney had, or might have had, if he had chosen to be present, full opportunity of cross-examining the person who made the same.—43 *V., c.* 35 *ss.* 1 *and* 3, *part.* 30-31 *V., c.* 35, *s.* 6, *Imp.*

The notice required by this section is a written notice. Whether it has been a reasonable notice, and whether the opportunity for cross-examination was sufficient or not, are questions for the judge at the trial.—*R.* v. *Shurmer*, 16 *Cox*, 94.

221. Whenever a prisoner in actual custody is served or receives notice of an intention to take such statement as hereinbefore mentioned, the judge who has appointed the commissioner may, by an order in writing, direct the gaoler having the custody of the prisoner to convey him to the place mentioned in the said notice, for the purpose of being present at the taking of the statement; and such gaoler shall convey the prisoner accordingly, and the expenses of such conveyance shall be paid out of the funds applicable to the other expenses of the prison from which the prisoner has been conveyed.—43 *V., c.* 35, *ss.* 2 *and* 3, *part.* 30-31 *V., c.* 35, *s.* 7, *Imp.*

222. If, upon the trial of any accused person, it is proved upon the oath or affirmation of any credible witness, that any person whose deposition has been taken by a justice in the preliminary or other investigation of any charge, is dead, or is so ill as not to be able to travel, or is absent from Canada, and if it is also proved that such deposition was taken in the presence of the person accused, and that he, his counsel or attorney, had a full opportunity of cross-examining the witness, then if the deposition purports to be signed by the justice by or before whom the same purports to have been taken, it shall be read as evidence in the prosecution, without further proof thereof, unless it is proved that such deposition was not in fact signed by the justice purporting to have signed the same.—32-33 *V., c.* 30, *s.* 30, *part* 11-12 *V., c.* 42, *s.* 17, *Imp.*

Doubts have arisen in England whether, under this last cited clause of the Imperial act, the prosecution must have been identically for the same offence as charged against the prisoner, by the depositions against him as taken by the magistrate, and it has even been held that a deposition taken on a charge of assault could not afterwards be received on an indictment for wounding.—*R.* v. *Ledbetter*, 3 *C. & K.* 108. Though in the subsequent case of *R.* v. *Beeston*, *Dears.* 405, it was held by the court of crimiual appeal that a deposition taken on a charge, either of assault and robbery, of doing grievous bodily harm, or of feloniously wounding with intent to do grievous bodily harm, can, after the death of the witness, be read upon a trial for murder or manslaughter, where the two charges relate to the same transaction, yet it seems by the report of the case that if the charges on the two occasions had been substantially different, the deposition would not have been admissible: see *R.* v. *Lee*, 4 *F. & F.* 63; *R.* v. *Radbourne*, 1 *Leach*, 457; *R.* v. *Smith*, *R. & R.* 339; *R.* v. *Dilmore*, 6 *Cox*, 52. But now, in Canada, by sec. 224 of the Procedure Act, all doubts on the question are removed, and a deposition taken on "*any*" charge against a person may be read as evidence in the prosecution of such person for "*any other offence whatsoever*," when the deposition is otherwise admissible.

Prisoner's deposition.—The depositions on oath of a witness legally taken are admissible evidence against him, if he is subsequently tried on a criminal charge. The only exception is in the case of answers to questions, which he

objected to, when his evidence was taken as tending to criminate him, but which he has been improperly compelled to answer.—*R.* v. *Coote, L. R.* 4 *P. C.* 599; 12 *Cox*, 557; *R.* v. *Garbett*, 1 *Den.* 236. Where a witness claims protection on the ground that an answer may criminate him, and he is compelled to answer, the answer is inadmissible whether he claim the protection in the first instance or after having given some answers tending to criminate himself.—*R.* v. *Garbett, ubi supra.* But it seems that the part of the deposition given before such witness has so claimed the protection of the court is admissible.—*R.* v. *Coote, ubi supra.* And the witness need not have been cautioned or put upon his guard as to the tendency of the question, in order to render his answer admissible. Secs. 70 and 71 of the Procedure Act, are applicable to accused persons only and not to witnesses; and sec. 72 of the same Act enacts specially that "nothing herein contained shall prevent any prosecutor from giving in evidence any admission or confession, or other statement made at any time by the person accused or charged, which by law would be admissible as evidence against him." See 3 *Russ.* 418, and *R.* v. *Coote, ubi supra.*

Also, *R.* v. *Wellings*, 14 *Cox*, 105, and *R.* v. *Beriau, Ramsay's App. Cases*, 185.

The fact alone of the witness residing abroad at the time of the trial is not sufficient to admit his deposition.—*R.* v. *Austin, Dears.* 612.

On a trial for murder, the examination of the deceased cannot be put in evidence, if the prisoner had not the opportunity to cross-examine him, he having knowledge that it was his interest to do so.—*R.* v. *Milloy*, 6 *L. N.* 95.

Depositions not taken in presence of the accused cannot be submitted to the grand jury under sec. 222, Procedure Act.—*R.* v. *Carbray*, 13 *Q. L. R.* 100.

The deposition, regularly taken by the committing magistrate, of a witness, was allowed to be read at the trial, for the reason that a medical man proved that the witness was old, and that he thought, under her state of nervousness, that she would faint at the idea of coming into court, though he was of opinion that she could go to London to see a doctor without difficulty or danger. *Held*, that her deposition ought not to have been received.—*R.* v. *Farrell*, 12 *Cox*, 605; *R.* v. *Thompson*, 13 *Cox*, 181.

The deposition of a witness who has travelled to the assize town, but is too ill to attend court, may be read before the grand jury.—*R.* v. *Wilson*, 12 *Cox*, 622; *R.* v. *Gerrans*, 13 *Cox*, 158; *R.* v. *Goodfellow*, 14 *Cox*, 326.

Depositions taken abroad under the Merchant Shipping Act may be received in evidence, if the witness cannot be had.—*R.* v. *Stewart*, 13 *Cox*, 296.

Too much importance ought not to be attached to the variations between what a witness says at the trial and what his deposition before the magistrate makes him say, if there is a substantial concordance between both.—*R.* v. *Wainwright*, 13 *Cox*, 171.

On a charge of murder, to prove malice or motive against the prisoner, the deposition of the deceased against him, taken before the magistrates on another charge, was held admissible.—*R.* v. *Buckley*, 13 *Cox*, 293; *R.* v. *Williams*, 12 *Cox*, 101.

Upon a prosecution for uttering forged notes, the deposition of one S., taken before the Police Magistrate on the preliminary investigation, was read upon the following proof that S. was absent from Canada. R. swore that S. had, a few months before, left his (R.'s) house where she (S.) had, for a time, lodged; that she had since twice heard from her in the U. S. but not for six months. The chief

constable of Hamilton, where the prisoner was tried, proved ineffectual attempts to find S., by means of personal inquiries in some places, and correspondence with the police of other cities. S. had for some time lived with the prisoner as his wife:

Held, upon a case reserved, Cameron, J., dis., that the admissibility of the deposition was in the discretion of the judge at the trial, and that it could not be said that he had wrongfully admitted it.—*The Queen* v. *Nelson*, 1 *O. R.* 500.

223. The statement made by the accused person before the justice may, if necessary, upon the trial of such person, be given in evidence against him without further proof thereof, unless it is proved that the justice purporting to have signed the same did not in fact sign the same.—32-33 *V.*, *c.* 30, *s.* 34. 11-12 *V.*, *c.* 42, *s.* 18, *Imp.*

See *The Queen* v. *Soucie*, under sec. 4 of c. 168, p. 565, *ante*. This section must be read in connection with secs. 70 and 71 of the Procedure Act, p. 688, *ante*.

224. Depositions taken in the preliminary or other investigation of any charge against any person may be read as evidence in the prosecution of such person for any other offence whatsoever, upon the like proof and in the same manner, in all respects, as they may, according to law, be read in the prosecution of the offence with which such person was charged when such depositions were taken.—32-33 *V.*, *c.* 29, *s.* 58.

The deposition on oath of a witness is evidence against him on his trial if he is subsequently charged with a crime.—*R.* v. *Coote*, 12 *Cox*, 557; *L. R.* 4 *P. C.* 599. See *R.* v. *Buckley*, *ante*, under sec. 222, and remarks under that section.

225. A certificate, containing the substance and effect only, omitting the formal part, of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court whereat the indictment was tried, or among which such indictment has been filed, or by the deputy of such clerk or other officer, shall, upon the trial of an indictment for perjury or subornation of perjury, be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same.—32-33 *V.*, *c.* 23, *s.* 11. 14-15 *V.*, *c.* 100, *s.* 22, *Imp.*

It is to be observed that this section is merely remedial, and will not prevent a regular record from being still admissible in evidence, and care must be taken to have such record drawn up in any case where the particular averments in the former indictment may be essential.—*Lord Campbell's Acts, by Greaves*, 27.

Before the same court, though not during the same term, the production by the officer of the court of the indictment with the entries thereon and the docket entries is sufficient. —*R.* v. *Newman*, 2 *Den.* 390. But the record or a certificate under the above section are necessary when before another court.—*R.* v. *Coles*, 16 *Cox*, 165.

226. Whenever, upon the trial of any offence, it is necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete on proof of any degree of penetration only.—32-33 *V.*, *c.* 20, *s.* 65.

See sec. 37 of c. 162, p. 197, *ante*.

227. The trial of any woman charged with the murder of any issue of her body, male or female, which, being born alive, would, by law, be bastard, shall proceed and be governed by such and like rules of evidence and presumption as are by law used and allowed to take place in respect to other trials for murder.—32-33 *V.*, *c.* 20, *s.* 62.

This section repeals 21 Jac. 1, c. 27, repealed in England by 43 Geo. 3, c. 58. By the repealed act, if the mother of an illegitimate child endeavored privately to conceal his birth and death, she was presumed to have murdered it, unless she could prove that the child was born dead. Taylor, *on Evidence*, *Note* 7, *p.* 128, justly says that this rule was barbarous and unreasonable.

228. In any prosecution, proceeding or trial for any offence under the eighty-seventh section of "*The Larceny Act*," a timber mark, duly registered under the provisions of the "*Act respecting the Marking of Timber*," on any timber, mast, spar, saw-log, or other description of lumber, shall be *primâ facie* evidence that the same is the property of the registered owner of such timber mark; and possession by any offender, or by others in his employ, or on his behalf, of any such timber, mast, spar, saw-log or other description of lumber so marked, shall, in all cases, throw upon the person charged with any such offence the burden of proving that such timber, mast, spar, saw-log or other description of lumber, came lawfully into his possession, or the possession of such others in his employ or on his behalf as aforesaid.—38 *V.*, *c.* 40, *s.* 1, *part.*

See sec. 87 of *The Larceny Act*, *p.* 457, *ante.*

The act respecting the marking of timber is c. 64 of *R. S. C.*

229. When, upon the trial of any person, it becomes necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of Her Majesty's mint, or other person employed in producing the lawful coin in Her Majesty's dominions or elsewhere, whether the coin counterfeited is current coin, or the coin of any foreign prince, state or country, not current in Canada, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness.—32-33 *V.*, *c.* 18, *s.* 30. 24-25 *V.*, *c.* 99, *s.* 29, *Imp.*

The usual practice is to call as a witness a silversmith of the town where the trial takes place, who examines the coin in court, in the presence of the jury.—*Davis's Cr. L.* 235.

230. A certificate, containing the substance and effect only, omitting the formal part, of any previous indictment and conviction for any felony or misdemeanor, or a copy of any summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court before which the offender was first convicted, or to which such summary conviction was returned, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of such

conviction, without proof of the signature or official character of the person appearing to have signed the same.—32-33 *V.*, *c.* 29, *s.* 26, *part.*

See secs. 139 and 207, *ante*, of which, in the corresponding English sections, this section 230 forms part.

The Act 34-35 V., c. 112, s. 18, Imp., also contains an enactment as to proof of a previous conviction.

231. A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction; and a certificate, as provided in the next preceding section, shall, upon proof of the identity of the witness, as such convict, be sufficient evidence of his conviction, without proof of the signature or the official character of the person appearing to have signed the certificate.—32-33 *V.*, *c.* 29, *s.* 65.

This enactment is taken from the 28 V., c. 18, s. 6, of the Imperial statutes, *An Act for amending the law of evidence and practice on criminal trials.*

Questions tending to expose the witness to criminal accusation, punishment or penalty need not be answered; no one can be forced to criminate himself. But this privilege can be invoked only by the witness himself. Nor is the judge bound to warn the witness of his right, though he may deem it proper to do so.—2 *Taylor, Ev., par.* 1319; *R.* v. *Coote, L. R.* 4 *P. C.* 599; 12 *Cox*, 557. Whether the answer may tend to criminate the witness, or expose him to a penalty or forfeiture, is a point which the court will determine, under all the circumstances of the case, as soon as the protection is claimed, but without requiring the witness fully to explain how the effect would be produced; for, if this were necessary, the protection which the rule is designed to afford to the witness would at once be annihilated.

It is now decided, contrary to an opinion formerly

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

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

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

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

No doubt cases may arise where the judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a remote date might, in general, be rightly suppressed; for the interests of justice can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked. But the rule of protection should not be further extended; for if the inquiry relates to transactions comparatively recent, bearing directly upon the moral principles of the witness, and his present character for

veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding the answer may disgrace him. It has, indeed, been termed a harsh alternative to compel a witness either to commit perjury or to destroy his own reputation; but, on the other hand, it is obviously most important that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause.—2 *Taylor, Ev., pars.* 1313, 1314, 1315; 3 *Russ.* 543, 547.

By the words "*or refuses to answer*" in the said section (and these words are also in the Imperial statute), it would, at first sight, seem that the witness questioned as to a previous conviction is not bound to answer; but it is obvious that this is not so; and the above quotation from *Taylor* goes to show clearly that the question, if insisted upon by the court, must be answered. Indeed, in a great many cases, the party putting the question could not be expected to be ready, on the spot, to prove the conviction of the witness, otherwise than by himself.

232. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto.—32-33 *V.*, c. 29, *s.* 66.

This is, *verbatim*, sec. 7 of 28 V., c. 18, of the Imperial statutes. Formerly the rule was that if an instrument, on being produced, appeared to be signed by subscribing witnesses, one of them, at least, should be called to prove its execution. The above clause abrogates this rule. It applies only to instruments to the validity of which attestation is not requisite. In 2 *Taylor, Ev., pars.* 1637, *et seq.*, will be found a list of the principal documents requiring attestation in England.

233. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury, as evidence of the genuineness or otherwise of the writing in dispute.—32-33 *V.*, *c.* 29, *s.* 67.

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

234. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, 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.* 68.

This is sec. 3 of the 28-29 V., c. 18, of the Imperial Statutes, *an Act for amending the law of evidence and practice on criminal trials.*

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

The word *adverse* in the above clause does not mean merely *unfavorable*, but *hostile*; 2 *Taylor, Ev., par.* 1282. However, in *Dear* v. *Knight*, 1 *F. & F.* 433, Erle,