CHAPTER IX.

PLEADING.

An indictment grounded upon an offence made by Act of Parliament must, by express words, bring the offence within the substantial description made in the Act. Those circumstances mentioned in the statute to make up the offence shall not be supplied by any general conclusion *contra formam statuti.*

As to indictments in general, the charge must contain such a description of the injury or crime, that the defendant may know what injury or crime it is which he is called upon to answer; that the jury may appear to be warranted in their conclusions of guilt or innocence upon the premises delivered to them; and that the court may see such a definite injury or crime that they may apply the remedy or punishment which the law prescribes. The certainty essential to the charge consists of two parts—the matter to be charged, and the manner of charging it. As to the matter to be charged, whatever circumstances are necessary to constitute the crime imputed must be set out, and all beyond are surplusage. (*a*)

Where an offence is created by statute, it is the safest rule to describe the offence in the very words used in the statute, and the courts are generally averse to support indictments where other words have been substituted. (*b*)

Where a statute uses the word "maliciously" in describing an offence, it is not sufficient to allege that it was done "feloniously," as the former expression is not included in the latter. Where a statute uses the words "wilfully and maliciously," and the act is laid as done "unlawfully, mali-

(*a*) *Reg.* v. *Tierney*, 29 U. C. Q. B. 184-5, per *Morrison*, J.
(*b*) *Reg.* v. *Jope*, 3 Allen, 162, per *Carter*, C. J.

ciously, and feloniously," the word "wilfully" being omitted, the indictment is insufficient; for where both the words "wilfully" and "maliciously" are used, they must be understood as descriptive of the offence, and therefore necessary in describing the offence in an indictment. (*c*) But an allegation that the prisoner did "feloniously stab, cut and wound," instead of did "unlawfully and maliciously," etc., was held good. (*d*)

It is not sufficient for an indictment to follow the words of a statute where the allegations submit a question of law for the jury to determine. It is not a universal rule that an offence may be described in an indictment in the words of the statute which has created it; for an indictment charging that the defendant falsely pretended certain facts, although in the very language of the statute, was held defective in error, for not averring specifically that the pretences were false. (*e*)

Where a statute creates a new offence, under particular circumstances, without which the offence did not exist, all these circumstances ought to be stated in the indictment. The prisoner should be able to gather from the indictment whether he is charged with an offence at the common law, or under a statute, or, if there should be several statutes applicable to the subject, under which statute he is charged. (*f*)

Where the offence charged is created by any statute, or subjected to a greater degree of punishment by any statute, the indictment shall, after verdict, be held sufficient, if it describes the offence in the words of the statute creating the offence or prescribing the punishment, although they be disjunctively stated, or appear to include more than one offence, or otherwise. (*g*)

It would appear, however, that this does not dispense with the necessity of stating the circumstances under which the

(*c*) *Reg.* v. *Jope*, 3 Allen, 162-3, per *Carter*, C. J.
(*d*) *Reg.* v. *Flynn*, 2 Pugsley & B. 321.
(*e*) *Reg.* v. *Switzer*, 14 U. C. C. P. 477; *Rex* v. *Perrott*, 2 M. & S. 379.
(*f*) *Reg.* v. *Cummings*, 4 U. C. L. J. 188, per *Esten*, V.-C.
(*g*) *Reg.* v. *Baby*, 12 U. C. Q. B. 346; 32 & 33 Vic., c. 20, s. 79.

offence was committed, and without which it could not have been committed. (*h*)

There are numerous instances where the statute being disjunctive, a conjunctive statement is commonly used in an indictment. Thus, the statute 7 & 8 Geo. IV., c. 30, enacts that if any person shall unlawfully and maliciously cut, break, or destroy any threshing-machine, the indictment may charge that the accused did feloniously, unlawfully, and maliciously cut, break, and destroy. So, where the offence by statute was unlawfully or maliciously breaking down, or cutting down, any sea bank or sea wall, the indictment may charge a cutting and breaking down. (*i*) And the indictment will not be bad on the ground of its charging several offences.

In indictments for offences against the persons or property of individuals, the Christian and surname of the party injured must be stated, if the party injured be known. (*j*)

So, in an indictment for publishing an obscene book, it is not sufficient to describe it by its title, but the words thereof alleged to be obscene must be set out; and the omission will not be cured by verdict. (*k*)

An indictment charging a person insolvent with making away with and concealing his goods to defraud creditors, must specify what goods and what value. (*l*) And the same ruling would seem to apply at any rate to the second part of section 110 of 32 & 33 Vic., c. 21.

And where the defendant was indicted in the district of Beauharnois for perjury committed in the district of Montreal, but there was no averment in the indictment that the defendant had been apprehended or that he was in custody at the time of the finding of the indictment, the omission was held fatal, and could not be cured by verdict. (*m*)

(*h*) *Reg.* v. *Cummings*, 4 U. C. L. J. 188, per *Estea*, V.-C.
(*i*) *Reg.* v. *Patterson*, 27 U. C. Q. B. 145-6, per *Draper*, C. J.
(*j*) *Reg.* v. *Quinn*, 29 U. C. Q. B. 163, per *Richards*, C. J.
(*k*) *Bradlaugh* v. *Reg.* L. R. 3 Q. B. D. 607.
(*l*) *Reg.* v. *Patoille*, 4 *Revue Leg.* 131.
(*m*) *Reg.* v. *Lynch*, 20 L. C. J. 187.

An indictment in the statutory form, charging the prisoner with having feloniously and maliciously set fire to, etc., is good without alleging any intent to injure or defraud; (*n*) but such an intention must be shown at the trial, (*o*) and in an indictment for false pretences such an omission would seem to be aided by verdict. (*p*) So would the omission of the false pretences, (*q*) if necessary to be alleged. (*r*)

An indictment charging B. with obtaining by false pretences, from one J. T., two horses with intent to defraud, and that the defendant was present aiding and abetting the said B. the misdemeanor aforesaid to commit, was held good as against the defendant, as charging him as principal in the second degree. (*s*)

An allegation of the crime having been committed upon the sea instead of upon the high seas, is good in arrest of judgment. (*t*)

A conviction charging that the prisoner did "unlawfully and maliciously cut and wound one Mary Kelly with intent then and there to do her grievous bodily harm," though insufficient to charge the felony, yet the court, by rejecting the words "with intent" etc., upheld it as a conviction for the misdemeanor. (*u*) And the omission of the word "company" is cured by verdict. (*v*)

But the omission of the words "was plaintiff" after the name of the plaintiff, in the description of the style of cause in an assignment of perjury, is fatal, before verdict at least. (*w*)

If an indictment for stealing certain articles be maintain-

(*n*) *Reg.* v. *Soucie*, 1 Pugsley & B. 611; *Reg.* v. *Cronin*, Rob. & Jos. Dig. 904.
(*o*) *Reg.* v. *Cronin*, *supra*.
(*p*) *Crawford* v. *Beattie*, 39 U. C. Q. B, 13.
(*q*) *Reg.* v. *Goldsmith*, L. R. 2 C. C. R. 74.
(*r*) See *Reg.* v. *Lavigne*, 4 R. L. 411, as to necessity of alleging the false pretences.
(*s*) *Reg.* v. *Connor*, 14 U. C. C. P. 529.
(*t*) *Reg.* v. *Sprungli*, 4 Q. L. R. 110.
(*u*) *Reg.* v. *Boucher*, 8 U. C. P. R. 20.
(*v*) *Reg.* v. *Foreman*, 1 L. C. L. J. 70.
(*w*) *Reg.* v. *Ling*, 5 Q. L. R. 359.

An indictment in the statutory form, charging the prisoner with having feloniously and maliciously set fire to, etc., is good without alleging any intent to injure or defraud; (*n*) but such an intention must be shown at the trial, (*o*) and in an indictment for false pretences such an omission would seem to be aided by verdict. (*p*) So would the omission of the false pretences, (*q*) if necessary to be alleged. (*r*)

An indictment charging B. with obtaining by false pretences, from one J. T., two horses with intent to defraud, and that the defendant was present aiding and abetting the said B. the misdemeanor aforesaid to commit, was held good as against the defendant, as charging him as principal in the second degree. (*s*)

An allegation of the crime having been committed upon the sea instead of upon the high seas, is good in arrest of judgment. (*t*)

A conviction charging that the prisoner did "unlawfully and maliciously cut and wound one Mary Kelly with intent then and there to do her grievous bodily harm," though insufficient to charge the felony, yet the court, by rejecting the words "with intent" etc., upheld it as a conviction for the misdemeanor. (*u*) And the omission of the word "company" is cured by verdict. (*v*)

But the omission of the words "was plaintiff" after the name of the plaintiff, in the description of the style of cause in an assignment of perjury, is fatal, before verdict at least. (*w*)

If an indictment for stealing certain articles be maintain-

(*n*) *Reg.* v. *Soucie*, 1 Pugsley & B. 611; *Reg.* v. *Cronin*, Rob. & Jos. Dig. 904.
(*o*) *Reg.* v. *Cronin*, *supra*.
(*p*) *Crawford* v. *Beattie*, 39 U. C. Q. B, 13.
(*q*) *Reg.* v. *Goldsmith*, L. R. 2 C. C. R. 74.
(*r*) See *Reg.* v. *Lavigne*, 4 R. L. 411, as to necessity of alleging the false pretences.
(*s*) *Reg.* v. *Connor*, 14 U. C. C. P. 529.
(*t*) *Reg.* v. *Sprungli*, 4 Q. L. R. 110.
(*u*) *Reg.* v. *Boucher*, 8 U. C. P. R. 20.
(*v*) *Reg.* v. *Foreman*, 1 L. C. L. J. 70.
(*w*) *Reg.* v. *Ling*, 5 Q. L. R. 359.

able as to some, the conviction is good, although as to the other goods it cannot be supported. (*x*)

Surplusage, or the allegation of unnecessary matter, will not vitiate an indictment at common law, or on a statute. The unnecessary allegations need not be proved, and may be rejected, provided they are not matters of description, (*y*) and do not alter the meaning of the words requisite to define the offence charged. (*z*) Only material allegations need be proved. (*a*) And where some counts in an indictment charged the destruction of a vessel with intent to prejudice the underwriters, and some without such intent, and the prisoner was found guilty on all the counts, it was held that, if necessary to show the prisoner had knowledge of the insurance, the court could alter the verdict to a finding on the counts which omitted the alleged intent. (*b*)

An indictment which charged A. with having made a false declaration, before a justice, that he had lost a pawnbroker's ticket, whereas he had not lost the ticket, but "had sold, lent, or deposited it with one C.," was held not bad for uncertainty, because the words "had sold, lent, or deposited" were surplusage. (*c*) So the ordinary conclusion of an indictment for perjury, "did wilfully and corruptly commit wilful and corrupt perjury," may be rejected as surplusage. (*d*)

And an allegation that "having made an assignment" in an indictment against an insolvent for having mutilated his books, is surplusage. (*e*) So on an indictment for not keeping a bridge in repair, it was held no objection that the proceedings on the record were in the Court of Queen's Bench for the Province of Ontario, there being no such

(*x*) *Reg.* v. *St. Denis*, 8 U. C. P. R. 16.
(*y*) *Reg.* v. *Bryans*, 12 U. C. C. P. 167, per *Draper*, C. J.
(*z*) *Reg.* v. *Bathgate*, 13 L. C. J. 304, per *Drummond*, J.
(*a*) *Reg* v. *Bryans*, *supra*, 169, per *Richards*, C. J.
(*b*) *Reg.* v. *Tower*, 4 Pugsley & B. 168.
(*c*) *Reg* v. *Parker*, L. R. 1 C. C. R. 225; 39 L. J. (M. C.) 60.
(*d*) *Reg.* v. *Hodgkiss*, L. R. 1 C. C. R. 213, per *Kelly*, C. B.; *Ryalls* v. *Reg.*, 11 Q. B. 781.
(*e*) *Reg.* v. *McLean*, 1 Pugsley & B. 377.

province when they were had; the name of the province being surplusage. (*f*)

It is a universal principle, which runs through the whole criminal law, that it will be sufficient to prove so much of an indictment as charges the defendant with a substantive crime; (*g*) and the 32 & 33 Vic., c. 29, s. 23, enacts that no indictment shall be held insufficient for want of the averment of any matter unnecessary to be proved, or for the insertion of the words "against the form of the statute," instead of the words "against the form of the statutes," or *vice versa*, or for the omission of the same.

The general rule was, that, in indictments for offences created by statute, the conclusion "*contra formam statuti*" was necessary. It was pretty clear, however, that, under the old statutes, the omission of these words was not fatal after verdict, though it might, perhaps, have been on demurrer. (*h*)

The general rule of law is, that no person shall be twice placed in legal peril of a conviction for the same offence. Consequently, on an indictment for any offence, a previous conviction, or acquittal of the same offence, may be a good plea in bar. The true test by which the validity of such a plea may be ascertained is, whether the evidence necessary to sustain the second indictment would have warranted a legal conviction upon the first. (*i*)

But the prisoner must be in legal peril on the first indictment, and unless the first indictment be such that the prisoner might have been convicted upon it, on proof of the facts contained in the second indictment, an acquittal on the first can be no bar to the second. (*j*)

Moreover, with reference to these pleas, when it is said

(*f*) *Reg.* v. *Desjardin Canal Co.*, 27 U. C. Q. B. 374.
(*g*) *Reg.* v. *Bryans*, 12 U. C. C. P. 167, per *Draper*, C. J.
(*h*) *Reg.* v. *Cummings*, 16 U. C. Q. B. 15; confirmed on appeal, 4 U. C. L. J. 182; *Reg.* v. *Tweedy*, 23 U. C. Q. B. 120; per *Draper*, C. J.; and see 32 & 33 Vic., c. 29, ss. 23, 32 and 78.
(*i*) See *Reg.* v. *Magrath*, 26 U. C. Q. B. 385.
(*j*) *Ex parte Estabrooks*, 4 Allen, 280, per *Wilmot*, J.

that a man is twice tried, a trial which proceeds to its legitimate and lawful conclusion by verdict is meant. When a man is said to be twice put in jeopardy, it signifies a putting in jeopardy by the verdict of a jury, and that he is not tried nor put in jeopardy until the verdict comes to pass; because if that were not so, it is clear that in every case of defective verdict a man could not be tried a second time, and yet it is admitted that, in the case of a verdict palpably defective, though the jury have pronounced upon the case, yet it will not avail the party if a second time put on trial. (*k*)

A party is not necessarily in jeopardy when a jury is sworn and evidence given. The true and rational doctrine is that, where a trial proves abortive by reason of no legal verdict having been given, the acquittal is no bar to a subsequent indictment, and a *venire de novo* may be awarded. (*l*)

A party is not in jeopardy, in the legal sense of the word, if there is a verdict against him on a bad indictment. (*m*) The rule means that a man shall not twice be put in peril after a verdict has been returned by the jury, that verdict having been given on a good indictment, and one on which the prisoner could be legally convicted and sentenced. (*n*)

Where a juryman is taken ill, or some unforeseen accident occurs, which would be within the ordinary excepted cases in which a jury may properly be discharged, or the jury give an imperfect verdict, or one which cannot be supported in point of law, a *venire de novo* may be awarded, and the defendant cannot plead *autrefois acquit*, because he has not been in legal jeopardy. (*o*)

The pleas of *autrefois convict* and *autrefois acquit* are the

(*k*) *Reg.* v. *Charlesworth*, 9 U. C. L. J. 49, per *Cockburn*, C. J.; 1 B. & S. 460; 31 L. J. (M. C.) 25; see also *Reg.* v. *Sullivan*, 15 U. C. Q. B. 199.

(*l*) *Ibid.*; 50, per *Wightman*, J.

(*m*) *Ibid.*; 51, per *Crompton*, J.; *Reg.* v. *Green*, 3 U. C. L. J. 19; Dears. & B. 113.

(*n*) *Winsor* v. *Reg.* L. R. 1 Q. B. 311, per *Cockburn*, C. J.; see also *Reg.* v. *Majrath*, 26 U. C. Q. B. 385; *Reg.* v. *Murphy*, L. R. 2 P. C. App. 548, per Sir *Wm. Erle*.

(*o*) *Reg.* v. *Charlesworth*, 9 U. C. L. J. 50, per *Wightman*, J.

only pleas known to the law of England to stay a man from being tried on an indictment or information. (*p*)

If the prisoner might have been convicted upon the first indictment, though, in fact, he was acquitted by a mistaken direction of the judge, he may plead *autrefois acquit.*

If a man commits a burglary, and at the same time steals goods out of the house, if he be indicted for the larceny only and be acquitted, yet he may be indicted for the burglary afterwards, and *e converso*, if indicted for the burglary with intent to commit larceny, and he be acquitted, yet he may be indicted for the larceny, for they are several offences, though committed at the same time. A man, acquitted of stealing the horse, may be convicted of stealing the saddle, though both were done at the same time. (*q*)

It would seem that in all cases where, by our statute law, a prisoner indicted for one offence is liable to be convicted of another, an acquittal or conviction of the former would be a good bar to an indictment for the latter. (*r*) In fact, s. 52 of the 32 & 33 Vic., c. 29, provides that 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.

A conviction for assault, the charge being of assault, by justices in Petty Sessions, at the instance of the person assaulted, and imprisonment consequent thereon, are not, either at common law or under the 32 & 33 Vic., c. 20, s. 45, a bar to an indictment for manslaughter of the person assaulted, should he subsequently die from the effects of the assault. (*s*) The word "cause" in the section, must be read as synonymous with "accusation" or "charge," and in this case, the accusation or charge was the assault; consequently, a conviction therefor was only a bar to a subsequent indictment for the same offence.

(*p*) *Winsor* v. *Reg.* L. R. 1 Q. B. 314, per *Blackburn*, J.; *Reg.* v. *Charlesworth*, *supra*, 49, per *Cockburn*, C. J.

(*q*) *Reg.* v. *Magrath*, 26 U. C. Q. B. 388 *et seq.* per *Draper*, C. J.

(*r*) See 32 & 33 Vic., c. 21, s. 74-99; c. 29, ss. 49, 50 and 51; and *Reg.* v. *Gorbutt*, Dears. & B. 166; 26 L. J. (M. C.) 47.

(*s*) *Reg.* v. *Morris*, L. R. 1 C. C. R. 90.

A conviction for assault in breach of recognizance is no bar to proceedings by *sci. fa.* on the recognizance. (*t*)

But if a party be charged before a justice of the peace with an assault, and he dismiss the complaint, giving a certificate under this clause, the defendant can avail himself of the certificate as a defence to an action for tearing the plaintiff's clothes, on the same occasion. (*u*)

If a plea *autrefois acquit* or *convict* be overruled, the prisoner may plead not guilty, and be tried at the same Court of Oyer and Terminer. (*v*)

A plea of *autrefois convict* is not proved by the production of the record, and verdict endorsed. (*w*)

A plea describing a statute, as passed in the 4th and 5th years of the reign of Queen Victoria, is bad on demurrer. (*x*) It seems a demurrer must be to the entire count or plea, and not to part of it; and if it is good upon the whole, anything else which it contains, which by itself would be insufficient, is mere surplusage. (*y*)

After a demurrer is overruled, to allow a party to plead not guilty is substantially correct, if regarded in what perhaps is the proper view to take of it, as an amendment allowed to the party before final judgment. (*z*)

The first count of an indictment on the Con. Stats. Can., c. 6, s. 20, charged that the defendant, after having made the alphabetical list of persons entitled to vote, etc., made out a duplicate original of the said list, and certified by affirmation to its correctness, and delivered the same to the clerk of the peace, and that in making out the certified list, so delivered to the clerk of the peace, of persons entitled to vote, etc., the defendant did feloniously omit, from said list,

---

(*t*) *Reg.* v. *Harmer*, 17 U. C. Q. B. 555.
(*u*) *Julien* v. *King*, 17 L. C. R. 268.
(*v*) See *Reg.* v. *Magrath*, 26 U. C. Q. B. 385.
(*w*) *Re Warner*, 1 U. C. L. J. N. S. 18, per *Hagarty*, J.
(*x*) *Johnstone* v. *Odell*, 1 U. C. C. P. 406, per *McLean*, J.; *Huron D. C.* v. *London D. C.*, 4 U. C. Q. B. 303.
(*y*) *Mulcahy* v. *Reg.*, L. R. 3 E. & I. App. 329, per Lord *Cranworth*.
(*z*) *Ibid.* 323, per *Willes*, J.

the names, etc., which names, or any or either of them, ought not to have been omitted. The second count was nearly the same as the first, the word "insert" being used where the word "omit" was used in the first. Upon demurrer to the indictment, the court held that the omission charged, having been from the certified list delivered to the clerk of the peace or "duplicate original," the words "said list," referring to the words "the certified list so delivered to the clerk of the peace," was a sufficient description to indentify the list intended.

As to the objection that it did not appear that the persons whose names were charged to have been omitted, etc., were persons entitled to vote, etc., it was held that the words in the indictment were not a direct and specific allegation that those persons were entitled to vote. As to an objection that it was not alleged that the list was made up from the last revised assessment roll, the court held that by the indictment it appeared that the assessment roll referred to was the assessment roll for 1863, and that it was sufficiently stated that the alphabetical list was made up for that year, and that the Crown would be bound to prove such a list; and further, that both counts of the indictment were bad, as they should have shown explicitly how and in what respect these names should or should not have been on the list, by setting out that they were upon, or were not upon, the assessment roll as the case might be, or at any rate were, or were not, upon the alphabetical list. (*a*)

Matter of description, in an indictment, though unnecessarily alleged, must be proved as laid. Therefore, where, in an indictment for assaulting a gamekeeper of the Duke of Cambridge, under 9 Geo. IV., c. 69, s. 2, the Duke was described as "George William Frederick Charles, Duke of Cambridge," and it was proved that "George William" were two of his names, but that he had other names which were not proved, and it was found by the verdict that the jury were satisfied

(*a*) *Reg.* v. *Switzer*, 14 U. C. C. P. 470.

of the identity of the Duke, and the prisoners were convicted, it was held that the conviction was wrong; that under 14 & 15 Vic., c. 100, s. 24, an amendment might have been made at the trial, by which the conviction would have been supported by striking out all the Christian names; but it was now too late, and that the Court of Quarter Sessions were not bound to amend; and that an amendment, by striking out the two names only which were not proved, would have been wrong. (*b*)

An indictment could not be amended at common law without the consent of the grand jury, on whose oath it was found. (*c*)

The 32 & 33 Vic., c. 29, s. 70 *et seq.*, contains provisions as to the amendment of indictments in certain cases.

Any objections for any defect apparent on the face of an indictment must be taken before plea. (*d*) And the "merits of the case," with reference to amendments in section 71, means the justice of the case as regards the guilt or innocence of the prisoner, and "his defence on such merits" means a substantial and not a formal and technical one. (*e*)

It would seem that a defect in laying the property in an indictment might be amended under s. 71. (*f*) And under a section of an English Act somewhat analogous to sec. 71, it was held that the judge had power to amend an indictment for perjury, describing the justices before whom the perjury was committed, as justices for a county, where they were proved to be justices for a borough only. (*g*)

The word "money" was substituted for "nineteen shillings and sixpence," in an indictment on the application of the Crown; (*h*) and in an indictment for arson, the words "with

(*b*) *Reg.* v. *Frost*, 1 U. C. L. J. 135; Dears. 474; 24 L. J. (M. C.) 116.
(*c*) *Re Conklin*, 31 U. C. Q. B. 167, per *Wilson*, J.
(*d*) *Reg.* v. *Flynn*, 2 Pugsley & B. 321.
(*e*) *Reg.* v. *Cronin*, Rob. & Jos. Dig. 904.
(*f*) *Reg.* v. *Jackson*, 19 U. C. C. P. 280; *Reg.* v. *Quinn*, 29 U. C. Q. B. 164, per *Richards*, C. J.
(*g*) *Reg.* v. *Western*, L. R. 1 C. C. R. 122; 37 L. J. (M. C.) 81.
(*h*) *Reg.* v. *Gamble*, L. R. 2 C. C. R. 1.

intent to defraud" were struck out, the evidence on the part of the Crown having failed to show a special intent; (*i*) and where one of the prosecutor's Christian names is omitted, it may be inserted. (*ii*)

The motion to quash must be before the evidence is gone into; (*j*) and the court will not allow the defendant's plea to be withdrawn for the purpose of admitting a demurrer without also allowing the Crown to amend. (*k*)

Where an amendment has once been made, the case must be decided upon the indictment in its amended form. (*l*)

The amendment must in all cases be made before verdict. (*m*) But leave to amend may be granted under the same sections, at any time from the finding of the indictment (*n*) till after counsel have addressed the jury. (*o*)

Upon an amendment of the indictment at the trial, no postponement of the trial will be granted, if the prisoner is not prejudiced in his defence. (*p*) And an application to postpone a trial in consequence of the absence of witnesses, must be supported by special affidavit showing that the witnesses in question are material. (*q*)

Section 72 of the 32 & 33 Vic., c. 29, enacts that after any such amendment the trial shall proceed, whenever the same is proceeded with, in the same manner and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury, and in all other respects as if no such variance had occurred.

A count on an indictment charging a prisoner, under the 32 & 33 Vic., c. 20, s. 52, with unlawfully and carnally knowing

---

(*i*) *Reg.* v. *Cronin*, Rob. & Jos. Dig. 904.
(*ii*) *Cornwall* v. *Reg.*, 33 U. C. Q. B. 106.
(*j*) *Reg.* v. *Bourdon*, 2 *Revue Leg.* 713.
(*k*) *Reg.* v. *McLean*, 1 Pugsley & B. 377.
(*l*) *Reg.* v. *Barnes*, L. R. 1 C. C. R. 45; 35 L. J. (M. C.) 204.
(*m*) *Reg.* v. *Frost*, Dears. 474; 27 L. J. (M. C.) 116; *Reg.* v. *Larkin*, Dears. 365; 23 L. J. (M. C.) 125.
(*n*) *Reg.* v. *Morrison*, 2 Pugsley & B. 682.
(*o*) *Reg.* v. *Fullarton*, 6 Cox, 194; Arch. Cr. Pldg. 207; but see *Reg.* v. *Rymes*, 3 C. & K. 326.
(*p*) *Reg.* v. *Senecal*, 8 L. C. J. 287.
(*q*) *Reg.* v. *Dougall*, 18 L. C. J. 85.

and abusing a girl, and also with an assault at common law, might be objectionable on the ground of duplicity. (*r*)

Counts for different misdemeanors of the same class may be joined in one indictment. (*s*)

Where different felonies are charged in different counts of an indictment, and an objection is taken to the indictment on that ground, before the prisoner has pleaded or the jury are charged, the judge, in his discretion, may quash the indictment; or, if it be not discovered until after the jury are charged, the judge may put the prosecutor to his election on which charge he will proceed. (*t*)

But in one case where the prisoner was convicted on an indictment containing two counts charging separate offences, and sentenced, and the evidence did not sustain the charge on one of the counts, the judgment was arrested. (*u*)

Counts under the 39 Geo. III., c. 85, for embezzling bank notes, might have been joined with counts for larceny at common law, (*v*) and the prosecutor would not, at the opening of his case, have been put to his election as to whether he would proceed on the statutory or common law count, though he would have been limited to one state of facts relating to one single act of offence. (*w*)

But counts ought not to be joined in an indictment against a prisoner for stealing and also for receiving, and the reason is, because they are, in fact, totally distinct offences, and the prisoner cannot be found guilty of both. But when the two facts charged form part of one and the same transaction, and are not repugnant, they may be properly joined, as in indictments for forgery, where one count is inserted for forgery and another for uttering the forged instrument. (*x*)

(*r*) *Reg.* v. *Guthrie*, L. R. 1 C. C. R. 242, per *Bovill*, C. J.
(*s*) *Reg.* v. *Abrahams*, 24 L. C. J. 325.
(*t*) *Young* v. *Reg.*, 3 T. R. 106; *Reg.* v. *Heywood*, L. & C. 451; 33 L. J. (M. C.) 133; Arch. Cr. Pldg. 70.
(*u*) *Reg.* v. *Hathaway*, 6 Allen, 352.
(*v*) *Rex* v. *Johnson*, 3 M. & S. 539.
(*w*) *Reg.* v. *Cummings*, 4 U. C. L. J. 184, per *Draper*, C. J.
(*x*) *Rex* v. *Blackson*, 8 C. & P. 43, per *Parke*, B.; *Reg.* v. *Russell*, 3 Russ. & Chesley, 254.

It would seem that, where there is only one offence charged, or *corpus delicti* complained of, the prosecutor cannot be put to his election, nor the indictment be quashed, though it contain several counts, all alleging the commission of the offence in different ways; in other words, it is not objectionable to vary the statement in the indictment in order to meet the evidence. (*y*)

Where an indictment contained two counts—the first for embezzlement as servant, the second for larceny as bailee, the prosecution was allowed to elect. (*z*)

There is no objection to the joinder of counts for embezzlement and larceny as a servant, and on the latter count there may be a conviction for larceny as a bailee. (*a*)

So it is not a misjoinder of counts to add statements of a previous conviction for misdemeanor, as counts to a count for larceny, under the 32 & 33 Vic., c. 21, s. 18; and the objection, at all events, could only be raised by demurrer, or motion to quash the indictment, pursuant to the 32 & 33 Vic., c. 29, s. 32. (*b*)

If the statements of the previous convictions are not treated as counts, but merely as statements made for the purpose of founding an inquiry, to be entered into only in the event of the prisoner being found guilty of the offence charged in the indictment; yet if they were not inquired into at all, and the jury was not charged with them, so that the prisoner was not prejudiced by their insertion, and if, after a conviction on the count for larceny, a demurrer to these statements, as insufficient in law, is decided in favor of the prisoner, a court of error will not reopen the matter, on the suggestion that there is a misjoinder of counts. (*c*) Nor is duplicity a ground of error. (*d*)

(*y*) See *Reg.* v. *School*, 26 U. C. Q. B. 214; Arch. Cr. Pldg. 72.
(*z*) *Reg.* v. *Holman*, 9 U. C. L. J 223; L. & C. 177; see also *Reg.* v. *Ferguson*, 1 U. C. L. J. 55; Dears. C. C. 427.
(*a*) 2 Russ. Cr. 247 n.
(*b*) *Reg.* v. *Mason*, 32 U. C. Q. B. 246; *Reg.* v. *Ferguson*, 1 Dears. 427.
(*c*) *Reg.* v. *Mason*, *supra*.
(*d*) *Cornwall* v. *Reg.*, 33 U. C. Q. B 106.

If there be an exception or proviso in the enacting clause of a statute, it must be expressly negatived in the indictment. (*e*)

The rule is, that, when the enacting clause of a statute constitutes an act to be an offence under certain circumstances and not under others, then, as the act is an offence only *sub modo*, the particular exceptions must be expressly specified and negatived; but when a statute constitutes an act to be an offence generally, and in a subsequent clause makes a proviso or exception in favor of particular cases, or in the same clause, but not in the enacting part of it, by words of reference or otherwise, then the proviso is matter of defence or excuse, which need not be noticed in an indictment. (*f*)

The reason why the exceptions in the enacting clause should be negatived is because the party cannot plead to such an indictment, and can have no remedy against it, but from an exception to some defect appearing on the face of it. (*g*)

The statement of the time when an offence is committed was never considered material, so long as there was proof of the offence occurring before the preferring of the indictment. (*h*)

The 32 & 33 Vic., c. 29, s. 23, would seem to render an averment of time unnecessary, in any case where time is not of the essence of the offence. (*i*)

It was formerly necessary that an indictment for homicide should describe the manner of the death, and the means by which it was effected. (*j*) But these need not now be stated. When, however, a statute makes the means of effecting an act material ingredients in the offence, it is necessary

(*e*) *Reg.* v. *White*, 21 U. C. C. P. 354.
(*f*) *Ibid.* 355, per *Galt*, J.
(*g*) *Ibid.* 356, per *Galt*, J.; and see Arch. Cr. Pldg. 62; *Spieres* v. *Parker*, 1 T. R. 141; *Reg.* v. *Earnshaw*, 15 Ea. 456; *Rex* v. *Hall*, 1 T. R. 320; *Steel* v. *Smith*, 1 B. & Ald. 94; Dwarris, 515-6.
(*h*) *Reg.* v. *Hamilton*, 16 U. C. C. P. 355, per *Richards*, C. J.
(*i*) See *Mulcahy* v. *Reg.*, L. R. 3 E. & I. App. 322, per *Willes*, J.
(*j*) See *Reg.* v. *Shea*, 3 Allen, 130-1, per *Carter*, C. J.

that the means should be set out in the indictment; for an indictment must bring the fact of making an offence within all the material words of the statute, and all necessary ingredients in the offence must be alleged. (*k*)

Thus, where a statute provides that "whosoever shall maliciously, by any means manifesting a design to cause grievous bodily harm," etc., attempt to cause grievous bodily harm to any person, the means should be set out with such particularity as necessarily to manifest the design which constitutes the felony, or there should be an allegation following the words of the Act. (*l*)

So it would seem that in an indictment, on the 32 & 33 Vic., c. 20, s. 20, for attempting, "by any means calculated to choke," etc., to render any person insensible, with intent, etc., should set forth the means, for they are material as to the offence. But it would no doubt be sufficient to follow the forms in the schedule to the 32 & 33 Vic., c. 29, in any case to which they are applicable.

It is not necessary that the proof should, in all cases, tally with the mode of death laid in the indictment. Where an indictment charged the prisoner with feloniously striking the deceased on the head with a handspike, giving him thereby a mortal wound and fracture, of which he died: it was proved that the death was caused by the blow on the head with the handspike, but that there was no external wound or fracture, the immediate cause of death being concussion of the brain, produced by the blow; and the court held that it is sufficient if the mode of death is substantially proved as laid, and it is not necessary that all the intermediate steps between the primary cause and the ultimate result should be also alleged and proved. (*m*)

The venue of legal proceedings is intended to show where the principal facts and circumstances in the proceedings

(*k*) See *Reg.* v. *Magee*, 12 Allen, 16, per *Carter*, C. J.; Arch. Cr. Pldg. 60-3.
(*l*) *Reg.* v. *Magee*, *supra*.
(*m*) *Reg* v. *Shea*, 3 Allen, 129.

occurred, or were alleged to have occurred, with a view to showing that the court and jury have jurisdiction in the matter. It was formerly necessary to state in the indictment the venue expressly, or, by reference to the venue in the margin, to every material allegation. (*n*)

But now, by the 32 & 33 Vic., c. 29, s. 15, it is not necessary to state any venue in the body of any indictment. Section 11 of this statute relates to procedure only, and does not authorize any order for the change of the place of trial of a prisoner, in any case where such change would not have been granted under the former practice. The statute does away with the old practice of removing the case, by *certiorari*, into the Queen's Bench, and then moving to change the venue. (*o*)

Under sec. 9 of this statute, the offence may be alleged to have been committed in any district, county, or place through any part whereof the coach, waggon, cart, carriage, or vessel, boat or raft passed, in the course of the journey or voyage during which the offence was committed, and the indictment need not state the place where the offence was actually committed. (*p*)

Where an indictment stated an assault committed upon one Marsh, at Fredericton, in the county of York, but the assault was proved to have been committed on board a steamboat, on the river St. John, in the course of its passage from St. John to Fredericton, before the steamboat arrived within the county of York, and while it was passing through another county; it was held that the indictment was sufficient, and that it was unnecessary to allege the facts as they actually occurred. (*q*)

But where a prisoner was tried at Amherst upon an indictment containing two counts, one for robbery and the other for receiving stolen goods, and both offences were

(*n*) *Reg.* v. *Atkinson*, 17 U. C. C. P. 299-300, per *J. Wilson*, J.
(*o*) *Reg.* v. *McLeod*, 6 C. L. J. N. S. 64; 5 U. C. P. R. 181.
(*p*) See *Reg.* v. *Webster*, 1 Allen, 589.
(*q*) *Ibid.*

proved to have been committed at Truro, situated in a county different from Amherst; the jury having found a general verdict of guilty on both counts, it was held that the prisoner should have been proceeded against only on the count for receiving; and that although he might be guilty of both offences, yet, as the robbery was committed in another county than that in which the trial took place, the prisoner was discharged. (*r*)

So where a prisoner hired a horse in the county of York to go to Aurora in that county, and afterwards sold the horse in the county of Waterloo, it was considered that no offence was shown in the former county. (*s*)

But where the prisoner, at Seaforth, in the county of Huron, falsely represented to the agent of a sewing machine company, that he owned a lot of land, and thus induced the agent to sell machines to him, which were sent to Toronto, in the county of York, and delivered to him at Seaforth; it was held that the offence was complete at Huron. (*t*)

The venue in criminal proceedings, as in civil, may be changed in a proper case. But it has been held in Quebec, that the Court of Queen's Bench there, sitting in appeal, will not entertain such an application on behalf of a person charged with an offence in the District of Three Rivers, where no reason appears why the application should not have been made before the judge resident in that district, where the offence would otherwise be triable. (*u*)

It would seem that no objection to the caption of an indictment, for an allegation that the grand jurors were "sworn and affirmed," can be sustained without showing that those who were sworn were persons who ought to have affirmed, or that those who affirmed were persons who ought to have sworn. (*v*)

(*r*) *Reg.* v. *Russell*, 3 Russ. & Chesley, 254.
(*s*) *Re Robinson*, 7 U. C. P. R. 239.
(*t*) *Reg.* v. *Feithenheimer*, 26 U. C. C. P. 139.
(*u*) *Ex parte Corwin*, 24 L. C. J. 104.
(*v*) *Mulcahy* v. *Reg.*, L. R. 3 E. & I. App. 306.

It is no objection to the indictment that the previous conviction is laid at the commencement; though, when the prisoner is given in charge to the jury, the subsequent felony must be read alone to them, in the first instance. (*w*)

It is no error to add allegations of previous convictions of misdemeanor to a count for larceny; and at any rate, the question can be raised only by demurrer on motion to quash before plea. (*x*)

Where a prosecutor has been bound, by recognizance, to prosecute, and give evidence against a person charged with perjury in the evidence given by him on the trial of a certain suit, and the grand jury have found an indictment against the defendant, the court will not quash the indictment because there is a variance in the specific charge of perjury contained in the information and that contained in the indictment, provided the indictment sets forth the substantial charge contained in the information, so that the defendant has reasonable notice of what he has to answer. (*y*)

An application to quash an indictment should be made *in limine* by demurrer or motion, or the defendant should wait the close of the evidence for the prosecution to demand an acquittal. (*z*)

Applications to quash an indictment are considered applications to the discretion of the court. (*a*)

A defective indictment may be quashed on motion as well as on demurrer. (*b*)

It is unusual to quash an indictment on the application of a defendant, when it is for a serious offence, unless upon the clearest and plainest grounds; but the court will drive the party to a demurrer, or motion in arrest of judgment,

(*w*) *Reg.* v. *Hilton*, 5 U. C. L. J. 70; Bell, 20; 28 L. J. (M. C.) 28; and see *Reg.* v. *Mason*, 22 U. C. C. P. 246.

(*x*) *Reg.* v. *Mason*, *supra*.

(*y*) *Reg.* v. *Broad*, 14 U. C. C. P. 168.

(*z*) *Reg.* v. *Roy*, 11 L. C. J. 90, per *Drummond*, J.; see 32 & 33 Vic., c. 29, s. 32.

(*a*) *Reg.* v. *Belyea*, 1 James, 277, per *Dodd*, J.; *Rex* v. *Hunt*, 4 B. & Ad. 430.

(*b*) *Reg.* v. *Bathgate*, 13 L. C. J. 299.

or writ of error. It is, therefore, a general rule that no indictments which charge the higher offences, as treason or felony, will be thus summarily set aside. (*c*)

The omission of the residences and occupations of grand jurors, in the list and in the panel, was held sufficient ground for quashing an indictment for felony. (*d*)

Where an indictment charges no offence against law, the objection may be properly taken in arrest of judgment, or the indictment may be demurred to, or a writ of error will lie. (*e*) But the omission of the word "feloniously" is aided by verdict. (*f*)

No mere formal defect, in an indictment, can be objected to after the prisoner is found guilty and sentenced at the Court of Oyer and Terminer. (*g*)

An objection to an indictment, as insufficient in law, made after the swearing of the jury, and after the prisoner was given in charge of them, was held not too late; for otherwise there never could be a motion in arrest of judgment. (*h*) Also, that an objection may be made at any time for a substantial but not for a formal defect, and that the 32 & 33 Vic., c. 29, s. 32, only applies to the latter. (*i*)

The forms of indictment in the 32 & 33 Vic., c. 29, schedule A, are intended as guides to simplify forms of indictments. They cannot be made use of in cases to which they are not applicable, so as to misinform a person of the nature of the offence with which he stands charged. (*j*) The adoption of the forms is discretionary. (*k*)

It is sufficient if an indictment be signed by the clerk of

(*c*) *Reg.* v. *Belyea*, *supra*, 225, per *Dodd*, J.
(*d*) *Ibid.* 220.
(*e*) *Reg.* v. *Clement*, 26 U. C. Q. B. 300, per *Draper*, C. J.
(*f*) *Reg.* v. *Quinn*, 1 Russ. & Geldert, 139.
(*g*) *Horseman* v. *Reg.*, 16 U. C. Q. B. 544, per *Robinson*, C. J.
(*h*) *Reg.* v. *Ryland*, L. R. 1 C. C. R. 99; 37 L. J. (M. C.) 10.
(*i*) *Ibid.*
(*j*) *Reg.* v. *Cummings*, 4 U. C. L. J. 188-9, per *Spragge*, V.-C.
(*k*) *Ibid.*; and see *Reg.* v. *McLaughlin*, 3 Allen, 159.

the Crown, (*l*) or by the counsel prosecuting for the provincial Attorney General. (*m*)

Before pleading to an indictment, the defendant must submit to the jurisdiction of the court. (*n*)

The prisoner must plead in abatement before he pleads in bar. (*o*)

No more than one plea can be pleaded to any indictment for misdemeanor or criminal information. (*p*)

A prisoner will be allowed to withdraw his plea of "guilty" if it appear that he may have been under some misapprehension when he pleaded, and might thereby suffer injury. (*q*)

(*l*) *Reg.* v. *Grant*, 2 L. C. L. J. 276.
(*m*) *Reg.* v. *Downey*, 13 L. C. J. 193.
(*n*) *Reg.* v. *Maxwell*, 10 L. C. R. 45.
(*o*) *Whelan* v. *Reg.*, 28 U. C. Q. B. 47.
(*p*) *Reg.* v. *Charlesworth*, 1 B. & S. 460; 31 L. J. (M. C.) 26.
(*q*) *Reg.* v. *Huddell*, 20 L. C. J. 301.

CHAPTER X.

PRACTICE.

There are three principal modes provided by the law of England for the prosecution of criminals: by indictment preferred by a grand jury; by criminal information to a superior court; and by summary proceedings before justices of the peace, by virtue of special powers conferred on them to that end by various statutes.

As proceedings by indictment usually, though not necessarily, follow the commitment of prisoners by justices of the peace, and as criminal informations are comparatively rare in this country, we will consider first the nature of that body, both with regard to their duties in holding preliminary investigations, and also with regard to their powers of summary conviction; then proceedings on indictments and criminal informations will be treated of; after which, various questions of practice, relating to the trial and the steps subsequent thereto, will be discussed.

Justices of the peace were first appointed in the reign of Edward I., (*a*) but with powers much less extended than have since been conferred on them.

By 29 Vic., c. 12, the oath of qualification of a justice may be taken either before some other justice of the peace, or before any person assigned by the governor to administer oaths and declarations, or before the clerk of the peace of the district or county for which the justice intends to act; and all such oaths theretofore taken before the last mentioned officer, or before a commissioner assigned by *Dedimus potestatem* to administer oaths, or before a person

(*a*) *Reg.* v. *Atkinson*, 17 U. C. C. P. 300, per *J. Wilson*, J.

acting as, but not being, a duly qualified justice of the peace for the same county, are confirmed. (*b*)

The fact of a justice acting as such is *prima facie* evidence of his appointment to the office; (*c*) and the mere production of a certificate, purporting to be under the hand and seal of the clerk of the peace, that there is no declaration of the justice's qualification filed in his office as required by the above statute, is not sufficient to rebut the presumption. (*d*)

Under the commission of the peace, justices have a general power for conservation of the peace, and the apprehension of all persons charged with indictable offences, and, on examination, to discharge, admit to bail, or commit for trial; (*e*) and their duties with regard to the same are prescribed by the 32 & 33 Vic., c. 30.

A justice's jurisdiction is confined to the county for which he has been appointed, (*f*) and of course he has no power to administer an oath or take any examination within the limits of a foreign country. (*g*) And where the justice has no jurisdiction, the consent of the prisoner cannot confer it. (*h*)

There should properly be an information laid; (*i*) but this is not essential to confer jurisdiction to hold a preliminary investigation; for so long as the prisoner is before the magistrate, the manner of his getting there is of little moment. (*j*)

Though a justice of the peace have jurisdiction over an offence in other respects, still, special circumstances, as, for

---

(*b*) Sec. 2; and see *Herbert q. t.* v. *Dowswell*, 24 U. C. Q. B. 427.
(*c*) *Berryman* v. *Wise*, 4 T. R. 366.
(*d*) *Reg.* v. *White*, 21 U. C. C. P. 354.
(*e*) *Connors* v. *Darling*, 23 U. C. Q. B. 543, per *Gowan*, J.
(*f*) *Reg.* v. *Wheton*, 3 All-n, 269.
(*g*) *Nary* v. *Owen*, Ber. 377.
(*h*) *Reg.* v. *Hebert*, 5 *Revue Leg.* 424.
(*i*) *Caudle* v. *Ferguson*, 1 Q. B. 889; *Friel* v. *Ferguson*, 15 U. C. C. P. 594, per *A. Wilson*, J.
(*j*) *Reg.* v. *Mason*, 29 U.C.Q.B. 431; *Reg.* v. *Hughes*, L. R. 4 Q. B. D. 614.

instance, where he is interested in the prosecution, (*k*) will render him incompetent to act; and any steps he may take in violation of this rule will be set aside. (*l*)

But as a general rule, the justice should decide any question involving an exception to his jurisdiction, or an exemption from any other cause, in order that the superior court may judge of the sufficiency of the same. (*m*)

Under R. S. O., c. 72, s. 4, a police magistrate for a city is *ex officio* a justice of the peace for the county in which such city lies. Under this section an alderman is not *ex officio* legally authorized to act as a justice of the peace until he has taken the oath of qualification as such. (*n*)

The plain import of the statute is to establish certain local courts, having limited criminal jurisdiction, and to define the respective jurisdictions of the police magistrate of a city situate within a county, and of the justices of the peace of that county, in respect of offences committed within the city and county respectively. (*o*)

By the 38 Vic., c. 47, any person charged with any offence in Ontario for which he might be tried at the General Sessions, may, with his consent, be tried by a police or stipendiary magistrate, and if found guilty, sentenced in the same manner as he might have been before the sessions.

Where a statute confers summary jurisdiction on two justices, or any stipendiary or police magistrate, a conviction by the latter must show that he is such a magistrate. (*p*) And it may be doubted whether, under such circumstances, one justice could sit for such a magistrate, or whether two would not be necessary. (*q*) And clearly, if not sitting for a magistrate, a conviction by one would be bad. (*r*)

(*k*) *Reg.* v. *Simmons*, 1 Pugsley, 158; *Reg.* v. *Milledge*, L. R. 4 Q. B. D. 332; *Reg.* v. *Meyer*, L. R. 1 Q. B. D. 173; *Reg.* v. *Gibbon*, L. R. 6 Q. B. D. 169; *Re Holman*, 3 Russell & Chesley, 375.

(*l*) *Reg.* v. *Simmons*, *supra*.

(*m*) *Re Dubord*, 14 L. C. J. 203.

(*n*) *Reg.* v. *Boyle*, 4 U. C. P. R. 256.

(*o*) *Reg.* v. *Morton*, 19 U. C. C. P. 27, per *Gwynne*, J.

(*p*) *Reg.* v. *Clancey*, 7 U. C. P. R.; and see 32 & 33 Vic., c. 28.

(*q*) *Ibid.*; see 36 Vic., c. 48, s. 305; and see *Re Crow*, 1 U. C. L. J. N. S. 302; 1 L. C. J. 189.

(*r*) *Re Crow*, *supra*.

Where a statute directs justices of a division, or near a certain place, to do a certain act, any justice of the county may do it. (*s*)

It is no objection under R. S. O., c. 3, that a conviction by justices for an offence tried in the county is signed by one of the justices, in a city having a police magistrate. (*t*)

Where a statute gives justices power to make by-laws and impose penalties, they cannot, without express authority from the legislature, levy such penalties by distress. (*u*)

Proceedings under the Rev. Stat., c. 146, s. 3 (N. B.), for knowingly solemnizing a marriage where either party is under twenty-one, without the consent of the father, are properly taken before two justices. The proceedings in such a case need not be in the name of the Queen. (*v*)

It has been held in New Brunswick, that where a summons has been issued by two justices, the cause must be tried before the same two justices, unless there be some special reason for not doing so, (*w*) which must appear on the face of the conviction, or at least it must show that the absent justices consented to it. (*x*) But one justice may issue the summons on a complaint, (*y*) and grant an adjournment, (*z*) though the penalty is recoverable before two justices.

Where two justices have heard a case, they must concur in their judgment; (*a*) but in a case before three, judgment may be rendered by two. (*b*) And the fact that one justice issued the summons in a matter over which he, sitting alone, might have jurisdiction, does not render him sole judge of the case; but if he allow other justices to sit with him, they

(*s*) *Reg.* v. *Wheton*, 3 Allen, 269.
(*t*) *Langwith* v. *Dawson*, 30 U. C. C. P. 375.
(*u*) *Kirkpatrick* v. *Asken*, Rob. & Jos. Dig. 1992.
(*v*) *Reg.* v. *Gallant*, 5 Allen, 115.
(*w*) *Weeks* v. *Boreham*, 2 Russell & Chesley, 377.
(*x*) *Dubord* v. *Boivin*, 14 L. C. J. 203.
(*y*) *Reg.* v. *Simmons*, 1 Pugsley, 158.
(*z*) *Ex parte Holder*, 6 Allen, 338.
(*a*) *St. Gemmes* v. *Cherrier*, 9 L. C. J. 22.
(*b*) *Ex parte Lumley*, 9 L. C. J. 169; *ex parte Trowley*, 9 L. C. J. 169; *ex parte Brodeur*, 2 L. C. J. 97.

have an equal voice with him in determining the question before them. (*c*)

On the examination of any person before a justice, on a charge of an indictable offence, with a view to his commitment for trial, no person has any right to be present without the permission of the presiding justice. (*d*) But it is different where the justices are sitting to try the offender under the Summary Conviction Act. (*e*)

Where the magistrate or justices are not simply holding a preliminary investigation, but proceed to adjudicate finally under the 32 & 33 Vic., c. 31, it seems necessary, in order to confer jurisdiction on them, that an information should be properly laid, (*f*) for by the express words of the statute, (*g*) their power of final adjudication is limited to "cases where an information is laid before one or more of Her Majesty's justices of the peace," etc. The power of justices to convict summarily results only from legislative sanction, and in all cases such authority must be shown, (*h*) and the maxim, *omnia presumuntur rite esse actu*, has no application to the acts of inferior courts. Therefore, on a prosecution for a penalty under a by-law of a corporation, the by-law must be proved, that the jurisdiction of the justices may appear on the proceedings. (*i*) And a conviction by summary process for an aggravated assault, committed on a voting day at an election for the House of Commons of Canada, was in Quebec held to be void, as the statute which constitutes the offence renders it punishable by indictment; and the offence is not included in those mentioned in the 32 & 33 Vic., c. 32, ss. 2 and 3. (*j*)

(*c*) *Reg.* v. *Milne*, 25 U. C. C. P. 94.
(*d*) 32 & 33 Vic., c. 30, s. 35.
(*e*) 32 & 33 Vic., c. 31, ss. 29 and 30.
(*f*) *Caudle* v. *Ferguson*, 1 Q. B. 889.
(*g*) *Friel* v. *Ferguson*, 15 U.C.C.P. 584; *Appleton* v. *Lepper*, 20 U.C.C.P. 142, per *Hagarty*, J.; *Powell* v. *Williamson*, 1 U. C. Q. B. 154; *Ex parte Eagles*, 2 Hannay, 53-4, per *Ritchie*, C. J.; *Connors* v. *Darling*, 23 U. C. Q. B. 546.
(*h*) *Bross* v. *Huber*, 18 U. C. Q. B. 286, per *Robinson*, C. J.; *Reg.* v. *O'Leary*, 3 Pugsley, 264.
(*i*) *Reg.* v. *Wortman*, 4 Allen, 73; *Rex* v. *All Saints, Southampton*, 7 B. & C. 785.
(*j*) *Reg. ex rel. Larouche* v. *Lenneux*, 5 Q. L. R. 261; ss. 2 and 3.

But the objection to the want of an information must be taken before the investigation is proceeded upon; for if the party appears and defends the suit without an information being laid or the issue of a summons, the objection cannot afterwards avail him. (*k*) And the rule is applicable in the case of a defective information or summons. (*l*)

Unless a statute require that the information should be in writing, or on oath, it need not be so. (*m*)

An information stating that a woman did "unlawfully take and carry away from his (the informant's) protection her daughter, S. W.," does not give a justice authority to issue a warrant. (*n*)

Neither does a complaint charging a "clandestine removal of property;" the utmost that it does justify is the issuing of a summons under the Act relating to petty trespasses. (*o*)

An information charging that the defendant did on, etc., "obtain by false pretences from complainant the sum of five dollars, contrary to law," omitting the words "with intent to defraud," might by intendment be held to charge the statutory offence. (*p*)

If a statute gives summary proceedings for various offences, specified in several sections, an information is bad which leaves it uncertain under which section it took place. (*q*)

In summary proceedings for assault it is not necessary that the fact that the complainant requested the case to be tried summarily should appear on the proceedings, if the form given by the statute be followed. (*r*) And even when

---

(*k*) *Ex parte Wood*, 1 Allen, 422; *Reg.* v. *McMillan*, 2 Pugsley, 110; *Reg.* v. *O'Leary*, 3 Pugsley, 264.

(*l*) *Ex parte Coll*, 3 Allen, 48; *Crawford* v. *Beattie*, 39 U. C. Q. B. 13; *Stoness* v. *Lake*, 40 U. C. Q. B. 320.

(*m*) *Friel* v. *Ferguson*, 15 U. C. C. P. 594; *Re Conklin*, 31 U. C. Q. B. 168, per *A. Wilson*, J.; see s. 24, 32 & 33 Vic., c. 31.

(*n*) *Stiles* v. *Brewster*, Stev. Dig. 811.

(*o*) *McNellis* v. *Gartshore*, 2 U. C. C. P. 471, per *McLean*, J.

(*p*) *Crawford* v. *Beattie*, 39 U. C. Q. B. 13.

(*q*) *Thompson and Durnford*, 12 L. C. J. 287, per *Mackay*, J.

(*r*) *Reg.* v. *Shaw*, 23 U. C. Q. B. 616.

not, after conviction it will be intended that such request was made. (*s*)

In a complaint for breach of a by-law, it is not necessary to insert the by-law itself, or to make a distinct allegation that it is in force.

A complaint may be made and a summons issued for two offences, provided the defendant has not been arrested in the first instance, and a conviction for one of such offences specifying it is valid. Service of a copy of a summons, issued by a magistrate, followed by appearance of the defendant, is sufficient. (*t*)

Where two or more persons may commit an offence under an Act, the information may be jointly laid against them. (*u*) But where the penalty is imposed upon each person, it is wrong to convict them jointly, even when they are charged on a joint information. (*v*)

If either the penalty be imposed by the Act on each person convicted (even where the offence would, in its own nature, be single), or if the quality of the offence be such that the guilt of one person may be distinct from that of the other, in either of these cases the penalties are several. (*w*)

At Petty Sessions, an information was laid against two defendants, charging that they did unlawfully use a gun and kill two pheasants, contrary to the 1 & 2 Wm. IV., c. 32, s. 3. Each claimed to be tried separately, in order to call the other as a witness. The justices refused, and heard the charge against both together, and convicted them, and a conviction was drawn up separately against each defendant imposing a penalty of £3; and it was held that it was in the discretion of the justices whether they would hear the charge separately or not; that as the penalty was imposed on every person acting in contravention of the statute each defendant was separately liable to the whole penalty;

(*s*) *Reg.* v. *O'Leary*, 3 Pugsley, 264.
(*t*) *Corignan* v. *Harbor Comrs. Montreal*, 5 L. C. R. 479.
(*u*) *Reg.* v. *Littlechild*, L. R. 6 Q. B. 295, per *Lush*, J.
(*v*) *Ibid.* 295, per *Mellor*, J.
(*w*) *Ibid.* 296, per *Hannen*, J.

and that separate convictions were right, although the prisoners were charged on a joint information. (*x*)

Where a limited authority is given to justices of the peace, they cannot extend their jurisdiction to cases not within it, by finding as a fact that which is not a fact. (*y*) So neither does a discretion, whether they will do a particular thing, enable them, having heard the case, to refuse a warrant, because they think the law under which they are called upon to act is unjust. (*z*)

Where the charge laid, as stated in the information, does not amount in law to the offence over which the justice has jurisdiction, his finding the party guilty by his conviction, in the very words of the statute will not give him jurisdiction. The conviction would be bad on its face, all the proceedings being before the court. (*a*)

In a prosecution before justices, their jurisdiction is ousted by the accused setting up a claim of right; (*b*) yet that claim must be *bona fide*, and the mere belief of the accused, unsupported by any ground for the claim, (*c*) or a claim of right, which cannot by law exist, is insufficient. (*d*) And in such case they cannot inquire into or determine summarily any excess of force alleged to have been used in the assertion of title, (*e*) or the validity of the claim set up. (*f*) Proceedings by indictment are then the proper course. (*g*)

A complaint for assault under s. 43 of the 32 & 33 Vic., c. 20, cannot be withdrawn by the complainant, even with the consent of the justice; (*h*) for the charge has become a

(*x*) *Reg.* v. *Littlechild*, *supra*.
(*y*) *The Haidee*, 10 L. C. R. 101; *The Scotia S. V. A. R.* 160.
(*z*) *Reg.* v. *Boteler*, 4 B. & S. 959; 33 L. J. (M. C.) 101.
(*a*) *Re McKinnon*, 2 U. C. L. J. N. S. 327, per *A. Wilson*, J.
(*b*) *Reg.* v. *O'Brien*, 5 Q. L. R. 161.
(*c*) *Reg.* v. *Cridland*, 7 E. & B. 853; 27 L. J. (M. C.) 28; *Reg.* v. *Stimpson*, 4 B. & S. 307; 32 L. J. (M. C.) 208.
(*d*) *Hudson* v. *McRae*, 4 B. & S. 585; 33 L. J. (M. C.) 65; *Hargreaves* v. *Deddanes*, L. R. 10 Q. B. 582.
(*e*) *Reg.* v. *Pearson*, L. R. 5 Q. B. 237.
(*f*) *Reg.* v. *Davidson*, 45 U. C. Q. B. 91.
(*g*) *Reg.* v. *Pearson*, L. R. 5 Q. B. 239, per *Lush*, J.
(*h*) *Re Conklin*, 31 U. C. Q. B. 160.

public matter, and the person charged has the right to have it tried; and further, because the complainant has made his election to have the case so disposed of, from which he cannot withdraw. (*i*)

If justices hear the case but decline to conclude it, as they should have done, they will be ordered to hear it; (*j*) so if they refuse to hear the whole case, and dismiss the summons. (*k*) But if justices, in their own discretion, refuse to hear a complaint which is the subject of an indictment, the court will not compel them to go on. (*l*)

The fact that the defendant pleads guilty to the charge cannot deprive the justice of the discretion he has to adjudicate on the case, under s. 46 of the last named statute.

The adjudication under that statute means the justice's final judgment or sentence to be pronounced. (*m*) If the justice adjudicate, the defendant will be entitled to the certificate, under s. 44, and if he do not adjudicate, there will be no certificate, and so there will be no bar to any subsequent proceedings. (*n*) There is no right to a certificate unless there has been a hearing upon the merits. (*o*)

A certificate under s. 44, given by a justice on a charge of assault and battery, is a defence to an indictment, founded on the same facts, charging an assault and battery, accompanied by malicious cutting and wounding, so as to cause grievous or actual bodily harm. (*p*) So, a former conviction by a justice is a bar to an indictment for felonious stabbing. (*q*) The certificate is also a bar to an indictment for assault, with intent to commit rape. (*r*)

(*i*) *Re Conklin*, 31 U. C. Q. B. 168, per *Wilson*, J.; see also *Tunnicliffe* v. *Tedd*, 5 C. B. 553; *Vaughton and Bradshaw*, 9 C. B. N. S. 103.
(*j*) *Rex* v. *Tod*, Str. 531; but see *Reg.* v. *Shortiss*, 1 Russell & Geldert, 70.
(*k*) *Rex* v. *Justices of Cumberland*, 4 A. & E. 695.
(*l*) *Reg.* v. *Higham*, 14 Q. B. 396; *Re Conklin*, *supra*, 167, per *Wilson*, J.
(*m*) *Re Conklin*, 31 U. C. Q. B. 166, per *Wilson*, J.
(*n*) *Ibid.* 166, per *Wilson*, J.; *Hartley* v. *Hindmarsh*, L. R. 1 C. P. 553.
(*o*) *Re Conklin*, 31 U. C. Q. B. 168, per *Wilson*, J.
(*p*) *Ibid.* 165, per *Wilson*, J.; *Reg.* v. *Ebrington*, 1 B. & S. 688.
(*q*) *Reg.* v. *Walker*, 2 M. & Rob. 446; *Re Conklin*, *supra*, 165, per *Wilson*, J.
(*r*) *Ibid.*; *Re Thompson*, 6 H. & N. 193; 6 Jur. N. S. 1247.

An information or complaint may be amended, but if on oath, it must be re-sworn. (*s*)

One C. appeared to an information charging him with an assault, and praying that the case might be disposed of summarily, under the statute. The complainant applied to amend the information by adding the words "falsely imprison." This being refused, the complainant offered no evidence, and a second information was at once laid, including the charge of false imprisonment. The magistrate refused to give a certificate of dismissal of the first charge or to proceed further thereon, but endorsed on the information "Case withdrawn by permission of court, with a view of having a new information laid." It was held that the information might be amended, but that, as the original was under oath, it must be re-sworn. Under the circumstances, the more correct course would seem to have been to go on with the original case, and, under sec. 46, to refrain from adjudicating. (*t*)

A defective information may be aided by evidence, (*u*) and under s. 5 of the 32 & 33 Vic., c. 31, a variance between the information, complaint, or summons, and the evidence adduced on the part of the informant or complainant, is not fatal if the defendant has not been deceived or misled thereby, or has no defence on the merits. (*v*)

The object of the legislature, in this provision, seems to have been to prevent the failure of justice in cases where, by the old law, very great technical precision was required, and that before a tribunal where great legal accuracy could hardly be expected. (*w*) It may be doubtful, under the terms of the section, whether the question of the party having been misled is not merely for the discretion of the justices, as to adjourning the hearing to a future day. (*x*)

(*s*) *Re Conklin*, *supra*.
(*t*) *Ibid.* 160.
(*u*) *Reg.* v. *Williams*, 37 U. C. Q. B. 540.
(*v*) See *ex parte Dunlop*, 3 Allen, 281; *ex parte Parks*, 3 Allen, 237; see also secs. 21 and 22.
(*w*) *Ex parte Dunlop*, 3 Allen, 283-4, per *Carter*, C. J.
(*x*) *Ibid.* 284, per *Carter*, C. J.

But it would seem that this section must be held to apply only to informations made by persons who have authority to make them, and not to give vitality to an information made by a person without any authority, and, in fact, to give the justice jurisdiction over the matter when otherwise he would not have it. (*y*)

An information, by a person who has no authority to make it, is the same as no information. (*z*)

An information, to be tried before two justices, is good though only signed by one. (*a*)

As soon as the information has been properly laid, the justice issues his summons or warrant thereon, and proceeds to a hearing of the case. The practice as to this is fully set out in the 32 & 33 Vic., c. 30 and 31; the former applying to indictable offences, and providing for the issue of a warrant in the first instance; the latter to summary convictions, and requiring, before the issue of a warrant of arrest, the service of a summons requiring the attendance of the defendant

The warrant of a justice is only *prima facie* evidence of its contents; and the recital that an information was laid prior to its issue may be rebutted. (*b*)

Although a warrant to a peace officer, by his name of office, usually gives him no authority out of the precincts of his jurisdiction, yet such authority may be expressly given on the face of the warrant. Therefore, where a warrant was directed to the constable of Thorold, in the Niagara District, authorizing him to search the plaintiff's house, in the township of Louth, in the same district; it not appearing that there was more than one person appointed to the office of constable of Thorold, it was held that the direction by description was good. (*c*)

(*y*) *Ex parte Eagles*, 2 Hannay, 54, per *Ritchie*, C. J.
(*z*) *Ibid.*
(*a*) *Falconbridge q. t.* v. *Tourangeau*, Rob. Dig. 260.
(*b*) *Friel* v. *Ferguson*, 15 U. C. C. P. 584; see also *Appleton* v. *Lepper*, 20 U. C. C. P. 138.
(*c*) *Jones* v. *Ross*, 3 U. C. Q. B. 328.

A warrant under 32 & 33 Vic., c. 31, is not bad though issued in form B. instead of form C. (*d*)

A warrant, though irregular, may be a justification to the officer who executes it, because he is not to canvass the legality of the process he executes, or set up his private opinion against that of the justice (*e*)

A warrant can be backed by a magistrate of a foreign county only "upon proof being made on oath or affirmation of the handwriting of the justice who issued the warrant," and an endorsement without such proof is illegal. (*f*)

Where an information contained every material averment necessary to give a magistrate jurisdiction to make an order for sureties to the peace, but contained also matter which it was contended so qualified the other averments as to render them nugatory, it was held that this was a judicial question for the magistrate to decide, and, therefore, that in issuing his warrant for the appearance of the accused he was not acting without jurisdiction, even though a superior court might quash his order to find sureties. (*g*)

The prisoner being before the justice, he must proceed in the manner pointed out by the statute above mentioned; witnesses must be examined whose evidence should be taken in writing; (*h*) for if no witnesses are examined, the commitment will be illegal.

The plaintiff was arrested upon a warrant issued by the defendant, a magistrate, and brought before him. Defendant examined the plaintiff, but took no evidence, said he could not bail, and committed the plaintiff to gaol on a warrant reciting that he was charged before him, on the oath of W. H., with stealing. The plaintiff did not ask to have any hearing or investigation, or produce, or offer to procure, any evidence on his behalf, or to give bail to the charge; but it

(*d*) *Reg.* v. *Perkins*, Stev. Dig. 810.
(*e*) *Ovens* v. *Taylor*, 19 U. C. C. P. 56, per *Hagarty*, C. J.; *Painter* v. *Liverpool Gas Co.*, 3 A. & E. 433.
(*f*) *Reid* v. *Maybee*, 31 U. C. C. P. 384.
(*g*) *Sprung* v. *Anderson*, 23 U. C. C. P. 152.
(*h*) *Reg.* v. *Flannigan*, 32 U. C. Q. B. 593.

was held that the commitment, without appearance of the prosecutor or examination of any witnesses, or of the plaintiff, according to the statute, or any legal confession, was an act wholly without, or in excess of, the jurisdiction of the magistrate, and illegal. (*i*)

Where a justice commences the examination of a party on a criminal charge, and after hearing a portion of the evidence refuses to proceed further, the prosecutor may, nevertheless, prefer an indictment against the prisoner before a grand jury. (*j*)

The justice may remand the prisoner from time to time for such period as may be reasonable, not exceeding eight clear days at any one time; and the remand must be in writing if for more than three clear days. (*k*)

The evidence taken, the justice, if not a case for summary conviction, should either discharge the prisoner or commit him for trial at the next court of competent criminal jurisdiction. But a discharge of a prisoner by one justice does not operate as a bar to the same person being again brought up before another justice, and committed upon the same charge, upon the same or different evidence. (*l*)

If the proceeding be by virtue of the summary powers of the justice, a conviction should be drawn up, and great care should be taken in its preparation.

The 32 & 33 Vic., c. 31, s. 50, enacts that "in all cases of conviction where no particular form of conviction is given by the Act or law creating the offence, or regulating the prosecution of the same, and in all cases of conviction upon Acts or laws hitherto passed, whether any particular form of conviction has been thereon given or not, the justice or justices who convict, may draw up his or their conviction, on parchment or on paper, in such one of the forms of conviction (I., 1, 2, 3,) as may be applicable to the case, or to

(*i*) *Connors* v. *Darling*, 23 U. C. Q. B. 541.
(*j*) *Reg.* v. *Duvaney*, 1 Hannay, 571.
(*k*) 32 & 33 Vic., c. 30, ss. 41 and 42.
(*l*) *Reg.* v. *Morton*, 19 U. C. C. P. 26, per *Gwynne*, J.

the like effect." So that it would be advisable hereafter to draw up all convictions in conformity with this Act. If the forms there given be not followed, the conviction to be good must either conform to those given in the particular statute under which proceedings are had, (*m*) or else be sufficient according to the general rules of law applicable in their construction. (*n*)

But the mere omission of immaterial words in a statutory form, such as "to be paid and applied according to law" in the clause imposing a fine, (*o*) or words added which do not materially alter the meaning of the form, such as inserting the name of the informer when not required, (*p*) will not render the conviction bad. (*q*)

Where the conviction does not follow any statutory form, it must be legal according to the principles of the common law; and in the first place should state that the party prosecuted had been summoned, and that he appeared, and that the evidence was taken in his presence. (*q*)

The name of the informant or complainant must also, in some form or other, appear on the face of the conviction. (*r*) The place for which the justice acts must be shown, and it must be alleged that the offence was committed within the limits of his jurisdiction, or facts must be stated which give jurisdiction beyond those limits. (*s*) But to state the township without alleging the county is sufficient, as the division of counties into townships is made by statute, of which the courts take judicial notice. (*t*)

The offence of which the defendant is convicted must be

(*m*) *Reg.* v. *Shaw*, 23 U. C. Q. B. 618; *Reid* v. *McWhinnie*, 27 U.C.Q.B. 289; *Reg.* v. *Hyde*, 16 Jur. 337; *Re Allison*, 10 Ex. 561; *ex parte Golding*, 1 Pugsley & B. 47.

(*n*) *Moore* v. *Jarvon*, 9 U. C. Q. B. 233.

(*o*) *Reg.* v. *Perkins*, Stev. Dig. 810.

(*p*) *Ex parte Eagles*, 2 Hannay, 53; *Reg.* v. *Johnson*, 8 Q. B. 102.

(*q*) *Moore* v. *Jarron*, 9 U. C. Q. B. 233.

(*r*) *Re Hennessy*, 8 U. C. L. J. 299.

(*s*) *Reg.* v. *Shaw*, 23 U.C.Q.B. 618, per *Draper*, C. J.; *Rex* v. *Edwards*, 1 Ea. 278.

(*t*) *Reg.* v. *Shaw*, 23 U. C. Q. B. 616.

stated with certainty, so as to be pleadable in the event of a second prosecution. (*u*) And a conviction "for wilfully damaging, spoiling, and taking, and carrying away six bushels of apples of the said Rogers, whereby the defendant committed an injury to the said goods and chattels" was held not to contain a statement of an offence for which a conviction could take place. (*v*)

And where an information in a conviction charged the defendant with measuring or surveying lumber intended for exportation, in violation of the Act of Assembly, 8 Vic., c. 81, and the evidence referred to three distinct acts, but it did not appear for which of them the defendant had been convicted, it was held that the conviction was bad for uncertainty. (*w*)

So where a conviction purporting to be made under Con. Stats. Can., c. 93, s. 28, charged that defendant, at a time and place named, wilfully and maliciously took and carried away the window sashes out of a building owned by one C., against the form of the statute, etc., without alleging damage, injury or spoil to any property, real or personal, or finding damage to any amount; it was held that the conviction should clearly show whether the damage, injury or spoil complained of, is done to real or personal property, stating what property; and in consequence of s. 29, where a private person is prosecutor, should also show the amount which the justice has ascertained to be reasonable compensation for such damage, injury or spoil. (*x*)

The offence created by the statute is damaging property, not taking and carrying it away. (*y*)

A conviction in the alternative is bad, as, for instance, adjudging the defendant to be imprisoned for twenty-five

(*u*) *Reg.* v. *Hoggard*, 30 U. C. Q. B. 152.
(*v*) *Eastman* v. *Reid*, 6 U. C. Q. B. 611.
(*w*) *Reg.* v. *Stevens*, 3 Kerr, 356.
(*x*) *Reg.* v. *Caswell*, 20 U. C. C. P. 275.
(*y*) *Ibid.*

days, or payment of £5 and costs. (*z*) So a conviction by two justices, for taking lumber feloniously or unlawfully, is bad. (*a*) For if the act be unlawful only, not felonious, it should be shown how it is unlawful, and it should show also that the offence comes under our statute, which gives the justices power to convict. (*b*) The name of the owner should also be stated, and not merely that the lumber is "the property of another." (*c*)

The petitioner was convicted by a court martial, held at the city of Montreal on the 26th, 27th, 28th and 29th days of March, 1867, and on the 1st and 2nd days of April, 1867, on the following charge: "for disgraceful conduct, in having at Montreal, Canada East, some time between the 17th January and 16th March, 1867, fraudulently embezzled or misapplied about five hundred cords of wood, government property intrusted to his charge as an assistant commissariat storekeeper, and which, at the latter date, was found deficient," and thereupon, on the said conviction, the court forthwith sentenced the petitioner, among other penalties, to be imprisoned with hard labor for six hundred and seventy-two days. The court held that it did not appear there had been preferred against the petitioner any specific charge, nor any conviction of him upon a specific or positive charge, but a conviction in the alternative, one of the two being no offence created by the 17th article of the Mutiny Act, without any certainty as to either of the two charges in the disjunctive, and that this was a matter of substance, and therefore the warrant of commitment was null and void, and the petitioner, who had been committed to prison, was entitled to be set at liberty. (*d*)

In describing the offence in convictions, it is not sufficient to state, as the offence, that which is only the legal result of certain facts, but the facts themselves must be specified, so

(*z*) *Reg* v. *Wortman*, 4 Allen, 73.
(*a*) *Reg.* v. *Craig*, 21 U. C. Q. B. 552.
(*b*) *Ibid.*
(*c*) *Ex parte Holder*, 6 Allen, 338.
(*d*) *Re Moore*, 11 L. C. J. 94.

that the court may judge whether they amount in law to the offence. And the conviction must contain the judgment on which it is based, and a statement that the conviction results from proof that the defendant has sold spirituous liquors without license is not sufficient. (*e*)

Thus a conviction by a magistrate stated that defendant did, on, etc., at, etc., being a public highway, use blasphemous language contrary to a certain by-law passed almost in the words of the Con. Stats. U. C., c. 54, s. 282, subs. 4, but there was no statement of the particular language used; it was held bad, as the statement in the conviction was only the legal result of certain facts, and the facts themselves were not set out. (*f*) The particular words used should have been stated.

As a general rule, where an Act in describing the offence makes use of general terms, which embrace a variety of circumstances, it is not enough to follow in a conviction the words of the statute; but it is necessary to state what particular fact prohibited has been committed. But in framing a conviction, it is in general sufficient to follow the words of the statute, where it gives a particular description of the offence. Where a particular Act creates the crime, it may be enough to describe it in the words of the legislature, but where the legislature speaks in general terms, the conviction must state what act in particular was done by the party offending, to enable him to meet the charge. (*g*)

A conviction which charged that the prisoner did, "unlawfully and maliciously, cut and wound one Mary Kelly, with intent to do her grievous bodily harm," though not sufficient to charge a felony under s. 17 of 32 & 33 Vic., c. 20, is good for a misdemeanor under s. 19, the statement of the intent being rejected as surplusage. (*h*) And the police magistrate has jurisdiction over both these offences. (*i*)

(*e*) *Duboird* v. *Boivin*, 14 L. C. J. 203.
(*f*) *Re Donnelly*, 20 U. C. C. P. 165.
(*g*) *Re Donnelly*, 20 U. C. C. P. 167, per *Hagarty*, C. J.; and see *Rex* v. *Sparling*, 1 Str. 497; *Reg.* v. *Scott*, 4 B. & S. 368; *Reg.* v. *Nott*, 4 Q. B. 768 as to particular applications of these principles.
(*h*) *Re Boucher*, 4 Ont. App. 191.
(*i*) *Ibid.*

A conviction under R. S. O., c. 142, s. 40, which omitted to state that the party practised "for hire, gain or hope of reward," was quashed. (*ii*)

A conviction under a by-law must show the by-law, (*j*) and also by what municipality it was passed, (*k*) that the court may judge of its sufficiency; and it is doubtful whether its date must not appear. (*kk*)

If the statute on which the by-law is based does not clearly give authority to fine or imprison, a conviction imposing a penalty will be quashed. (*l*)

And where a conviction purported to be for an offence against a by-law, but the by-law showed no such offence, it was quashed, and would not be supported as warranted by the general law. (*m*)

Where it appears by the conviction that the defendant has appeared and pleaded, and the merits have been tried, and the defendant has not appealed against the conviction, it cannot be vacated for any defect of form whatever. The construction must then be such a fair and liberal one as is agreeable to the justice of the case. (*n*)

It is no ground for quashing a conviction that evidence has been improperly received of a similar offence on another day than that charged, if there is ample evidence without it to sustain the conviction, and the prosecution made no use of it against the prisoners. (*o*)

And the court will not quash a conviction on the weight or upon a conflict of evidence, but there must be reasonable evidence to support it, such as would be sufficient to go to the jury upon a trial. (*p*)

(*ii*) *Reg.* v. *Hersel*, 44 U. C. Q. B. 51.
(*j*) *Reg.* v. *Ross*, Rob. & Jos. Dig. 1979.
(*k*) *Reg.* v. *Osler*, 32 U. C. Q. B. 324.
(*kk*) *Ibid.*
(*l*) *Ex parte Brown*, 18 L. C. J. 194.
(*m*) *Re Bates*, 40 U. C. Q. B. 284; and see *Reg.* v. *Washington*, 46 U. C. Q. B. 221.
(*n*) 32 & 33 Vic., c. 31, s. 73; *Reg.* v. *Caswell*, 33 U. C. Q. B. 310, per *Wilson*, J.
(*o*) *Reg.* v. *Mailloux*, 3 Pugsley, 493.
(*p*) *Reg.* v. *Howarth*, 33 U. C. Q. B. 537.

In Quebec a conviction against a bailiff for exacting more than his legal fees was quashed, because no precise date of the offence was given. (*q*)

A conviction on a charge of having disturbed the public peace by insulting a person and by committing an assault upon him, and by crying out and threatening to beat him, was quashed, as it did not appear to be warranted by any law or statute in such case provided. (*r*) But the authority of this may be doubted.

By the 32 & 33 Vic., c. 31, s. 25, every complaint shall be for one matter of complaint only, and not for two or more offences. Therefore, a conviction for that the defendant "did in or about the month of June, 1880, on various occasions" commit the offence charged in the information, and a fine was inflicted "for his said offence," was held bad. (*s*)

A conviction for a penalty, to be paid "forthwith within thirty days," is good. (*t*)

Where, by a first statute, the penalty of two months' imprisonment, "with or without hard labor," was imposed, and by a second statute the time was extended to six months, without mentioning hard labor, it was held that the alteration was equivalent to a new statute, and that a conviction under the latter, imposing six months' imprisonment with hard labor, was bad. (*u*)

The legal effect of reversing or annulling a conviction is to render the sentence and imprisonment illegal, and not as for a crime. The rule has been laid down that when judgment, pronounced upon a conviction, is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused; restored in his credit, his capacity, his blood and his estates, with regard to which last, though they be granted away by the Crown, yet

(*q*) *Ex parte Nutt*, 6 L. C. R. 488.
(*r*) *Ex parte Rouleau*, 17 L. C. J. 172.
(*s*) *Reg.* v. *Clennan*, 8 U. C. P. R. 418.
(*t*) *Reg.* v. *McGowan*, 6 Allen, 64.
(*u*) *Ex parte Williams*, 19 L. C. J. 120.

the owner may enter upon the grantee with as little ceremony as he might enter upon a disseizor. (*v*)

Where a conviction, which had been affirmed on appeal to the sessions, was brought up by *certiorari*, contrary to the 32 & 33 Vic., c. 30, s. 71, as amended by the 33 Vic., c. 27, s. 2, which enacts that in such case no *certiorari* shall issue; it was held that although the conviction was clearly bad, the court could not quash it, for the case was one in which the justice had jurisdiction, and the court were not asked to do anything to enforce the conviction, and no motion had been made to quash the *certiorari*. (*w*)

It would seem that a conviction by a justice may be quashed, unless it is sealed. (*x*)

A conviction will be quashed, if it appears that the defendant was not put on his defence or allowed to cross-examine the witnesses, (*y*) or where the justice has no jurisdiction. (*z*)

So, if the summons state no place where the offence was committed, although the place appear on the face of the conviction; (*a*) and a conviction for two offences incurring penalties should specify for each offence the time, place, and penalty. (*b*)

Although a conviction is a defence to another proceeding for the same offence, yet a conviction fraudulently obtained before a different magistrate, for the purpose of defeating the prosecution, cannot avail for that end. (*c*)

Justices have no power to award costs on conviction unless expressly given them by statute, (*d*) and where they are so empowered, they must specify the amount. (*e*)

(*v*) *Davis* v *Stewart*, 29 U. C. Q. B. 446, per *Wilson*, J.; 4 Bla. Com. 393.
(*w*) *Reg.* v. *Johnson*, 30 U. C. Q. B. 423.
(*x*) *Haacke* v. *Adamson*, 14 U. C. C. P. 201; see also *Macdonald* v. *Stuckey*, 31 U. C. Q. B. 577; 32 & 33 Vic., c. 31, s. 42.
(*y*) *Ex parte Lindsay*, Rob. Dig. 73.
(*z*) *Reg.* v. *Taylor*, 8 U. C. Q. B. 257.
(*a*) *Ex parte Leonard*, 6 L. C. R. 480.
(*b*) *Ex parte Paige*, 18 L. C. J. 119.
(*c*) *Reg.* v. *Roberts*, 5 Allen, 531.
(*d*) *Reg.* v. *Lennan*, 44 U. C. Q. B. 456.
(*e*) *Ex parte Hartt*, 3 Allen, 122; *Dickson* v. *Crabbe*, 24 U. C. Q. B. 494; *Moffatt* v. *Barnard*, 24 U. C. Q. B. 498; and see 32 & 33 Vic., c. 31, s. 55.

There is no such general power as to costs on a conviction under an Ontario Act; and where not given by the statute itself, the conviction cannot be amended. (*f*) In New Brunswick, however, a conviction for breach of a by-law of the city of Fredericton, defective in this respect, was amended by deducting the amount of costs so improperly imposed, and allowing the conviction to stand for the balance. (*g*)

Where there is a conviction against several, and the magistrate has power to award costs, he should apportion them, and not charge the full amount against each. (*h*)

A general power to grant costs on a conviction does not necessarily empower justices to impose the costs of commitment and conveying the prisoner to gaol; and the forms of conviction given in the statutes are applicable only where such authority exists. (*i*) But a defect of this nature, it has been held in New Brunswick, may be amended. (*j*)

The Summary Convictions Act, 32 & 33 Vic., c. 31, empowers justices to award costs either on dismissal of the complaint or on conviction, which may be recovered in the same manner as are penalties under the Act, viz., by distress, and in default of distress by imprisonment, with or without hard labor, for any time not exceeding one month, unless the costs be sooner paid, (*k*) and may also award the costs of commitment and conveying the prisoner to gaol.

Before a prisoner can be imprisoned under this statute, a distress must be issued and returned; (*l*) and the costs of commitment, etc., must be specified in the warrant. (*m*)

It is no objection to a warrant of distress that the costs of conveying the defendants to gaol, in the event of imprisonment in default of distress, were specified in the conviction; or that the costs of such conveying were mentioned in the

(*f*) *Reg.* v. *Lennan*, *supra*.
(*g*) *Ex parte Mowry*, 3 Allen, 276.
(*h*) *Parsons q. t.* v. *Crabbe*, 31 U. C. C. P. 151.
(*i*) *Reg.* v. *Harshman*, Stev. Dig. 822.
(*j*) *Ibid.* 821.
(*k*) Secs. 54 *et seq.*; *ex parte Ross*, 2 Pugsley & B. 337.
(*l*) *Reg.* v. *Blakeley*, 6 U. C. P. R. 244.
(*m*) Sec. 62.

warrant of distress, for it authorized a distress only for the penalty and costs of conviction. (*n*)

A conviction is bad which orders imprisonment in default of immediate payment of a sum of money, when the by-law upon which it is based is in the alternative, imposing a fine or imprisonment. A conviction is also bad which gives costs, when the by-law upon which it is based gives no jurisdiction as to costs. (*o*)

A judgment for too little is as bad as a judgment for too much; and a conviction for one month instead of two months is therefore bad. (*p*)

A conviction inflicting one penalty for two offences is bad. (*q*) And where a statute prescribes a definite penalty for an offence, the imposition of a penalty other than the one prescribed is irregular and fatal. (*r*)

Where no other mode is provided, a prosecution for a penalty may be in the name of the Queen. (*s*)

Where the defendant is summarily convicted at one time of several offences, the justice has power, under 32 & 33 Vic., c. 31, s. 63, to award that the imprisonment, under one or more of the convictions, shall commence at the expiration of the sentence previously pronounced. (*t*)

Under the 7 & 8 Geo. IV., c. 28, the practice of the judges was, where more than one case of felony was established against a man, and he was convicted of them at one and the same time, to make the sentence of imprisonment for the two or three offences, as the case might be, commence at the expiration of the sentence first awarded. (*u*)

In respect to warrants committing prisoners on charges of offences committed, it has been held not necessary to state

---

(*n*) *Reid* v. *McWhinnie*, 27 U. C. Q. B. 289.
(*o*) *Ex parte Marry*, 14 L. C. J. 163.
(*p*) *Ex parte Slack*, 7 L. C. J. 6.
(*q*) *Corignan* v. *Harbour Comrs. Montreal*, 5 L. C. R. 479.
(*r*) *Ex parte Wilson*, 1 Pugsley & B. 274.
(*s*) *Reg.* v. *Armstrong*, 6 Allen, 81.
(*t*) *Reg.* v. *Cutbush*, L. R. 2 Q. B. 379.
(*u*) *Ibid.* 382, per *Cockburn*, C. J.

on the face of them that the justice had information on oath which could justify him in binding the defendant to keep the peace. (*v*)

A warrant of commitment must state the place where the offence was committed, otherwise it will be defective, (*w*) and a verbal warrant of commitment is bad. (*x*)

It is a general rule, that, where a man is committed for any crime, either at common law, or created by Act of Parliament, for which he is punishable by indictment, then he is to be committed until discharged by due course of law. But where the committal is in pursuance of a special authority, the terms of the commitment must be special, and must exactly pursue that authority. (*y*)

It is not necessary that, in the warrant of commitment, the offence should be described with the nicety and technical precision of an indictment; but the prisoner should be charged with some legally defined and well-known offence, for which he would be subjected to criminal proceedings, either by indictment or otherwise, and that specific offence cannot be included under a general term, which compendiously covers a great variety of criminal offences. (*z*)

As the term felony includes a number of crimes, ranging between treason and larceny, it is not sufficient simply to designate the offence by the name of the class of offences to which the justice may find or judge it to belong.

A commitment, in the absence of any statutory provisions prescribing its forms and contents, should state the facts charged to constitute the offence with sufficient particularity to enable the court or judge, on *habeas corpus*, to determine what particular crime is charged against the prisoner; and if it fail to do this, the prisoner ought to be discharged. (*a*)

A warrant was held bad which charged that the defendant

(*v*) *Dawson* v. *Fraser*, 7 U. C. Q. B. 391.
(*w*) *Re Beebe*, 3 U. C. P. R. 270.
(*x*) *Campbell* v. *Flewelling*, 2 Pugsley, 403.
(*y*) *Re Anderson*, 11 U. C. C. P. 54.
(*z*) *Reg.* v. *Young, the St Alban's Raid*, 3, per *Badgley*, J.
(*a*) *Ibid.* 3, per *Badgley*, J.

did embezzle in the county of Grey, while the magistrate was acting in and for the county of Oxford, and which did not show that the defendant had the embezzled property with him in the county of Oxford according to 32 & 33 Vic., c. 21, s. 121, or that he was, or resided, or was suspected of being or residing within the jurisdiction of such magistrate, according to 32 & 33 Vic., c. 30, s. 1. (*b*)

A commitment with hard labor, on a conviction warranting only imprisonment without hard labor, is bad. (*c*)

Defects in stating an offence in a warrant of commitment are not fatal, for there is not the same necessity for adherence to technical terms as in an indictment; and upon the return to a *habeas corpus*, it is the evidence, which is the foundation of the warrant, the court looks at, when the evidence is before them on a *certiorari*, rather than the warrant itself; and when a legal cause for imprisonment appears on the evidence, the ends of justice are not allowed to be defeated by a want of proper form in the warrant, but the court will rather see that the error is corrected and amend the warrant. (*d*)

Justices should not omit any part of a prescribed form of commitment, lest the part omitted be material, and render the warrant void. (*dd*)

When a justice follows the words used by the legislature, the court will hold that he intended them in the same sense; but if he uses other words, he ought to be more precise. (*e*) It is, however, the duty of the court to take care that, in all cases brought before them, justices shall have the full protection to which the law entitles them. (*f*)

A warrant of commitment under 31 Vic., c. 16, signed by one qualified justice of the peace, and by an alderman who has not taken the necessary oath, is invalid to uphold the

(*b*) *McGregor* v. *Scarlett*, 7 U. C. P. R. 20.
(*c*) *Reg.* v. *Yeomans*, 6 U. C. P. R. 66.
(*d*) *Re Anderson*, 20 U. C. Q. B. 162; *Rex* v. *Marks*, 3 East, 57; *Reg.* v. *Murray*, 2 L. C. L. J. 87.
(*dd*) *Re Beebe*, 3 U. C. P. R. 373.
(*e*) *Re Anderson*, 11 U. C. C. P. 63.
(*f*) *Croukhite* v. *Sommerville*, 3 U. C. Q. B. 131, per *Robinson*, C. J.

detention of a prisoner confined under it, though it might be a justification to a person acting in virtue of it, if an action were brought against him. (*g*)

The 32 & 33 Vic., c. 31, s. 86, provides that, after a case has been heard and determined, one justice may issue all warrants of distress or commitment thereon.

By s. 87, it shall not be necessary that the justice who acts before or after the hearing be the justice, or one of the justices, by whom the case is or was heard and determined. It is therefore not necessary that a warrant of distress or commitment should be signed by two justices, though two are required to convict; nor is it necessary that the justice who commits should also have heard and determined. (*h*)

The issuing of a warrant of commitment, under 32 & 33 Vic., c. 31, s. 75, is discretionary and not compulsory upon a justice of the peace. The court will, therefore, upon this ground, as well as upon the ground that the person sought to be committed has not been made a party to the application, refuse a *mandamus* to compel the issue of the warrant. (*i*)

The Con. Stats. U. C., c. 126, s. 6, now embodied in R. S. O., c. 73, s. 6, was passed expressly for the protection of justices of the peace; and when it is desired to compel a justice to issue a warrant of commitment against a person, proceedings should not be taken by *mandamus*, but a rule should be issued, under this clause, and the person to be affected should be made a party to the rule. (*j*)

Where the defendant, a justice of the peace, issued his warrant, under Con. Stats. Can., c. 103, s. 67, to commit the plaintiff for thirty days, for non-payment of the costs of an appeal to the Quarter Sessions, unless such sum and all costs of the distress and commitment, and conveying the party to gaol, should be sooner paid, but omitted to state in the warrant the amount of the costs of distress, commitment and

(*g*) *Reg.* v. *Boyle*, 4 U. C. P. R. 256.
(*h*) *Re Crow*, 1 U. C. L. J. N. S. 302.
(*i*) *Re Delaney* v. *Macnab*, 21 U. C. C. P. 563.
(*j*) *Re Delaney* v. *Macnab*, 21 U. C. C. P. 563.

conveyance to gaol; it was held, that it was the duty of the justice to ascertain and state the amount of these costs; yet the omission to do so, though it might have occasioned the plaintiff's discharge, did not show either a want or excess of jurisdiction. The warrant, however, was irregular in omitting these particulars, and there was consequently an irregular exercise of jurisdiction. (*k*)

Where an Act, passed by the Provincial Legislature, was subsequently disallowed by Her Majesty, but, while it was in force, the plaintiff had been convicted under it by the defendants, as justices of the peace, and directed to pay a fine, to be levied according to the Act, and, the fine not having been paid, a warrant was properly issued by the defendants for his arrest and imprisonment, which, however, was not executed by the officer to whom it was directed until after the disallowance of the Act was published in the *Gazette*, and from its publication only the Act ceased: it was held, that the defendants were justified in making the conviction and issuing the warrant, and could not be held liable by reason of the warrant being executed after the operation of the Act had been determined. (*l*)

The warrant of commitment should show before whom the conviction was had. It lies on the party alleging the sufficiency of the conviction to sustain the commitment, to produce the conviction. (*m*)

Where a prisoner is in custody of a gaoler, under several warrants, the magistrate cannot withdraw them, or any of them, from the gaoler's hands, because they are for his protection; but the gaoler ought to know which is the operative warrant, otherwise he may not know whether he is to discharge the prisoner from custody at the end of the time specified in one or in the other. (*n*)

(*k*) *Dickson* v. *Crabb*, 24 U. C. Q. B. 494.
(*l*) *Clapp* v. *Lawrason*, 6 U. C. Q. B. O. S. 319; see 31 Vic., c. 1, s. 7, thirty-fifthly, sixthly and seventhly.
(*m*) *Re Crow*, 1 U. C. L. J. N. S. 302; 1 L. C. G. 189.
(*n*) *Re McKinnon*, 2 U. C. L. J. N. S. 329.

A warrant ought to set forth the day and year wherein it was made, and it is safe, but perhaps not necessary, in the body of the warrant, to show the place where it is made, yet it seems necessary to set forth the county in the margin, at least, if it be not set forth in the body.

In strictness, it is not indispensable that the authority of the magistrate should be shown on the face of the warrant, for the omission may be shown by averment and parol evidence. A commitment must be in writing, under the hand and seal of the person by whom it is made, expressing his office or authority, and the time and place at which it is made, and must be directed to the gaoler or keeper of the prison. (*o*)

A final commitment, for want of sureties to keep the peace, must be in writing. Where, however, a person having been brought up before a justice on a charge of threatened assault, was ordered by the justice to find sureties to keep the peace, and he offered bail, who were rejected as not being householders, and, being thus prevented from immediately obtaining bail, remained in custody of a police constable for three hours, during which time the justice frequently visited him to ascertain if he had found bail, and at night he was taken to the gaol, remaining there until the following morning, when he was discharged on bail being procured; it was held that this was not a final commitment for want of sureties, and that, consequently, it did not require a written warrant, for the detention was no longer than might be reasonably necessary for ascertaining whether the party could find some one who would become his surety. (*p*) The time allowed for this purpose must always depend on the circumstances of each case. (*q*)

A commitment in default of sureties to keep the peace should show the date on which the words were alleged to

(*o*) *Reg.* v. *Reno*, 4 U. C. P. R. 292, per *Draper*, C. J.
(*p*) *Lynden* v. *King*, 6 U. C Q. B. O. S. 586.
(*q*) *Ibid.*

have been spoken, and contain a statement to the effect that complainant is apprehensive of bodily fear. (*r*)

When articles of the peace have been exhibited in open court against a person, the court will direct that he do stand committed until security to keep the peace be given. (*s*)

Where a prisoner is committed to be held until discharged by due course of law, the warrant continues in force until the prisoner is discharged or sent to the penitentiary. It is sufficient, therefore, if at the circuit the judge remands verbally a prisoner into the custody of the proper officer in court. (*t*) Where, in the course of a civil action, the judge is of opinion that forgery or perjury has been committed, he will, as a matter of duty, order that the defendant be prosecuted for these crimes. (*u*) The 41 Vic., c. 19, makes provision for the discharge in certain cases of persons who have been confined for the period of two weeks in default of sureties for the peace.

Sometimes, in cases of indictable offences, an inquisition is taken by a coroner, and the prisoner is committed for trial on the verdict of the coroner's jury. The finding of a coroner's inquest is equivalent to the finding of a grand jury, and a defendant may be prosecuted for murder or manslaughter upon an inquisition, which is the record of the finding of a jury sworn to inquire into the death of the deceased, *super visum corporis*. Such an inquisition amounts to an indictment. (*v*)

And where, on an indictment for manslaughter, the grand jury had found "no bill," it was held that the Crown had the right to have the prisoner arraigned and tried on the finding of the coroner's jury. (*w*)

A coroner's duty is judicial, and he can only take an

(*r*) *Re Ross*, 3 U. C. P. R. 301.
(*s*) *Reg.* v. *Vendette*, 8 L. C. J. 284.
(*t*) *Reg.* v. *Mulholland*, 4 Pugsley & B. 476.
(*u*) *Content* v. *Lamontagne*, 17 L. C. J. 319.
(*v*) *Reg.* v. *Ingham*, 5 B. & S. 257; 33 L. J. (Q. B.) 183; Arch. Cr. Pldg. 116.
(*w*) *Reg.* v. *Tremblay*, 18 L. C. J. 158.

inquest *super visum corporis;* and an inquest where the coroner and jurors were not present at the same time was held void. (*x*)

Where a coroner's finding on an inquisition does not disclose with certainty any offence against the person who caused the death, yet is so worded as to leave the matter in doubt, as if it found that one G. "did feloniously and maliciously kill and slay one M., against the peace, etc., in self-defence of him, the said G.," the court will quash it on the application of G. (*y*) But if no crime is disclosed, the court will not quash the finding on the application of a person on whose medical skill it reflects unfavorably (*z*) On such an application the propriety of entitling the matter "the Queen against" the applicant has been doubted. (*a*)

A finding of manslaughter which omits the words "feloniously" and "slay," is bad, and will be quashed on a rule. (*b*) And a coroner's warrant reciting the inquisition, and stating the offence to be that the prisoner "did stand charged with having inflicted blows on the body of the said" deceased, and not showing the place where the blows, if any, were inflicted, or where the offence, if any, was committed, was held defective. (*c*)

An inquest held by a coroner on a Sunday, being a judicial act, is invalid. (*d*) A coroner cannot take a second inquisition on the same body, the first inquisition being valid and subsisting. (*e*)

A barrister cannot insist on being present at a coroner's inquest, and upon examining and cross-examining the witnesses. (*f*)

Imprisonment is imposed for different purposes. It may

(*x*) *Ex parte Wilson*, Stev. Dig. 335.
(*y*) *Reg.* v. *Golding*, 39 U. C. Q. B. 259.
(*z*) *Reg.* v. *Farley*, 24 U. C. Q. B. 384.
(*a*) *Ibid.*
(*b*) *Ex parte Brydges*, 18 L. C. J. 141.
(*c*) *In re Carmichael*, 10 U. C. L. J. 325.
(*d*) *Re Cooper*, 6 U. C. L. J. N. S. 317.
(*e*) *Reg.* v. *White*, 7 U. C. L. J. 219; 3 E. & E. 137; 27 L. J. (Q. B.) 257.
(*f*) *Agnew* v. *Stewart*, 21 U. C. Q. B. 396.

be for prevention, as by a constable, to hinder a fray, or by any person, to restrain a misdemeanor or prevent a felony, or for security in criminal cases, before investigation or trial, or until sureties for the peace are given ; or in coercion, to ensure the performance of some particular act, as in cases of actual contempt, until the contempt be purged, and in cases of supposed contempt, as for not making a return of legal process, or for not paying over moneys raised by such process, by officers of the court, until return of payment is made, and to enforce the payment of pecuniary fines, or punitive, as in criminal sentences. (*g*)

Where a party, undergoing an imprisonment on conviction of felony, has been released on bail in consequence of the issue of a writ of error, and such writ of error is subsequently quashed, he may be reimprisoned for the unexpired term of his sentence on a warrant of a judge of the Court of Queen's Bench, signed in chambers, and granted in consequence of the court having ordered process to issue to apprehend such party and bring him before the court, "or before one of the justices thereof, to be dealt with according to law." (*h*)

The period of a man's imprisonment must be certain, and not dependent on the will of the officer who is charged with the imprisonment. Every judicial act is supposed to happen the first instant of the day it takes place. The imprisonment of a person, therefore, is deemed to commence at the beginning of the day on which he was adjudged to be imprisoned, and he will be entitled to his discharge, not at the same hour of the day he was brought to prison, but on the first opening of the prison on the day after his imprisonment expired. (*i*)

An adjudication mentioned in the margin of the warrant of commitment, where there are several warrants each for a distinct period of imprisonment, that the term of imprisonment mentioned in the second and third warrants shall commence at the expiration of the time mentioned in the warrant

(*g*) *McInnes* v. *Davidson*, 4 U. C. P. R. 189, per *A. Wilson*, J.
(*h*) *Ex parte Spelman*, 14 L. C. J. 281.
(*i*) *Reg.* v. *Scott*, 2 U. C. L. J. N. S. 324, per *J. Wilson*, J.

immediately preceding, is valid. An adjudication so stated in the margin properly forms a part of the warrant, and, even if the portions in the margin of the second and third warrants could not be read as parts of these warrants, the periods of imprisonment would nevertheless be quite sufficient, the only difference being that all the warrants would be running at the same time, instead of counting consecutively. (*j*)

It is not necessary, before a defendant convicted of assault is imprisoned, that he should be served with a copy of the minute of conviction. The 32 & 33 Vic., c. 31, which might require this to be done before a warrant of commitment could issue, applies only to orders of justices, not to convictions. A party convicted of an offence is bound to take notice of the terms of the conviction at his peril. (*k*)

A witness who, on the usual application, has been ordered to withdraw from the court room, is guilty of contempt if, after his examination, he communicates facts disclosed in evidence at the trial to another witness not examined at the time of the disclosure. (*l*) In this case the rule for attachment was discharged, the defendant swearing, in answer, that he did not enter the court room during the trial till called as a witness; that he communicated the fact without any intention of influencing the evidence to be given by the witness, or of committing a contempt of court, and in utter ignorance of there being any impropriety in so doing. The affidavit further stated that the deponent was wholly unconscious of the possibility of his conduct being considered a contempt.

If a witness absent himself a bench warrant may be issued, which, if tested in open session and signed by the clerk of the peace, is not invalid for want of a seal; (*m*) and the witness may be committed for contempt. But an attach-

(*j*) *Re Crow*, 1 U. C. L. J. N. S. 302; 1 L. C. G. 189; see 32 & 33 Vic., c. 31, s. 63.
(*k*) *Reg.* v. *O'Leary*, 3 Pugsley, 264.
(*l*) *Reg.* v. *McCorkill*, 8 L. C. J. 282.
(*m*) *Fraser* v. *Dickson*, 5 U. C. Q. B. 231.

ment will not be granted against a witness for not obeying a subpœna unless there is a clear case of contempt; but if his absence is wilful, the court will not, in general, look to the materiality of his testimony. (*n*)

A subpœna to attend on the 10th September, and so from day to day, was served on the 11th September, and the witness attended for several days, and knew that the case was not tried; he was held guilty of contempt in subsequently absenting himself. Where a witness accepted the conduct money, and went with the person who served him with the subpœna, and remained at the court several days, an attachment was granted against him for subsequently absenting himself, though he and another person swore, in contradiction to the party who served the subpœna, that the original was not shown to him, and he also swore that he attended the court as a juror, and left in consequence of ill health with the intention of returning, his absence appearing to be wilful. (*o*)

Where a party is served with a subpœna to attend as a witness, and accepts a sum of money which is tendered to him for his expenses without objecting to the amount, but refuses to attend on account of his own business, he is liable to an attachment for the non-attendance, even though the sum tendered be less than he is entitled to receive. (*p*) But if he had objected to the sum when tendered, it would have been an answer to the application. (*q*)

It is not necessary to show that the witness was called on his subpœna, if it is shown by other satisfactory evidence that he did not attend. (*r*)

An attempt by a third person to prevent a suitor from laying his case before the court, by threats of bringing him into disgrace and disrepute, is a contempt of court, and subjects the offender to a heavy fine. (*s*)

(*n*) *Meloney* v. *Morrison*, 1 Allen, 240.
(*o*) *Johnson* v. *Williston*, 2 Allen, 171.
(*p*) *Gilbert* v. *Campbell*, 1 Hannay, 258.
(*q*) *Ibid.*
(*r*) *Meloney* v. *Morrison*, 1 Allen, 240.
(*s*) *Re Mulock*, 13 W. R. 278; 1 L. C. G. 25.

A frivolous opposition, made to retard a judicial sale, is a contempt of court. (*t*)

An advocate who publishes in a public newspaper letters containing libellous, insulting and contemptuous statements, and language concerning one of the justices of the court, in reference to the conduct of said justice while acting in his judicial capacity, on an application made to him in chambers for a writ of *habeas corpus*, is guilty of contempt. (*u*)

In this case it was held in the Privy Council, reversing the judgment of the Court of Queen's Bench for Quebec (Crown side), that a judge of the Court of Queen's Bench, in Quebec, whilst sitting alone, in the exercise of the criminal jurisdiction conferred upon him by Con. Stats. L. C., c. 77, s. 72, has no power to pronounce such advocate in contempt for conduct of the above description, or to impose a fine; and that the proceedings for such contempt could only be legally and properly taken in the full Court of Queen's Bench. (*v*)

An order was made for the delivery of infant children by the father to the mother. On an application to commit the father for a contempt in not obeying this order, it appeared that, in his absence from home, the children had been removed from his house and taken to the United States by his son, aged fifteen. They denied collusion, the son saying that he acted without his father's knowledge or consent, but the father took no steps to bring the children back, and did not offer to do so if time were given him. To a demand made for the children, the father replied that they were not in his custody; but it was held that he was not excused from obeying the order, and was in contempt. (*w*)

Affidavits disingenuously drawn up, with a view of presenting inferences, and giving color to the transactions to which they refer inconsistent with the whole truth, even

(*t*) *Thomas* v. *Pepin*, 5 L. C. J. 76.
(*u*) *Reg.* v. *Ramsay*, 11 L. C. J. 152; S. C. L. R. 3 P. C. App. 427.
(*v*) *Ibid.*
(*w*) *Reg.* v. *Allen*, 5 U. C. P. R. 453.

though true as far as they go, should be read with suspicion and carry but little weight. (*x*)

A contempt of court being a criminal offence, no person can be punished for such unless the specific offence charged against him be distinctly stated, and an opportunity given him of answering. (*y*)

To contempts of court committed by an individual in his personal character only, there has been attached by law, and by long practice, a definite kind of punishment by fine and imprisonment. (*z*)

An order suspending an attorney, and barrister of the Supreme Court of Nova Scotia, from practising in that court, for having addressed a letter to the Chief Justice reflecting on the judges and the administration of justice generally in the court, was discharged by the judicial committee of the Privy Council, as it substituted a penalty and mode of punishment which was not the appropriate and fitting punishment for the offence. The letter, though a contempt of court and punishable by fine and imprisonment, having been written by a practitioner, in his individual and private capacity as a suitor, in respect of a supposed grievance as a suitor, of an injury done to him as such suitor, and having no connection whatever with his professional character, or anything done by him professionally either as an attorney or barrister, it was not competent for the Supreme Court to go further than award to the offence the customary punishment for contempt of court, or to inflict a professional punishment of indefinite suspension for an act not done professionally, and which, *per se*, did not render the party committing it unfit to remain a practitioner of the court. (*a*)

The power to punish for contempt is inherent in all courts, and is a necessary condition of their existence. In Canada, this power is not confined to contempt in the face of the

(*x*) *Reg.* v. *Allen*, 5 U. C. P. R. 453.
(*y*) *Re Pollard*, L. R. 2 P. C. App. 106.
(*z*) *Re Wallace*, L. R. 1 P. C. App. 295, per Lord *Westbury*.
(*a*) *Ibid.* 283; 1 Oldright, 654.

court, or to pending cases, or to resistance to process; but it extends to the punishment of all contemptuous publications, calumniating or misrepresenting its judicial opinions as a court, or the opinion or order of any judge of the court, pronounced or made either in term or in vacation, whether in chambers, or at his own residence, or in any other place, where, within the jurisdiction of the court, he may be called upon to perform any judicial duty, and to all publications tending to cast ridicule or odium upon the court or any of its judges, in reference to their judicial acts, or to impair the respect and confidence of the public in the purity and integrity of the tribunal or any of its members. (*b*)

An attachment against a sheriff for not obeying a rule to bring in the body, cannot be granted in vacation by a single judge at chambers. (*c*)

Where an attorney of this court, practising in an inferior court, has charged, and the judge has allowed, costs clearly not sanctioned by law, this court will punish by fine and attachment. (*d*)

A rule for attachment for a contempt of court, committed during term, can be moved for on the last day of such term, and it is no objection that it is made returnable next term. The rule will be discharged if headed "*In re*," etc., when there was no such matter depending in court. (*e*)

Any court of record has power to fine and imprison for contempts committed in the face of the court. (*f*) It seems the commitment may be made *sedente curia*, by oral command without any warrant made at the time. This proceeds on the ground that there is, in contemplation of law, a record of such commitment, which may be drawn up when necessary. (*g*)

(*b*) *Reg.* v. *Ramsay*, 11 L. C. J. 158.
(*c*) *Rex* v. *Sheriff of Niagara*, Draper, 343.
(*d*) *Rex* v. *Whitehead*, Taylor, 476.
(*e*) *Re Ross*, 2 Russell & Chesley, 596.
(*f*) *Armstrong* v. *McCaffrey*, 1 Hannay, 517.
(*g*) *Owens* v. *Taylor*, 19 U. C. C. P. 53, per *Hagarty*, J.

A Provincial Legislature has not the power to order the arrest of any one for contempt. (*h*)

The proceedings on a rule for contempt do not constitute a criminal case, so as to allow a writ of error with respect to such rule. (*i*)

Justices of the peace, acting judicially in a proceeding in which they have power to fine and imprison, are judges of record, and have power to commit to prison orally, without warrant, for contempt, committed in the face of the court. (*j*)

Thus, if the justice be called a "rascal, and a dirty mean dog," a "damned lousy scoundrel," a "confounded dog," etc., the justice has a right to imprison as often as the offence is committed. But the commitment must be for a specified period. (*k*)

And where a prisoner was convicted three several times on the same day for using opprobrious epithets to a justice, while in the execution of his office, and detained in prison under three several warrants, all dated the same day, the periods of imprisonment in the two last commencing from the expiration of the one preceding it, but the first to be computed "from the time of his arrival and delivery (by the bailiff) into your (the gaoler's) custody thenceforward," it was held that although the justice had a right to convict and sentence for continuing periods, and to make the period of imprisonment on the second and third adjudications begin at the termination of the first imprisonment, yet, as the first period of imprisonment was depending on the will of the officer who was to convey to gaol, it was therefore uncertain, and the other periods of imprisonment depending on the same contingency were likewise uncertain, and the prisoner was entitled to his discharge. (*l*)

A justice of the peace, while sitting in discharge of his

(*h*) *Ex parte Cote*, 6 *Revue Leg.* 582.
(*i*) *Ramsay* v. *Reg.*, 11 L. C. J. 158.
(*j*) *Armstrong* v. *McCaffrey*, 1 Hannay, 517; *Jones* v. *Glassford*, Rob. & Jos. Dig. 1974.
(*k*) *Jones* v. *Glassford*, *supra*; *Dawson* v. *Fraser*, 7 U. C. Q. B. 391.
(*l*) *Ibid.*

duty, has power, without any formal proceeding, to order at once into custody, and cause the removal of any party who, by his indecent behavior or insulting language, is obstructing the administration of justice, or may commit him until he finds sureties to keep the peace. But he has no power, either at the time of the misconduct, much less on the next day, to make out a warrant to a constable, and to commit the offending party to gaol for any certain time, by way of punishment, without adjudging him formally, after a summons to appear for hearing to such punishment on account of his contempt, and a hearing of his defence, and making a minute of such sentence. (*m*)

It has been doubted whether a justice of the peace, executing his duty in his own house, and not presiding in any court, can legally punish for a contempt committed there. (*n*)

A commitment by a justice for a contempt, if there be no recorded conviction, should show that the party was convicted of the contempt. And stating that he is charged with it is insufficient; at any rate, the evidence should in some way show the fact of conviction, and the manner of it. (*o*)

A warrant to a constable to commit for contempt, containing a direction to detain the party till he shall pay the costs of his apprehension and conveyance to gaol, is defective. For the statute 3 James I., c. 10, only authorizes such expenses to be levied of the offender's goods; and if he could be imprisoned till he paid them, it would be necessary that the amount of such expenses should be stated, or the gaoler would not know when he might discharge him.

Where a power resides in any court or judge to commit for contempt, it is the peculiar privilege of such court or judge to determine upon the facts, and it does not properly belong to any higher tribunal to examine into the truth of the case. (*p*) Therefore the court, in adjudicating on a case of contempt,

(*m*) *Re Clarke*, 7 U. C. Q. B. 223.
(*n*) *McKenzie* v. *Newburn*, 6 U. C. Q. B. O. S. 486.
(*o*) *Ibid.*
(*p*) *Re Clarke*, 7 U. C. Q. B. 223.

will not enter into the truth of the alleged facts constituting the contempt.

The District Magistrate's Court in the Province of Quebec is not a court of record. (*q*)

The 32 & 33 Vic., c. 31, s. 65 *et seq.*, as amended by the 33 Vic., c. 27, 40 Vic., c. 27, and 42 Vic., c. 44, provides for appeals in cases of summary conviction.

The Con. Stats. U. C., c. 114, giving an appeal to the sessions, on conviction of a person in any matter cognizable by a justice of the peace, not being a crime, was repealed by the 38 Vic., c. 4, s. 12, and by the statute R. S. O., c. 74, appeals in matters within the jurisdiction of the Ontario Legislature are made to conform to the proceedings provided by the 32 & 33 Vic., c. 31, before mentioned.

The right of appeal under these statutes is given only to the defendant on conviction, not to the complainant on acquittal. (*r*)

An appeal is subject to the following conditions: If the conviction or order be made more than twelve days before the sittings of the court to which the appeal is given, such appeal shall be made to the then next sittings of such court; but if the conviction or order be made within twelve days of the sittings of such court, then to the second sittings next after such conviction or order. The person aggrieved shall give to the prosecutor or complainant, or to the convicting justice, or one of the convicting justices for him, a notice in writing of such appeal, within four days after such conviction or order, and the person appealing shall either remain in custody or give security, or in certain cases deposit money as security.

A notice of appeal for the next ensuing sittings, when the sittings are within twelve days of the conviction, is inoperative, and proper notice may afterwards be given, but of course within the four days; and this though on the first notice the

(*q*) *Provost* v. *Masson*, 5 *Revue Leg*, 557.
(*r*) *Re Murphy*, 8 U. C. P. R. 420.

defendant have obtained an order for costs from the session, under sec. 69 of the principal Act. (*s*)

The notice need not be signed by the appellant. (*t*)

The words within four days after conviction, exclude the day of conviction. (*u*)

An appeal lies to the sessions from a summary conviction, under the Inland Revenue Act, 31 Vic., c. 8, s. 130, for possessing distilling apparatus without having made a return thereof, such an offence being a crime. (*v*)

So an appeal lies from a conviction for penalties under the Dominion Fisheries Act, 1868, c. 60. (*w*)

Under "the Indian Act, 1876," 39 Vic., c. 13, s. 84 (D.), an appeal must be brought before the appellate judge within thirty days from the conviction. Giving notice of appeal to the next session, and entering a recognizance within that time, is not sufficient. (*x*)

The person appealing from a summary conviction by a justice, must show a compliance with all the conditions imposed upon him by the statute under which he appeals. He must not only give notice within the proper time, but he must also either remain in custody or enter into the proper recognizance. (*y*) Where, in the recognizance, the appellant, instead of being bound to appear and try the appeal, etc., as required by the Act, was bound to appear at the sessions to answer any charge that might be made against him, the appeal was dismissed. An application to take the appellant's recognizance in court was refused, on the ground that, although the recognizance need not be entered into within four days, it must be entered into and filed before the sittings of the Court of Quarter Sessions, to which the appeal is made. (*z*)

It was held, under the former statutes, that the form of

(*s*) *Reg.* v. *Caswell*, 33 U. C. Q. B. 303.
(*t*) *Reg.* v. *Nicol*, 40 U. C. Q. B. 76.
(*u*) *Scott* v. *Dickson*, 1 U. C. P. R. 366.
(*v*) *Re Lucas and McGlashan*, 29 U. C. Q. B. 81.
(*w*) *Reg.* v. *Todd*, 1 Russell & Chesley, 62.
(*x*) *Re Hunter*, 7 U. C. P. R. 86.
(*y*) *Kent* v. *Olds*, 7 U. C. L. J. 21; *Re Meyer*, 23 U. C. Q. B. 611.
(*z*) *Kent* v. *Olds*, *supra*.

recognizance to try an appeal, given in the schedule to the Con. Stats. Can., c. 103, p. 1130, was sufficient, though the condition differed in form from that provided for by c. 99, s. 117. (*a*)

Before an appeal can be entertained, it is clearly incumbent on the appellant to show his right to appeal, by proving compliance with the 33 Vic., c. 27, s. 1, subs. 3, by having remained in custody, or entered into a recognizance. This is a substantial, not a mere technical, objection to the appeal, and is not waived by the respondent asking for a postponement, after the appellant has proved his notice of appeal on the first day of the court. (*b*)

But when exception has been taken to the jurisdiction of the court, and the party objecting has afterwards proceeded to trial on the merits, he should be held to have waived proof of the preliminary conditions to give jurisdiction, where it appears that they have in fact been complied with. (*c*)

The production of the recognizance by the clerk of the court, and proof of service of the notice of appeal, are sufficient to found the jurisdiction of the court. (*d*)

The enrolment of the recognizance is unnecessary, and the filing the recognizance by the appellant, instead of its being transmitted to the clerk of the peace by the justice who took it, is not fatal. So the condition reading to appeal "to the General Quarter or General Sessions," and not "to the Court of General Sessions of the Peace," does not render it invalid. (*e*)

A notice of appeal following the form given in the Con. Stats. Can., c. 103, p. 1130, and stating "that the formal conviction drawn up and returned to the sessions is not sufficient to support the conviction, etc.," was held sufficiently particular to allow all objections being raised, which were apparent on the face of the conviction or order. (*f*)

(*a*) *Re Wilson*, 23 U. C. Q. B. 301.
(*b*) *Re Meyers*, 23 U. C. Q. B. 611.
(*c*) *Reg.* v. *Essery*, Rob. & Jos. Dig. p. 3485.
(*d*) *Ibid.*
(*e*) *Ibid.*
(*f*) *Helps and Eno*, 9 U. C. L. J. 302.

After notice of appeal has been given, and the time for hearing the appeal arrived, no amendment can be made to the conviction. (*g*)

The appeal should not be drawn up until the four days have elapsed. (*h*)

It appears to be the established practice for the sessions to hear appeals on the first day, but there is no law compelling them to do so. (*i*)

One D. M. having been on the 27th of August, 1862, convicted before justices of the peace, "for allowing card-playing at his inn, and other disorderly conduct during this year," was fined $20 and costs. On judgment being pronounced, he remarked that he would pay the fine, etc., but he would "see further about it." On the 30th of August notice of appeal was given to the prosecutor and to one of the convicting justices, and on the 11th of September the appeal came on at the Quarter Sessions, when that court decided that the right to appeal was waived and lost by reason of the plaintiff having paid the fine and costs. The court above, however, under these facts held that there was no waiver of the right to appeal; that the statement of the defendant was capable of meaning that he meant to use any remedy that was by law open to him, whether by appeal or otherwise, and as the Act respecting appeals does not require notice of appeal to the convicting justice, nor provide for a stay of the levy, it might be reasonably inferred that he paid the fine and costs to prevent the distress and sale which might have taken place, although he had at the moment of conviction given the most formal notice of appeal. (*j*)

The court should rather lean to the hearing of appeals than to dismissing them on technical grounds. (*k*)

An appeal from a conviction for selling liquor without

(*g*) *Reg.* v. *Smith*, 35 U. C. Q. B. 518.
(*h*) *Reg.* v. *Hessell*. 44 U. C. Q. B. 51.
(*i*) *Re Meyers*, 23 U. C. Q. B. 614, per *Draper*, C J.
(*j*) *Re Justices of York*, 13 U. C. C. P. 159.
(*k*) *Ibid.* 162, per *Draper*, C.J.; *Rex* v. *Justices of Norfolk*, 5 B. & A. 992.

license, contrary to the R. S. O., c. 181, must be tried by the judge of the county court in chambers, without a jury. (*l*) And the judge may quash the conviction without hearing it *de novo*, if bad on its face. (*m*)

It would appear that, under the present statutes, which it has been decided are within the competence of the Dominion Parliament to enact, (*n*) it is discretionary with the court to grant or refuse a jury at the request of either appellant or respondent; for the 36 Vic., c. 58, s. 2, has been held to be explanatory of sec. 66 of the 32 & 33 Vic., c. 31, in all cases. (*o*) But, if a jury be not so demanded, it seems it is imperative on the court to try the appeal, and they shall be the absolute judges, as well of the fact as of the law, in respect to the conviction or decision appealed from. (*p*)

The Court of Quarter Sessions, by the 33 Vic., c. 27, s. 1, subs. 3, and R. S. O., c. 74, s. 4, has power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another or others of the said court. An adjournment of the sessions is a continuance of the same sessions or sittings. (*q*)

An appeal, dismissed for want of prosecution, may, at the instance of the appellant, and on his satisfactorily accounting for his non-appearance, be reinstated. (*r*)

The 32 & 33 Vic., c. 31, s. 66, provided that no witnesses should be examined who were not examined before the justice on the hearing of the case, and this whether the appeal was tried by the court or a jury. But now the 43 Vic., c. 44, s. 10, and the R. S. O., c. 74, s. 4, provide that either of the parties to the appeal may call witnesses and adduce evidence, in addition to the witnesses called and evidence adduced at the original hearing. (*s*)

(*l*) See sec. 71; *Re Brown*, 8 C. L. J. N. S. 81.
(*m*) *Rose* v. *Burke*, 1 Russ. & Geld. 94.
(*n*) *Reg.* v. *Bradshaw*, 38 U. C. Q. B. 564.
(*o*) *Reg.* v. *Washington*, 46 U. C. Q. B. 221.
(*p*) See 32 & 33 Vic., c. 31, s. 66; see also 33 Vic., c. 27, s. 1, subs. 3.
(*q*) *Reg.* v. *Guardians of Cam. Union*, 7 U. C. L. J. 331; *Rawnsley* v. *Hutchinson*, L. R. 6 Q. B. 305.
(*r*) *Re Smith*, 10 U. C. L. J. 20.
(*s*) *Reg.* v. *Washington*, 46 U. C. Q. B. 221.

Where a rule *nisi*, for a *mandamus* to the sessions, commanding them to hear an appeal, called upon the Court of Quarter Sessions in and for the United Counties, etc., instead of the justices of the peace for the United Counties, and the rule had been enlarged in the prior term; on objection to the rule on the above ground, it was replied that the enlargement waived the objection, and this seems to have been acquiesced in by counsel and by the court. (*t*) In fact, it seems that in all cases formal and technical objections are waived by an enlargement. (*u*)

The appellant having been convicted of an assault under the Con. Stats. Can., c. 91, s. 37, appealed to the Quarter Sessions. On the first day of the court, after he had proved his notice of appeal, at the respondent's request the case was postponed until the following day, and the respondent then objected to the jurisdiction, as it was not shown that the appellant had either remained in custody or entered into a recognizance, as required by Con. Stats. Can., c. 99, s. 117. The court held that this objection was not waived by the application to postpone. (*v*)

Causes appealed to the sessions cannot afterwards be appealed to a superior court; nor can the latter court entertain such a case even to the extent of considering a point reserved by the sessions by consent. (*w*) And the right of appeal does not exist, even where the appeal to the sessions has gone off on a preliminary objection. (*x*)

For the purpose of preventing frivolous appeals, the 32 & 33 Vic., c. 31, s. 69, enables the Court of Sessions, on proof of the giving of notice of appeal, though such appeal was not afterwards prosecuted or entered, if it has not been abandoned according to law, to order the payment of reasonable costs, by the party giving the notice.

(*t*) *Re Justices of York*, 13 U. C. C. P. 159.
(*u*) *Reg.* v. *Allen*, 5 U. C. P. R. 453-8.
(*v*) *Re Meyers*, 23 U. C. Q. B. 611.
(*w*) *Cochran* v. *Lincoln*, 3 Russ. & Ches. 480; *Rose* v. *Burke*, 1 Russ. & Geld. 94; *Coolan* v. *McLean*, 3 Russ. & Ches. 479; 32 & 33 Vic., c. 31, s. 71.
(*x*) *Reg.* v. *Firman*, 6 U. C. P. R. 67.

There was nothing in the Con. Stats. U. C., c. 114, to authorize an order that a defendant, who had appealed and been acquitted by a jury upon his trial, should pay the costs of the appeal and trial, or any portion of them.

Where the Court of Quarter Sessions ordered a party to pay certain costs of an appeal, and they not being paid, an indictment was preferred for non-payment thereof, and on this indictment the defendant was found guilty; it was held that the indictment could not be supported, either at common law or under the statute. (*y*)

The court will not give costs, on adjourning an appeal, unless the objection is made at the time of the adjournment. (*z*)

Under the English Act, 20 & 21 Vic., c. 43, the court will not entertain an application for costs of an appeal against a decision of a justice, in the term after that in which the judgment is pronounced. (*a*)

It seems doubtful whether, under the 32 & 33 Vic., c. 31, s. 74, an order of sessions, simply ordering costs of an appeal to be paid, without directing them to be paid to the clerk of the peace, as required by the Act, is regular. (*b*)

The sessions have, it seems, no power to order a person acquitted on appeal to pay any part of the costs of such appeal. (*c*)

Where a rule for amendment is opposed, the costs must be paid by the successful party. (*d*)

Where one of the justices, before whom a person was convicted for breach of the license laws, stated that all the papers necessary to perfecting the appeal were filed, except the bond telling the party it was all right, the court allowed the appeal, though no affidavit had been filed. (*e*)

(*y*) *Reg.* v. *Orr*, 12 U. C. Q. B. 57.
(*z*) *Re McCumber*, 36 U. C. Q. B. 516.
(*a*) *Budenberg and Roberts*, L. R. 2 C. P. 292.
(*b*) *Re Delaney* v. *Macnab*, 21 U. C. C. P., 563.
(*c*) *Reg.* v. *Orr*, 12 U. C. Q. B. 57.
(*d*) *McKay* v. *McKay*, 2 Thomson, 75.
(*e*) *Ibid.*

In Nova Scotia, under the Rev. Stat., c. 95, an appeal under the River Fisheries Act must be made to the sessions. (*f*)

The 32 & 33 Vic., c. 30, s. 41, empowers the justice before whom the prisoner is charged with an indictable offence to remand, from time to time, for such period as may be reasonable, not exceeding eight clear days at any one time. Sec. 42 authorizes a verbal remand where the time does not exceed three clear days.

Where the remand is in open court to the proper officer there present, no written order or commitment is necessary. (*g*)

A remand for an unreasonable time would be void. (*h*) It seems doubtful whether a judge, sitting in chambers, has power, on an application of a prisoner for his discharge on a bad warrant, to remand him, (*i*) and in aid of the prosecution to order a *certiorari* to bring up the depositions; or whether the court or judge has power, upon reading such depositions, to amend a bad warrant of a coroner or issue a new one, for the purpose of detaining a prisoner in custody. (*j*)

On discharging a jury charged with a prisoner, because they are unable to agree, the court has power, and it is the duty of the judge, to remand the prisoner to gaol until delivered in due course of law, or to the next sessions of the court, fixing or not fixing the day, as the case may be. (*k*)

When prisoners are remanded to prison, after the disagreement of the jury on the trial, they are detained, not upon the indictment, which is only the accusation and charge found for their trial, but upon the original commitment for the offence originally charged. (*l*)

It would seem that the Con. Stats. U. C., c. 112, as to the reservation of points of law in criminal cases, only confers on the sessions authority to state a case for the opinion of the

(*f*) *Gough* v. *Morton*, 2 Thomson, 10.
(*g*) *Reg.* v. *Mulholland*, 4 Pugsley & B. 478.
(*h*) *Connors* v. *Darling*, 23 U. C. Q. B. 547-51, per *Hagarty*, J.
(*i*) *Re Carmichael*, 10 U. C. L. J. 325.
(*j*) *Ibid.*
(*k*) *Ex parte Blossom*, 10 L. C. J. 32, per *Monk*, J.
(*l*) *Ibid.* 41, per *Badgley*, J.

superior court, where the original hearing and conviction is at the sessions, and that, when a summary conviction is appealed to the sessions, there is no power to reserve a case on such appeal. (*m*)

The court has authority, in virtue of its inherent jurisdiction at common law, when a prisoner charged with felony is brought up on a *habeas corpus*, to look not merely at the commitment, but also at the depositions; and though the former be informal, yet if the latter show that a felony has been committed, and that there is a reasonable ground of charge against the prisoner, he will be remanded and not bailed, with a view to amending the warrant. (*n*)

It would seem that, where proceedings are taken by *habeas corpus* and *certiorari*, under the 29 & 30 Vic., c. 45, the evidence may also be looked at on the return to the *certiorari*. (*o*)

This statute had in view and recognizes the right of every man, committed on a criminal charge, to have the opinion of a judge of the Superior Court on the cause of his commitment by an inferior jurisdiction. The judges of the Superior Court are bound, when a prisoner is brought before them, under the statute, to examine the proceedings and evidence anterior to the warrant of commitment, and to discharge the prisoner if there does not appear sufficient cause for his detention. (*p*)

Before sec. 3 of this statute, there was no way of inquiring into the truth of the facts as stated in the return. Section 3 provides that, in all cases coming within the Act, although the return to any writ of *habeas corpus* shall be good and sufficient in law, it shall be lawful for the court, or for any judge before whom such writ may be returnable, to proceed to examine into the truth of the facts set forth in such return, by affidavit or by affirmation, where an affirmation is allowed by law.

(*m*) *Pomeroy and Wilson*, 26 U. C. Q. B. 45; see also *Yearke* v. *Bingleman*, 28 U. C. Q. B. 551.
(*n*) *Re Anderson*, 11 U. C. C. P. 56.
(*o*) *Reg.* v. *Levecque*, 30 U. C. Q. B. 509.
(*p*) *Reg.* v. *Mosier*, 4 U. C. P. R. 64.

As to the writ of *certiorari*, which is always issued along with the *habeas corpus* in order to bring up the depositions and papers, it may now, by the 29 & 30 Vic., c. 45, s. 5, be returned "to any judge in chambers, or to the court."

Before this Act, writs of *certiorari* had in practice issued in vacation, by order of a judge in chambers, but as the power to do so was questioned, the Act was passed to remove the doubt. (*q*)

The prisoner may contradict the return to the writ of *habeas corpus*, by showing that one of the persons who signed the warrant was not a legally qualified justice of the peace, and it would seem that he could do so even independent of the above statute. (*r*) But at all events, this section disposes of the point by empowering the judge to examine into the truth of the facts set forth in the return. (*s*)

No appeal lies from a conviction rendered by a judge of the Sessions of the Peace for the Province of Quebec. (*t*)

The 29 & 30 Vic., c. 45, was passed to extend the remedy by *habeas corpus*, and enforce obedience thereunto, and prevent delays in the execution thereof.

In doubtful cases, the court always inclines in favor of liberty. (*u*) It therefore is the duty of a judge hearing an application for discharge under a writ of *habeas corpus*, when a prisoner is restrained of his liberty under a statute, to discharge him, unless satisfied by unequivocal words that the imprisonment is warranted by the statute. (*v*) It is also the duty of the judge, when doubting the sufficiency of the warrant of commitment, to discharge the prisoner. (*w*) But the writ should not be used as a means of appealing from

(*q*) *Reg.* v. *Mosier*, 4 U. C. P. R. 70, per *J. Wilson*, J.
(*r*) *Bailey's case*, 3 E. & B. 614; *Reg.* v. *Boyle*, 4 U. C. P. R. 256.
(*s*) *Reg.* v. *Boyle*, 4 U. C. P. R. 256.
(*t*) *Ex parte Slack*, 7 L. C. J. 6.
(*u*) *Reg.* v. *Boyle*, 4 U. C. P. R. 264, per *Morrison*, J.
(*v*) *Re Slater*, 9 U. C. L. J. 21.
(*w*) *Re Beebe*, 3 U. C. P. R. 270.

other tribunals points more relating to practice than affecting the merits. (*x*)

It would seem that a judge in chambers has, at common law, power to issue writs of *habeas corpus* in cases not within the 31 Car. II., c. 2. (*y*) But it seems doubtful whether a judge in chambers has power to rescind his own order for a writ of *habeas corpus*, or to quash the writ itself, on the ground that it issued improvidently; or to call upon the prosecutor or justice to show cause why a writ of *habeas corpus* should not issue, instead of at once ordering the issue of the writ. (*z*)

A judge, sitting in *banc* during term in the Practice Court, has no authority under Con. Stats. U. C., c. 10, s. 9, to grant a rule *nisi* for a writ of *habeas corpus ad subjiciendum*; for until the rule is moved, there is no cause or business depending, in relation to the prisoner's conviction or commitment. Where such rule had been issued there, returnable in full court, it was discharged on this preliminary objection. (*a*)

The judges of the superior courts had power to direct the issue of writs of *habeas corpus ad subjiciendum*, in vacation, returnable either in term or vacation. (*b*)

The 29 & 30 Vic., c. 45, s. 1, confers full authority on any of the judges of either of the superior courts of law or equity in Ontario to award, in vacation time, a writ of *habeas corpus ad subjiciendum*, under the seal of the court wherein the application shall be made. Where writs of *habeas corpus* were made returnable forthwith, and the prisoners were brought into court on Tuesday, and the matter directed to be argued on the following Saturday, and the writs and returns, which had been filed the day the prisoners were brought in, were by order of a judge taken off the file again and returned

(*x*) *Cornwall* v. *Reg.*, 33 U. C. Q. B. 106.
(*y*) *Re McKinnon*, 2 U. C. L. J. N. S. 327, per *A. Wilson*, J.
(*z*) *Re Ross*, 3 U. C. P. R. 301.
(*a*) *Reg.* v. *Smith*, 24 U. C. Q. B. 480.
(*b*) *Re Hawkins*, 3 U. C. P. R. 239.

to the sheriff; it was held by a majority of the court that the court could direct the sheriff to bring in the bodies of the prisoners on the day set for argument, without directing new writs to issue. (*c*)

Where the proper remedy is by writ of error, a *habeas corpus* will not be granted. (*d*)

A writ of *habeas corpus* has been refused in the case of a person confined in gaol, under civil process, such as a *capias ad respondendum*. (*e*)

As the Imp. Stat. 56 Geo. III., c. 100, is not in force in this country, it was at least doubtful whether a judge, in chambers, had power to order the issue of a writ of *habeas corpus*, where the custody is not for criminal or supposed criminal matter. And where, upon the return of a writ of *habeas corpus*, it appeared that the prisoner was in custody under a writ of *capias*, issued out of a county court, and regular on its face, but which, it was contended, had been improperly issued on defective materials, a judge, sitting in chambers, refused to discharge the prisoner. (*f*) But provincial statutes have remedied this defect. (*g*)

The 29 & 30 Vic., c. 45, expressly excepts persons imprisoned for debt, or by process in any civil suit; and it would seem that the writ cannot now be obtained in the case of a person confined under a *capias ad respondendum* on civil process.

A *habeas corpus* will not be granted to bring up a prisoner under sentence of conviction at the sessions for larceny. (*h*)

A judge has no jurisdiction, on a writ of *habeas corpus*, to liberate a person found guilty of simple larceny and sentenced to be imprisoned in the penitentiary for life, although it may appear that the sentence is illegal. The judge to

(*c*) *Reg.* v. *Tower*, 4 Pugsley & B. 478.
(*d*) *Re McKinnon*, 2 U. C. L. J. N. S. 327.
(*e*) *Barber* v. *O'Hara*, 8 L. C. R. 216.
(*f*) *Re Bigger*, 10 U. C. L. J. 329; *Re Hawkins*, 9 U.C.L.J. 298, doubted; see, however, *Re Runciman* v. *Armstrong*, 2 U. C. L. J. N. S. 165.
(*g*) R. S. O., c. 70.
(*h*) *Reg.* v. *Crabbe*, 11 U. C. Q. B. 447.

whom an application for such writ is made, having no jurisdiction to reverse the sentence, must abstain from giving an opinion upon the legality or illegality of such sentence. (*i*) His proper course is by petition to the Crown.

In one case, where a person having been sent to the penitentiary upon a judgment which was afterwards reversed as having been pronounced upon two counts, one of which was defective, a *habeas corpus* was ordered to bring him up to receive the proper judgment. (*j*)

The mere fact of the warrant of commitment having been countersigned, under the 31 Vic., c. 16, s. 1, by the clerk of the Privy Council, does not withdraw the case from the jurisdiction of a judge on a *habeas corpus*. (*k*)

At common law a writ of *habeas corpus ad testificandum* may be issued to the warden of the Provincial Penitentiary, to bring a convict for life before a court of Oyer and Terminer and general gaol delivery, to give testimony, on behalf of the Crown, in a case of murder. The writ may be granted before the sittings of the court commence. (*l*)

Under the 4 & 5 Vic., c. 24, s. 11, a court of Oyer and Terminer could, while sitting, make an order to any gaol or prison out of the county where the court was sitting, to bring up a prisoner, in order to give evidence at the trial. But under this statute no order could be made until the opening of the court. (*m*)

Now the 32 & 33 Vic., c. 29, s. 60, provides that an order may be made on the warden of the penitentiary to deliver the prisoner to the person named in such order to receive him, and the latter shall convey the prisoner to the place of trial, to obey such further order as to the court may seem meet.

Where an offender, for whose arrest a magistrate's warrant is issued, lives in a county different from that where the

(*i*) *Ex parte Plante*, 6 L. C. R. 106.
(*j*) *Cornwall* v. *Reg.*, 33 U. C. Q. B. 106.
(*k*) *Reg.* v. *Boyle*, 4 U. C. P. R. 256.
(*l*) *Reg.* v. *Townsend*, 3 U. C. L. J. 184.
(*m*) *Ibid.*

warrant issued, and the warrant is backed to take him in the county where he resides, and it is there found that he is a prisoner for debt, in close custody, in such county, he may be removed under a writ of *habeas corpus ad subjiciendum*. (*n*)

A prisoner is not entitled to a *habeas corpus*, under the 31 Car. II., c. 2, unless there be a "request, in writing, by him, or any one on his behalf, attested and subscribed by two witnesses who were present at the delivery of the same." (*o*)

As a general rule, the affidavit on which an order for a writ of *habeas corpus* is moved should be made by the prisoner himself, or some reason, such as coercion, shown for his not making it; and it should be entitled in one or other of the superior courts. It is discretionary, however, with the judge to whom the application is made to receive an affidavit of a different kind, or one not sworn to by the prisoner himself. (*p*)

It has been held sufficient to return to a writ of *habeas corpus* a copy of the warrant under which the prisoner is detained, and not the original. (*q*) But the authority of this case has been doubted, and seems very questionable. It has been subsequently held that the person to whom a writ of *habeas corpus* is directed, commanding him to return "the cause of taking and detainer," must return the original, and not merely a copy of the warrant. (*r*) The sheriff, although he cannot return a warrant in *hæc verba*, must return the truth of the whole matter. (*s*)

Where a commitment is illegal on its face, the court will not wait till the committing magistrate has been notified to produce the papers, but will order a writ of *habeas corpus* to issue instanter; (*t*) and where a prisoner is brought up upon such a writ, and the return shows a commitment bad upon

(*n*) *Reg.* v. *Phipps*, 4 U. C. L. J. 160.
(*o*) *Re Carmichael*, 1 U. C. L. J. N. S. 243.
(*p*) *Re Ross*, 3 U. C. P. R. 301; 10 U. C. L. J. 133.
(*q*) *Ibid.*
(*r*) *Re Carmichael*, 10 U. C. L. J. 325.
(*s*) *Reg.* v. *Mulholland*, 4 Pugsley & B. 476
(*t*) *Ex parte Messier*, 1 L. C. L. J. 71.

its face, the court will not, on the suggestion that the conviction is good, adjourn the case for the purpose of having the conviction brought up, and amending the commitment by it. (*u*)

Where a prisoner is, under a writ of *habeas corpus*, discharged from close custody, on the ground that the warrant of commitment charges no offence, he is not, under 31 Car. II., c. 2, s. 6, entitled to his discharge as against a subsequent warrant, correctly stating the offence, upon the alleged ground that the second is "for the same offence" as the first arrest. (*v*) But it has been held in Quebec, that where particular acts set forth in a warrant do not give cause of arrest, no new warrant for the same cause can issue, even where, in a subsequent case against another person, the courts have held that the grounds set out on such first warrant did disclose an offence. (*w*)

The court refused to discharge a prisoner brought up on *habeas corpus*, charged with having murdered his wife in Ireland; communication having been made by the Provincial to the Home Government on the subject, and no answer received, and the prisoner having been in custody less than a year. (*x*) The object of the 31 Vic., c. 16, was to suspend the operation of the writ of *habeas corpus*, and to deprive the subject restrained of his liberty. (*y*)

The county judge, sitting under 32 & 33 Vic., c. 35, as amended by the 42 Vic., c. 44, has the same authority and jurisdiction as the Court of Sessions, (*z*) and his court is a court of record, and there is therefore no right to a writ of *habeas corpus*. (*a*)

Although justices of the peace, exercising summary jurisdiction, are the sole judges of the weight of evidence given before them, and no other of the Queen's courts will examine

---

(*u*) *Re Timson*, L. R. 5 Ex. 257.
(*v*) *Re Carmichael*, 1 U. C. L. J. N. S. 243.
(*w*) *Ex parte Dewernay*, and *ex parte Cotte*, 19 L. C. J. 248.
(*x*) *Rex* v. *Fitzgerald*, 3 U. C. Q. B. O. S. 300.
(*y*) *Re Boyle*, 4 U. C. P. R. 261, per *Morrison*, J.
(*z*) *Reg.* v. *Haines*, 42 U. C. Q. B. 208; see also *Reg.* v. *Piché*, 39 U. C. C. P. 409; *Reg.* v. *St. Denis*, 8 U. C. P. R. 16.
(*a*) *Reg.* v. *St. Denis*, *supra*.

whether they have formed the right conclusion from it or not; yet other courts may and ought to examine whether the premises stated by the justices are such as will warrant their conclusion in point of law. (*b*)

When a matter is within the jurisdiction of justices, and their proceedings are regular and according to law, the court will not interfere with their decision, though it should be wrong or unjust, but the court will inquire whether the case was within their jurisdiction or not. Thus, where the nature of the charge is doubtful, and in the course of the inquiry it turns out that the case is not one over which they have jurisdiction, the superior court may, on *habeas corpus*, examine the evidence and entertain the question of jurisdiction. (*c*)

Where justices have to decide a collateral matter, before they have jurisdiction, and they give themselves jurisdiction by finding facts which they are not warranted in finding, the court will review their decision, and if they have, improperly given themselves jurisdiction, will set aside the proceedings; but, where the question is a material element in the consideration of the matter they have to determine and they, exercising their judgment as judges of the fact, have decided it on a conflict of evidence, it is contrary to principle and practice to interfere; (*d*) even though they may think that, upon the evidence, the justices have come to a wrong conclusion.

Thus where a charge was preferred to a court of Quarter Sessions, under 1 Wm. & M., c. 21, s. 6, against a clerk of the peace, for a misdemeanor in his office, and evidence was taken, and the court decided that the charges were proved, and dismissed the clerk of the peace from his office, and appointed another person in his place; it was held on a *quo warranto* information against the person so appointed, that the sufficiency of the evidence was a question entirely for the

(*b*) *The Scotia S. V. A. R.* 160.
(*c*) *Re McKinnon*, 2 U. C. L. J. N. S. 327-8, per *A. Wilson*, J.
(*d*) *Ex parte Vaughan*, L. R. 2 Q. B. 116, per *Cockburn*, C. J.

court of Quarter Sessions, and the decision of that court could not be reviewed by the Court of Queen's Bench. (*e*)

Except when applied for on behalf of the Crown, a *certiorari* is not a writ of course; (*f*) and is only applicable to judicial as distinguished from ministerial acts. (*g*).

The granting or refusing of the writ rests in the discretion of the court; and where the proceedings sought to be removed were completely spent, and no benefit would arise from re-opening them, the order was refused. (*h*) There is no right of revision of judgment on an application for this writ; (*i*) and a motion having been made for a *certiorari* and refused, the court declined to hear a second application. (*j*)

The court must be satisfied on affidavits that there is sufficient ground for issuing it; and it must in every case be a question for the court to decide whether, in fact, sufficient grounds do exist. (*k*) And it seems doubtful whether the applicant should not produce a copy of the proceedings before the justice, or account for not doing so, (*l*) and their substance should in all cases be before the court. (*m*)

Where a man is chosen into an office or place, by virtue whereof he has a lawful right, and is deprived thereof by an inferior jurisdiction, who proceed in a summary way, in such case he is entitled to a *certiorari, ex debito justitiæ*, because he has no other remedy, being bound by the judgment of the inferior jurisdiction. (*n*)

In other cases, where the application is by the party grieved, so as to answer the same purpose as a writ of error, it might be treated like a writ of error, as *ex debito justitiæ;* but where the applicant is not a party grieved, who substan-

(*e*) *Reg.* v. *Russell*, 5 U. C. L. J. N. S. 129; 17 W. R. 402.
(*f*) *Reg.* v. *Justices of Surrey*, L. R. 5 Q. B. 466.
(*g*) *Reg.* v. *Simpson*, 4 Pugsley & B. 472.
(*h*) *Reg.* v. *Lord Newborough*, L. R. 4 Q. B. 585.
(*i*) *Ex parte Spelman*, 10 L. C. J. 81; but see *contra ex parte Beauparlant*, 10 L. C. J. 102.
(*j*) *Ex parte Abel*, 2 Pugsley & B. 2.
(*k*) *Reg.* v. *Gzowski*, 14 U. C. Q. B. 591.
(*l*) *Ex parte Abel*, 2 Pugsley & B. 660.
(*m*) *Ex Parte Nevers*, 1 Pugsley & B. 5.
(*n*) See *Reg.* v. *South Holland, D. C.* 8 A. & E. 429.

tially brings error to redress his private wrong, but comes forward as one of the general public, having no particular interest in the matter; and if the court thinks that no good would be done to the public, it is not bound to grant it at the instance of such a person. (*o*)

Certiorari may be granted to remove proceedings which are void. (*p*)

When a statute gives an appeal, this does not take away the right to a *certiorari*. The right can only be taken away by express words; and, for this reason, the power given to a judge of sessions to hear appeals from summary convictions before justices of the peace does not take away the right of this court to grant a writ of *certiorari* to remove such conviction. (*q*) Nor does the fact that the petitioner has a remedy by trespass affect his right. (*r*)

Where a defendant has been committed for trial, but afterwards admitted to bail and discharged from custody, a superior court of law has still power to remove the proceedings on *certiorari*, but in its discretion will not do so where there is no reason to apprehend that he will not be fairly tried. (*s*)

A writ of *certiorari* may be granted, though expressly taken away by statute, (*t*) where there is ground for the belief that the conviction was had without proof; (*u*) and generally where there is a plain excess of jurisdiction. (*v*) So it lies where the conviction, on its face, is defective in substance; (*w*) as, for instance, omitting to state the reasons on which it is

---

(*o*) *Reg.* v. *Justices of Surrey*, L. R. 5 Q. B. 472-3.

(*p*) *Reg.* v. *Simpson*, 4 Pugsley & B. 472.

(*q*) *Ex parte Montgomery*, 3 Allen, 149; see also *Rex* v. *Gingras*, S. L. C. A. 560; but see *ex parte Richards*, 2 Pug. 6; *ex parte Nowlin*, Stev. Dig. 286; *ex parte Wilson*, 1 Pugsley & B. 274.

(*r*) *Ex parte Thompson*, 2 Q. L. R. 115.

(*s*) *Reg.* v. *Adams*, 8 U. C. P. R. 462.

(*t*) *Reg.* v. *Hoggard*, 30 U. C. Q. B. 156, per *Richards*, C. J.; *Barnaby* v. *Gardiner*, 1 James, 306.

(*u*) *Ex parte Morrison*, 13 L. C. J. 295; *ex parte Church*, 14 L. C. R 318; see also *ex parte Lalonde*, 15 L. C. J. 251.

(*v*) *Hespeler and Shaw*, 16 U. C. Q. B. 104; *ex parte Matthews*, 1 Q.L.R. 353.

(*w*) *Re Watts*, 5 U. C. P. R. 267.

based. (*x*) And a *prima facie* case, showing want or excess of jurisdiction, or that the court was illegally convened or irregularly constituted, will be sufficient to obtain the writ. (*y*)

But it seems in such cases, that on the return the court cannot quash the conviction, but can only discharge the prisoner; and this even though there be no motion to quash the *certiorari*. (*z*) Still, the conviction being before the court, it might have power to quash it. (*a*)

There can be no *certiorari* after judgment, and the only course then is a writ of error. (*b*) Nor can an indictment be removed by *certiorari* from the court of General Sessions to the Queen's Bench, after verdict and before judgment, even by the consent of parties, for their consent will not authorize an unprecedented course in a criminal case. (*c*)

Where a conviction was made, under the Con. Stats. U. C., c. 75, and, on appeal to the sessions, the appeal was adjourned to another sessions, when the conviction was quashed, it was held that a *certiorari* might issue to remove the order quashing the conviction. (*d*)

Where the conviction is already in the possession of the superior court, no *certiorari* is necessary. (*e*)

The court will not grant a *certiorari* to examine the finding of a jury or justice of the peace on the facts, but to determine whether inferior tribunals exceeded their jurisdiction in convicting for an offence, which was not within the statute. (*f*) A *certiorari* will lie to bring the record and proceedings of a court martial before the superior court. (*g*)

(*x*) *Ex parte Lalonde*, 3 *Revue Leg.* 450; and see *ex parte Tremblay*, 15 L. C. J. 251.

(*y*) *Ex parte Thompson*, 2 Q. L. R. 115.

(*z*) *Reg.* v. *Johnson*, 30 U. C. Q. B. 423; *Reg.* v. *Levecque*, 30 U. C. Q. B. 509; and see *Reg.* v. *McAllen*, 45 U. C. Q. B. 402.

(*a*) *Ibid.*

(*b*) *Reg.* v. *Crabbe*, 11 U. C. Q. B. 447; *Reg.* v. *Smith*, 10 U. C. Q. B. 99.

(*c*) *Reg.* v. *Lafferty*, 9 U. C. Q. B. 306.

(*d*) *Re Doyle*, 4 U. C. P. R. 32.

(*e*) *Reg.* v. *Brydges*, 18 L. C. J. 94.

(*f*) *Hespeler and Shaw*, 16 U.C.Q.B. 104; *ex parte Lanier*, 6 *Revue Leg.* 350 *Rex* v. *Gingras*, S. L. C. A. 560; *Lord* v. *Turner*, 2 Hannay, 13. *Ex parte Thompson*, *supra*.

But a party imprisoned for contempt of the Court of Sessions cannot have his conviction removed by *certiorari*. (*h*)

In a prosecution, under the Act 5 Wm. IV., c. 2, for non-performance of statute labor, it must be proved that the party has been notified by the overseer of the time and place of meeting to perform the work, and where the affidavits, in answer to an application for a *certiorari* to remove the proceedings in such a prosecution, stated that the party had been duly notified, the court made the rule absolute, in order to ascertain what the notice really was, the appellant having in his affidavit denied notice. (*i*)

Mere irregularities in the proceedings of the inferior court are not sufficient to justify the granting of a writ of *certiorari*; but there must be proof that actual injustice has been done. (*j*) Where a defendant applies for a *certiorari* to remove an indictment, he must show that it is probable the case will not be fairly or satisfactorily tried in the court below, and if difficulties in point of law form the ground of the application, they must be specifically stated, and no mere general statement will suffice. (*k*)

Where the defendant, having been convicted on the information of a toll-gate keeper of evading toll, appealed to the sessions, where he was tried before a jury and acquitted, this court refused a writ of *certiorari* to remove the proceedings, the effect of which would be to put him a second time on trial. (*l*) It would seem that after an acquittal at the sessions, the writ cannot be granted; at all events, at the instance of a private prosecutor. (*m*) A conviction under the Con. Stats. L. C., c. 6, by a judge of the sessions of the peace cannot be brought up before the superior court by *certiorari*. (*n*)

(*h*) *Ex parte Vallieres de St. Real*, S. L. C. A. 593.
(*i*) *Ex parte Ferguson*, 1 Allen, 663.
(*j*) *Ex parte Gauthier*, 3 L. C. R. 498.
(*k*) *Re Kellett*, 2 U. C. P. R. 102; *Reg.* v. *Jowle*, 5 A. & E. 539; *Reg.* v. *Josephs*, 8 Dowl. P. C. 128.
(*l*) *Re Stewart*, 2 L. C. G. 23.
(*m*) *Ibid.*; see *Reg.* v. *Lafferty*, 9 U. C. Q. B. 306.
(*n*) *Ex parte Vaillancourt*, 16 L. C. R. 227.

Two persons were convicted of selling intoxicating liquors without license, in a township where the sale of intoxicating liquors, and the issue of licenses authorizing the sale, were prohibited under the Temperance Act of 1864, 27 & 28 Vic., c. 18. A memorandum of the conviction, simply stating it to have been a conviction for selling liquor without a license, was given by the justices to the accused. An application for a writ of *certiorari* to remove the conviction was refused, for it would seem, although the issue of a license was prohibited by a by-law, it was still an offence under (Ont.) 32 Vic., c. 32, to sell liquor without a license, and even if the conviction had been under the Temperance Act of 1864, and not under (Ont.) 32 Vic., c. 32, it was amendable under 29 & 30 Vic., c. 50; (*o*) and under the Canada Temperance Act, 1878, 41 Vic., c. 16, the right to a *certiorari* is taken away in all cases in which the magistrate has jurisdiction. (*p*)

Where a judgment has been pronounced in open court, and afterwards changed in such a manner as to increase the amount which the defendant was ordered to pay, the judgment will be set aside on *certiorari*. (*q*) And where it is shown that there is reasonable doubt as to the legality of the conviction, a judge will order a *certiorari*, even though it has been confirmed by the sessions on appeal. (*r*)

A conviction by a stipendiary magistrate of the city of Halifax, under sec. 140 of the City Charter, is receivable on *certiorari*. (*s*)

So, a *certiorari* lies to remove orders of sessions relating to the expenditure of the district rates and assessments at the instance of the Attorney General without notice. (*t*)

Where the magistrate before whom the conviction is had

(*o*) *Re Watts*, 5 U. C. P. R. 247.
(*p*) *Ex parte Orr*, 4 Pugsley & B. 67.
(*q*) *Ex parte MacFarlane*, 16 L. C. J. 221.
(*r*) *Re Sullivan*, 8 U. C. L. J. 276; but see *ex parte Richards*, 2 Pug. 6.
(*s*) *Reg.* v. *Levy*, 3 Russ. & Ches. 51.
(*t*) *Rex* v. *Justices of Newcastle*, Draper, 121.

refuses to certify the proceedings for appeal, the court will grant a *certiorari*. (*u*)

In the case of a conviction for an offence not being a crime, such as a breach of a by-law, (*v*) affirmed on appeal to the sessions, the writ of *certiorari* is not taken away by the (Ont.) 38 Vic., c. 4. (*w*)

In Quebec no *certiorari* can issue to quash a conviction under the License Act of that province, until the deposit required by law has been made. (*x*)

Proceedings had under the 31 Vic., c. 42, s. 18, are of such a character as to be susceptible of being removed by *certiorari*. (*a*)

The Superior Court of Montreal has no jurisdiction to grant a writ of *certiorari*, to bring up a conviction had before a justice of the peace, in the district of Three Rivers. (*b*)

A conviction before the police magistrate of St. John for breach of the by-laws of the corporation, cannot be removed by *certiorari*. (*c*) Nor can a conviction by a district magistrate of Quebec, under the License Act of that province, even where the defendant has made the required deposit. (*d*)

Orders or judgments which are not of a final character do not give rise to *certiorari*. (*e*)

Before a justice can convict a defendant not appearing, the service of the summons should be proved in open court, and an affidavit sworn before a commissioner is not sufficient. (*f*) And the mode in which such service is proved, and how and when it was effected, should be entered by the clerk in his book, and a mere entry of the fact of service is not enough; (*g*)

(*u*) *Ex parte Eastabrook*, 1 Pugsley & B. 283.
(*v*) *Reg.* v. *Washington*, 46 U. C. Q. B. 221.
(*w*) *Re Bates*, 40 U. C. Q. B. 284.
(*x*) *Ex parte Doray*, 6 *Revue Leg.* 507.
(*a*) *Ex parte Morrison*, 13 L. C. J. 295.
(*b*) *Ex parte Cumming*, 3 L. C. R. 110.
(*c*) *Ex parte Harley*, 5 Allen, 264.
(*d*) *Ex parte Duncan*, 16 L. C. J. 188.
(*e*) *Ex parte The Fabrique of Montreal*, 4 *Revue Leg.* 271.
(*f*) *Reg.* v. *Golding*, 2 Pug. 385.
(*g*) *Ibid.*

and where these requirements are neglected, the conviction will be quashed on *certiorari*. (*h*)

A *certiorari* only substitutes the superior court for the court below, and, whatever ought to have been done by the inferior tribunal had the case remained there, it must be the duty of the superior court to do when the case is removed. (*i*) And the conviction is there for all purposes, and a party may move to quash it, however and at whosesoever instance brought up. (*j*)

An application for a *certiorari* should be made at the first term after the conviction, but where the justice had no jurisdiction in the matter, a *certiorari* was granted though a term had elapsed. (*k*) And special circumstances, as the fact that papers transmitted to counsel have miscarried, will induce the court to entertain an application after the first term. (*l*) Where an appeal from a summary conviction was made to a judge of the superior court under the (N. B.) 1 Rev. Stat., c. 161, s. 32, by which an appeal from a summary conviction was required to be made in the same manner as from a judgment in a civil suit, (*m*) and dismissed by him, it was held that a subsequent application for a *certiorari* should, in general, be made at the first term afterwards. The court refused to interfere in such a case, after the lapse of one term, where the conviction appeared to be sufficient on the merits; (*n*) or where, on proceedings for not altering a public road, the road had been opened in the meantime. (*o*) An application for a *certiorari* to remove proceedings under the Highway Act, 13 Vic., c. 4 (N. B.), though no time was limited by law, should be made without unreasonable delay. But a delay of one term was held not unreasonable. (*p*)

(*h*) *Reg.* v. *Golding*, 2 Pug. 385.
(*i*) *Reg.* v. *Wightman*, 29 U. C. Q. B. 214, per *Morrison*. J.
(*j*) *Reg.* v. *Wehlen*, 45 U. C. Q. B. 399.
(*k*) *Ex parte Mulhern*, 4 Allen, 259.
(*l*) *Reg.* v. *Golding*, 2 Pug. 385.
(*m*) See c. 137, s. 44.
(*n*) *Ex parte O'Regan*, 3 Allen, 261.
(*o*) *Rex* v. *Heaviside*, Stev. Dig. 286.
(*p*) *Ex parte Herbert*, 3 Allen, 108.

By the 13 Geo. II., c. 18, s. 5, the writ must be sued out within six calendar months next after the making of the conviction, judgment or order sought to be removed. And the fact that the notice has been served within that time does not save a writ issued after the expiration of the six months. (*q*) This provision does not bind the Crown. (*r*)

A writ of *certiorari* allowed before the expiration of six months from the day of the conviction, but not sued out until after the expiry of the six months, will be quashed. (*s*) And delay in taking out the writ has always been held to amount to a forfeiture of it. (*t*)

A *certiorari* not prosecuted during six months will be dismissed on motion. (*u*)

The statute further enacts that no writ of *certiorari* shall thenceforth be granted, issued forth, or allowed, to remove any conviction, order, etc., made by or before any justice or justices of the peace, or the General Quarter Sessions, unless it be duly proved upon oath that the party suing out the same hath given six days' notice thereof, in writing, to the justice or justices, or any two of them, if so many there be, by and before whom such conviction, etc., shall be so made, to the end that such justice, or the parties therein concerned, may show cause against the issuing or granting of the said *certiorari*.

A party was convicted of assault before three justices, and sentenced to pay a fine and costs. He appealed to the sessions, and the conviction was affirmed. He then obtained a *certiorari*, addressed to the chairman of the sessions, to remove the conviction affirmed by the sessions. The caption of the order made by the sessions, affirming the conviction of the defendant, stated it to have been by the chairman, and J. K. and W. G., justices. On the *ex parte*

(*q*) *Ex parte Palmer*, 16 L. C. J. 253.
(*r*) *Rex* v. *Justices of Newcastle*, Draper, 121.
(*s*) *Rex* v. *Chillas*, Rob. Dig. 74; 2 *Revue Leg.* 52; and see *ex parte Fiset*, 3 Q. L. R. 102.
(*t*) *Ex parte Hough*, 5 Q. L. R. 314.
(*u*) *Ex parte Boyer*, 2 L. C. J. 188-9; *ex parte Prefontaine*, *ibid.* 202.

application for the *certiorari*, the only notices, filed by the defendant, were notices served on the three convicting justices. No notice was served on the chairman of the sessions, or any two of his associates. It was held, on a rule to quash the *certiorari*, that the notice required by the statute should have been given to the chairman of the sessions and his associates, or any two of them, as required by the statute, and the *certiorari*, being obtained without such notice, was set aside. (*v*)

But where a conviction was made by a magistrate within twelve days of the sitting of the court, for which notice of appeal was given, which was therefore inoperative, and the sessions neither acted on nor confirmed the conviction, and the same still remained in the custody of the convicting magistrate, to whom the *certiorari* was directed, it was held that notice to the chairman of the sessions, of the defendant's intention to move for such writ, was not required. (*w*)

The notice should be given to the justices actually present, when the order of sessions is made. It has been held that, where a rule *nisi* for a *certiorari* has been first taken out and served on the justices, and a rule absolute obtained for issuing the writ, such a proceeding is not notice to the justices, and, in such a case, the court has quashed the *certiorari* upon motion to do so. (*x*)

Notice of application for a writ of *certiorari* must be given to the convicting justice, and the want of such notice is good cause to be shown to a rule *nisi* to quash the conviction. (*y*) And it has been doubted whether the writ was properly issued without such notice, though the object was to obtain the discharge of the prisoner, not to quash the conviction. (*z*)

In the *Ellis' case*, notice was given to the convicting

(*v*) *Reg.* v. *Ellis*, 25 U. C. Q. B. 324; 2 U. C. L. J. N. S. 184.
(*w*) *Reg.* v. *Caswell*, 33 U. C. Q. B. 303.
(*x*) *Reg.* v. *Ellis*, *supra*, 326, per *Morrison*, J.; *Rex* v. *Nichols*, 5 T. R. 281 n.; *Rex* v. *Rattislaw*, 5 Dowl. P. C. 539.
(*y*) *Reg.* v. *Peterman*, 23 U. C. Q. B. 516.
(*z*) *Reg.* v. *Munro*, 24 U. C. Q. B. 44.

justices but not to the chairman of the sessions or to his associates; and in the *Peterman case*, notice was given to the chairman of the sessions but not to the convicting justice. It would seem, therefore, that notice to both parties is necessary. In a notice, under the statute, of application for a *certiorari* to remove a conviction, the grounds of objection to such conviction need not be stated. (*a*)

Where, on application for a *certiorari*, made on notice to the justices, the rule was refused, such notice cannot inure to the benefit of a subsequent *ex parte* application on the same material. (*b*)

No notice is necessary where the conviction is already in the possession of the court, (*c*) or when the application is made by the private prosecutor and not by the defendant; and the writ in such case issues of course, and without assigning any grounds. (*d*)

The cases before referred to (*e*) apply only when the writ is obtained by the defendant with the view of quashing the conviction. (*f*)

An application to a judge in chambers for a *certiorari*, should be by a summons or rule *nisi*, in the first instance. (*g*)

Where a rule *nisi* for a *certiorari* is discharged because the affidavits are improperly entitled, the application may be renewed on amended affidavits. (*h*)

The affidavit of service of notice of motion for the *certiorari* must identify the magistrate served as the convicting magistrate. But an affidavit, defective in this respect, was allowed to be amended, the time for moving the *certiorari* not having expired. Acceptance of service, and an under-

(*a*) *Re Taylor* v. *Davy*, 1 U. C. P. R. 346.
(*b*) *Reg.* v. *McAllan*, 45 U. C. Q. B. 402.
(*c*) *Reg.* v. *Wehlen*, 45 U. C. Q. B. 399.
(*d*) *Reg.* v. *Murray*, 27 U. C. Q. B. 134.
(*e*) *Reg.* v. *Ellis*, 25 U. C. Q. B. 324; *Reg.* v. *Peterman*, 23 U. C. Q. B.
(*f*) *Reg.* v. *Murray*, *supra*.
(*g*) *Ex parte Howell*, 1 Allen, 584.
(*h*) *Ex parte Bustin*, 2 Allen, 211.

taking to show cause by an attorney for the magistrate, does not waive this objection. (*i*)

But an application was refused where three former applications had failed, two in consequence of a defect in the jurat of the affidavit, and one in consequence of the rule having been improperly granted by a judge at chambers. (*j*)

Where an order *nisi* for a *certiorari* had been served only four days before the first day of the term at which it was returnable, the court refused to make the rule absolute, and enlarged it till next term. (*k*) And where a rule was served only the day before the term, the court refused to enlarge it, (*l*) By the practice of the courts of New Brunswick, a *certiorari* is returnable, unless otherwise ordered, at the term next after that in which the rule for it is granted; and if not issued and served before such term, it is too late. (*m*)

Where the Christian name of the appellant was misstated in the writ, it was quashed, and a new writ ordered to issue. (*n*)

After the return of a *certiorari*, affidavits may be used to show want of jurisdiction in the justice, when the fact does not appear in the return. (*o*) But affidavits on which the writ is obtained cannot be used to contradict the return. (*p*)

Where a *certiorari* is applied for, to remove a conviction with a view to quashing it, before the return to the writ is filed, affidavits and rules should not be entitled in the cause, for, until the return is filed, there is no cause in court. So as soon as the return to the *certiorari* has been filed, the cause is in court, and the motion paper and rule *nisi* must be entitled in the cause. Where the rule was not so entitled it was discharged, but, being on a technical objection, without costs, and, under the circumstances of the case, an amendment was not allowed. (*q*)

(*i*) *Re Lake*, 42 U. C. Q. B. 206.
(*j*) *Ex parte Irvine*, 2 Allen, 519.
(*k*) *Ex parte Lyons*, 6 Allen, 409.
(*l*) *Reg.* v. *Harshman*, Stev. Dig. 823.
(*m*) *Ibid.* 293.
(*n*) *Reg.* v. *Walters*, 6 Allen, 409.
(*o*) *Reg.* v. *Simmons*, 1 Pugsley, 158.
(*p*) *Reg.* v. *Harshman*, Stev. Dig. 293.
(*q*) *Reg.* v. *Morston*, 27 U. C. Q. B. 132.

Where a rule *nisi* was obtained, to show cause why a *certiorari* should not issue to quash a conviction, it was held that the rule was properly entitled "In the matter of T. B.," and that it need not state into which court the conviction was to be removed, for this was sufficiently shown by entitling it in the court in which the motion was made. After the rule *nisi* for the *certiorari* is made absolute, affidavits, etc., should be entitled "The Queen against A. B.," etc., but, before, they are properly entitled "In the matter of A. B." (*r*)

On applications to quash convictions, the convicting justice must be a party to the rule. (*s*)

The writ of *certiorari*, issuing under the provisions of the 12 Vic., c. 41, must be addressed to the justice of the peace making the conviction, and not to the bailiff effecting the service of such writ, and such writ of *certiorari* addressed to the bailiff is a nullity, and will be superseded. (*t*) So a writ of *certiorari*, addressed to the superintendent of police, and which ought to have been addressed to the judge of the Sessions of the Peace, according to the provisions of the 25 Vic., c. 13, s. 1, will be set aside. Another writ will not be awarded, on motion to rectify the error in the address of the first writ. (*u*)

It is improper to call on the Court of General Sessions to show cause to a rule for a *certiorari*. (*v*)

In the Province of Quebec the writ should be addressed to the judge, not to the prothonotary of the court, and a writ issued contrary to this rule will be quashed. (*w*) So will a writ addressed to the superintendent of police, when it ought to have been directed to the judge of Quarter Sessions; and on motion to rectify the error, a rule will be refused. (*x*)

But an objection, on motion to quash a conviction, that the *certiorari* was improperly directed to and returned by the

(*r*) *Re Barrett*, 28 U. C. Q. B. 559.
(*s*) *Reg.* v. *Law*, 27 U. C. Q. B. 260.
(*t*) *Reg.* v. *Barbeau*, 1 L. C. R. 320.
(*u*) *Piton* v. *Lemoine*, 16 L. C. R. 316.
(*v*) *Re Nash*, 33 U. C. Q. B. 181.
(*w*) *Grant* v. *Lockhead*, 16 L. C. R. 308; 10 L. C. J. 183.
(*x*) *Piton* v. *Lemoine*, 16 L. C. R. 316.

clerk of the peace and county attorney instead of to the county judge or magistrate, was overruled. (*y*)

Under the 12 Vic., c. 41, the original writ, and not a copy, must be served on the convicting justice ; but it is not necessary to serve a copy of the writ upon the complainant. (*z*)

A writ of *certiorari* will be quashed where a copy only of the writ has been served on the convicting justice, and his return made thereon. (*a*)

Where a conviction has been brought up by *habeas corpus* and *certiorari*, under the 29 & 30 Vic., c. 45, when, by the provisions of the 32 & 33 Vic., c. 31, no such writ could issue, it was held that it could not be quashed, but the court could only discharge the defendant. (*b*)

The conviction being in court, however brought up, the court might be obliged to consider it as upon a *certiorari*, issued at the common law, so long as it was regularly in court. (*c*)

The 71st section of the 32 & 33 Vic., c. 21, as amended by the 33 Vic., c. 27, does not prevent the removal of the conviction by *certiorari*. (*d*)

The defendant cannot, by motion, compel a petitioner for *certiorari* to proceed upon such writ, but the proper course for the defendant is to issue a *procedendo*. (*e*)

A judgment of the superior court, rendered on a writ of *certiorari*, is a final judgment, (*f*) and, under the circumstances in this case, it was held that no appeal lay from such judgment to the Court of Queen's Bench, as constituted in Quebec. (*g*) It seems that no appeal will lie from a judgment rendered on a writ of *certiorari*. (*h*)

(*y*) *Reg.* v. *Frawley*, 45 U. C. Q. B. 227.
(*z*) *Ex parte Filiau*, 4 L. C. R. 129.
(*a*) *Ex parte Lahayes*, 6 L. C. R. 486.
(*b*) *Reg.* v. *Levecque*, 30 U. C. Q. B. 509.
(*c*) *Ibid.* 513, per *Wilson*, J.; *Reg.* v. *Hellier*, 17 Q. B. 229; *Reg.* v. *Hyde*, 16 Jur. 337.
(*d*) *Reg.* v. *Levecque*, *supra*, 512, per *Wilson*, J.
(*e*) *Ex parte Morisset*, 2 L. C. R. 302; *Reg.* v. *Carrier*, *ibid.*
(*f*) *Boston and Lelievre*, 14 L. C. R. 457.
(*g*) *Ibid.*
(*h*) *Bazin and Crevier*, Rob. Dig. 28.

The return of the notice of motion for a writ of *certiorari* may be made by a bailiff; but if under his oath of office, it is insufficient. Such return must be proved upon oath, as required by the 13 Geo. II., c. 18, s. 5. (*i*)

A return from the justices should be before the court. (*j*)

And where none had been made by the justices to a *certiorari* directed to them, the court held the objection fatal, and refused to give judgment on the merits. (*k*)

Where a magistrate on a summary trial takes no written depositions, but the conviction returned to a *certiorari* sets out the evidence, the return must be taken *prima facie* to give a full and true statement. (*l*)

Parties failing to make a proper return, and within the proper time, will be mulcted in costs. (*m*)

A justice has no right to refuse to make a return to a writ of *certiorari* because the fees due in such case have not been paid, but a rule *nisi* for an attachment will not be issued *de plano* without previous notice to the justice. (*n*)

A motion to compel a justice to return the original papers, under a writ of *certiorari*, will be granted without costs against the justice. (*o*) But, in one case, such motion was granted with costs. (*p*)

The justices will be ordered to amend their return in a proper case. And where a return stated that the order was not in their possession, they were permitted to amend it by stating the substance of the order, and if they could not do this, then how the original order went out of their possession. (*q*) And where it appears on affidavit that the convic-

(*i*) *Ex parte Adams*, 10 L. C. J. 176, overruling *ex parte Roy*, 7 L. C. J. 109.
(*j*) *Lord* v. *Turner*, 2 Hannay, 13.
(*k*) *Mosher* v. *Doran*, 3 Russ. & Ches. 184; *Town of Pictou* v. *McDonald*, *ibid.* 334.
(*l*) *Reg.* v. *Flannigan*, 32 U. C. Q. B. 593; *ex parte Morrison*, 13 L. C. J. 295.
(*m*) *Ex parte Leroux*, 10 L. C. J. 193.
(*n*) *Ex parte Davies*, 3 L. C. R. 60.
(*o*) *Ex parte Demers*, 7 L. C. R. 428.
(*p*) *Ex parte Terrien*, 7 L. C. R. 429.
(*q*) *Reg.* v. *Vail*, 5 Allen, 165.

tion returned does not truly set forth the evidence given at the summary trial, they will be ordered to make a proper return or amend their conviction. (*r*)

But the evidence can be amended only with the concurrence of the witness, if he have signed the deposition ; and it is only by an amendment of the return that such evidence can be received, nor can it be supplied by affidavits. (*s*) But affidavits may be used as before stated to point out the discrepancy and found an order for amendment.

Where a *certiorari* simply requires a return of the evidence, the justice need not return the conviction, or a copy of it. (*t*) If the justice should have returned the conviction but had not done so, he would be allowed an opportunity to do so, and amend his return. If he had already returned the conviction to the clerk of the peace, he might show that fact, or he might transmit a copy of it instead, stating why he could not return the original. (*u*) If the justice did not truly return the proceedings, he would be liable for making a false return. (*v*) A return of affidavit and warrant only is insufficient. (*w*)

A party appearing to support a conviction cannot object to the cause being proceeded with, because the justice's return to the *certiorari* is not under seal. (*x*)

In a case where, owing to a mistake in the Crown Office, a rule to return a writ of *certiorari*, and afterwards a rule for an attachment issued, although a return had, in fact, been filed—more than six months having thus expired since the conviction—the court was asked to allow process to issue against the justice for the illegal conviction, as of a previous term, but the application was refused. (*y*)

(*r*) *Reg.* v. *Flannigan*, 32 U. C. Q. B. 593 ; but see *ex parte Morrison*, 13 L. C. J. 295.

(*s*) *Reg.* v. *McNaney*, 7 C. L. J. N. S. 325-6, per *Wilson*, J.; 5 U.C.P.R. 438.

(*t*) *Ibid.* 325, per *Wilson*, J.

(*u*) *Ibid.* 326, per *Wilson*, J.

(*v*) *Ibid.* 325, per *Wilson*, J.

(*w*) *Rex* v. *Desgagne*, Rob. Dig. 73.

(*x*) *Reg.* v. *Oulton*, 1 Allen, 269.

(*y*) *Re Joice*, 19 U. C. Q. B. 197.

Where a rule *nisi* for a *certiorari* to remove a conviction is discharged, the successful party is not entitled to the costs of opposing the rule. (*z*)

No separate application to supersede a *certiorari* need be made, but objection may be taken to it in showing cause to a rule to quash the conviction. (*a*)

Where irregularity is moved against as a substantive matter, the court might give an opportunity to amend; but if urged against the quashing of a bad conviction, no such opportunity is afforded. (*b*)

In showing cause to a rule *nisi* to quash a conviction, it was objected that the recognizance roll was irregular, being dated in the 32nd year of the reign of Her Majesty, while the conviction was in the 33rd; but held that this was only ground for a motion to quash the *certiorari* or the allowance of it, and that it could not be shown as a defect against quashing a bad conviction; and it would seem the objection to the recognizance could not be taken at that stage of the proceedings. (*c*)

The exercise of jurisdiction, in each of the circuit courts of New Brunswick, is not entirely confined to one particular judge, so as to exclude any other judge from sitting and holding the court, should occasion require; but the court, on every day on which it sits, is to be holden before some one of the judges of the Supreme Court. (*d*)

Where a circuit court is adjourned to a future day, in consequence of unfinished civil business, the criminal jurisdiction of the adjourned court is not confined to the trial of offences committed before the adjournment, or of indictments previously found. (*e*)

In the Province of Quebec the following points have been

(*z*) *Ex parte Daley*, 1 Allen, 435; see as to costs, *Reg.* v. *Ipstones*, L. R. 3 Q. B. 216.
(*a*) *Reg.* v. *McAllan*, 45 U. C. Q. B. 402.
(*b*) *Reg.* v. *Hoggard*, 30 U. C. Q. B. 156-7, per *Richards*, C. J.
(*c*) *Ibid.* 152.
(*d*) *Reg.* v. *Dennis*, 3 Allen, 425, per *Carter*, C. J.
(*e*) *Ibid.* 423.

decided: No motion to quash is necessary in cases of *certiorari;* (*f*) but in another case, simple inscription was held not sufficient without a rule to quash. (*g*) The motion to quash, if necessary at all, need not contain any reasons. (*h*) The six days' notice of the application for *certiorari* is not necessary in that province, the ordinary delay of one clear day being sufficient. (*i*) The merits of a *certiorari* may be heard on the merits of a rule to quash, without an inscription for hearing. (*j*) But such hearing must be had in one of the two divisions of the court appointed for such hearing in ordinary cases. (*k*) The conviction of an inferior tribunal will be quashed even after it has been enforced and executed. (*l*)

The police magistrate has jurisdiction to impose a fine of $100 for assault. (*m*)

County courts have no jurisdiction in penal actions, unless it is expressly given them by statute. (*n*) They have, however, jurisdiction under R. S. O., c. 76, s. 3, to try an action for a penalty against a justice of the peace, where the penalty claimed does not exceed $80. (*o*)

The court of Quarter Sessions does not possess any greater powers than are conferred on it by statute. It has, however, jurisdiction over offences attended with a breach of the peace. But forgery and perjury, not being attended with a breach of the peace, are not triable at the sessions. (*p*) Rape

---

(*f*) *Ex parte Thompson*, 5 Q. L. R. 200.
(*g*) *Ex parte Lanier*, 6 *Revue Leg.* 350; *ex parte Whitehead*, 14 L. C. J. 267.
(*h*) *Ibid.*
(*i*) *Ibid.*
(*j*) *Ex parte Murray*, 14 L. C. J. 101.
(*k*) *Ex parte Whitehead*, 15 L. C. J. 43.
(*l*) *Ex parte Thompson*, 5 Q. L. R. 200.
(*m*) *Ex parte Roy*, 5 *Revue Leg.* 452.
(*n*) *O'Reilly q. t.* v. *Allan*, 11 U. C. Q. B. 526.
(*o*) *Brash q. t.* v. *Taggart*, 16 U. C. C. P. 415.
(*p*) *Reg.* v. *McDonald*, 31 U. C. Q. B. 337-9; *Reg.* v. *Yarrington*, 1 Salk. 406; *Rex* v. *Haynes*, R. & M. 298; *Rex* v. *Higgins*, 2 Ea. 5; *Butt* v. *Conant*, 1 B. & B. 548; *ex parte Bartlett*, 7 Jur. 649; *Reg.* v. *Dunlop*, 15 U. C. Q. B. 118; *Reg.* v. *Currie*, 31 U. C. Q. B. 582.

also, though necessarily involving a breach of the peace, is not, it seems, within such jurisdiction. (*q*)

Under 32 & 33 Vic., c. 20, s. 48, the sessions of the peace cannot try the offences specified in sections 27, 28, and 29 of that Act. A similar provision is made by c. 21, s. 92, as to certain offences under it. By c. 29 of the same year, s. 12, no court of general or quarter sessions, or recorder's court, nor any court but a superior court, having criminal jurisdiction, shall have power to try any treason, or any felony punishable with death, or any libel. So neither can the sessions try coinage offences, (*r*) bribery or personation at Dominion elections, (*s*) nor offences against the Act for preventing lawless aggressions. (*t*) The enumerated exceptions contained in the foregoing statutes, and the excepted cases of forgery and perjury define, as nearly as may be, what the general jurisdiction of the sessions of the peace is. The unexcepted offences they may try; (*u*) for instance, kidnapping is within their jurisdiction. (*v*)

As the court of Quarter Sessions has no jurisdiction in perjury, a recognizance to appear for trial on such a charge at the sessions is wrong; but *certiorari* to remove it will be refused, if the time for the appearance of the party has gone by. (*w*)

The quarter sessions is a court of Oyer and Terminer, and a *venire de novo* may be awarded to it by the Queen's Bench. (*x*)

If an order of justices, in sessions, be defective in one part, it may be quashed as to that, and confirmed as to the rest, if the different parts can be separated. (*y*)

The court of Quarter Sessions has a general power to

(*q*) 32 & 33 Vic., c. 20, s. 49; 36 Vic., c. 50, s. 1.
(*r*) See 25 Ed. III., c. 2, s. 7; 31 Vic., c. 69, s. 4.
(*s*) 37 Vic., c. 9, s. 118.
(*t*) 31 Vic., c. 14.
(*u*) *Reg.* v. *McDonald*, 31 U. C. Q. B. 339, per *Wilson*, J.
(*v*) *Cornwall* v. *Reg.*, 33 U. C. Q. B. 106.
(*w*) *Reg.* v. *Currie*, 31 U. C. Q. B. 582.
(*x*) *Reg* v. *McDonald*, 31 U. C. Q. B. 338, per *Wilson*, J.; *Campbell* v *Reg.*, 11 Q. B. 799-814.
(*y*) *Reg.* v. *Simpson*, 1 Hannay, 32.

adjourn, unless an Act of Parliament plainly intimates an intention that they should not have such power. (*z*) The power of adjournment of any matter of which the court of sessions may be seized is inherent in the court, and such adjournment need not be to the next, but may be to any future court. Nor need there be a formal adjournment, if some proceeding is adopted by the court which virtually amounts to an adjournment. (*a*)

Where a statute enables two justices to do an act, the justices sitting in Quarter Sessions may do the same act; for they are not the less justices of the peace, because they are sitting in court in that capacity. (*b*)

It would seem that the chairman of the Quarter Sessions cannot make any order of the court, except during the sessions, either regular or adjourned. (*c*)

The sessions possess the same powers as the superior courts as to altering their judgments during the same sessions or term; and for that purpose the sessions, as the term, is all looked upon as one day. (*d*)

On the first day of the sessions, the appellant's counsel called on and proved his case. The respondent did not appear. It was not known that he had employed counsel, and the court ordered the conviction to be quashed. On the second day, counsel appeared and stated he had been employed, and was taken by surprise, and explained the reason of his non-appearance on the first day, to the satisfaction of the court and the appellant's counsel, and applied to have the order of the court, quashing the conviction, discharged. The chairman intimated that the application must not be understood in the nature of a new trial, and that if a jury had decided the case, the authority of the sessions to disturb the verdict might be doubted; but the court above held, on the authority

(*z*) See *Reg.* v. *Murray*, 27 U. C. Q. B. 134.
(*a*) *Reg.* v. *Justices of Westmoreland*, L. R. 3 Q. B. 457.
(*b*) *Fraser* v. *Dickson*, 5 U. C. Q. B. 233, per *Robinson*, C. J.
(*c*) *Re Coleman*, 23 U. C. Q. B. 615.
(*d*) *Reg.* v. *Fitzgerald*, 20 U. C. Q. B. 546, per *Robinson*, C. J.

of *Holborn* v. *Danes*, (*e*) that the sessions had power to revoke the order quashing the conviction, (*f*) and may alter their judgment at any time during the same session. (*g*)

It seems that the fact of a bench warrant having no seal does not make it invalid, (*y*) and a warrant of commitment, under the seal of the court or signature of the chairman, is not necessary. (*i*)

An attorney-at-law has no right to act as an advocate in a court of Quarter Sessions, (*j*) and it is not in the power of county court judges to allow attorneys, who are not barristers, to practise before them as advocates in county courts. (*k*)

A party prosecuting under s. 28 of the Criminal Procedure Act, 1869, has no right to be represented by any other advocate than the representative of the Attorney General. (*l*)

The Attorney General or Solicitor General may delegate to counsel prosecuting for the Crown the authority vested in him under sec. 28 of the 32 & 33 Vic., c. 29, to direct an indictment to be laid before the grand jury for certain offences. (*m*)

It seems that the judges of every court have power to regulate its proceedings as to who shall be admitted to act as advocates, and that there is no positive rule of law to prevent any court of justice from allowing the attorney, even of a private individual, from acting as an advocate. (*n*) But it would seem that these remarks can only hold when there is no statute excluding the person permitted to act. (*o*)

When a case has been reserved for the opinion of the supe-

(*e*) 2 Salk. 494-606.
(*f*) *McLean and McLean*, 9 U. C. L. J. 217.
(*g*) *Ibid.*; *Re Smith*, 10 U. C. L. J. 29.
(*h*) *Fraser* v. *Dickson*, 5 U. C. Q. B. 234, per *Robinson*, C. J.
(*i*) *Ovens* v. *Taylor*, 19 U. C. C. P. 49.
(*j*) *Reg.* v. *Erridge*, 3 U. C. L. J. 32.
(*k*) *Re Brooke*, 10 U. C. L. J. 49; see also *Re Lapenotiere*, 4 U. C. Q. B. 492.
(*l*) *Reg.* v. *St. Armour*, 5 *Revue Leg.* 469.
(*m*) *Reg.* v. *Abrahams*, 24 L. C. J. 325.
(*n*) *Reg.* v. *Carter*, 15 L. C. R. 295-6, per *Meredith*, J.
(*o*) See *Re Judge, C. C. York*, 31 U. C. Q. B. 267.

rior court, the Court of Sessions are no longer in possession of it, either to pass sentence or for any other purpose. (*p*)

The power of fining and imprisoning, necessary to constitute a court of record, must be a general power, and a limited power of fining and imprisoning, such as the power to impose a specific pecuniary penalty and a certain number of days' imprisonment, does not constitute a court of record. (*q*)

A court of Quarter Sessions, being a court of record, has jurisdiction to fine for contempt of court; and a counsel was fined for using insulting language to a juryman, and thereby obstructing the business of the court. The Court of Queen's Bench will exercise a supervision in such cases, and see that the inferior court has not exceeded its jurisdiction. (*r*)

Criminal informations.— Where an indictment will lie for a misdemeanor, an information may also be sustained. (*s*)

Formerly any person might file a criminal information in the Queen's Bench, for a misdemeanor, against any other, and such informations were frequently resorted to as a means of extorting money. (*t*) The abuse was effectually put a stop to by the 4 & 5 W. & M., c. 18, which enacts: "The clerk of the Crown, in the King's Bench, shall not, without express orders given by the court in open court, receive or file any information for a misdemeanor before he shall have taken, or shall have delivered to him, a recognizance, from the person procuring such information, to be exhibited in the penalty of £20, conditioned to prosecute such information with effect."

The remedy, by criminal information, obtains in Quebec, and the duties and powers of the clerk of the Crown, in such cases, are analogous to those of the master of the Crown Office, or clerk of the Crown, in England. (*u*)

A party applying for a criminal information must declare

(*p*) *Reg.* v. *Boultbee*, 23 U. C. Q. B. 457.
(*q*) *Young* v. *Woodcock*, 3 Kerr, 554.
(*r*) *Re Pater*, 5 B. & S. 299; 10 Jur. N. S. 972.
(*s*) *Reg.* v. *Mercer*, 17 U. C. Q. B. 630-1, per *Burns*, J.
(*t*) Arch. Cr. Prac. 17.
(*u*) *Ex parte Gugy*, 9 L. C. R. 51.

that he waives all other remedies, whether by civil action or otherwise. (*v*)

It is an established rule that no application for a criminal information can be made against a justice, for anything done in execution of his office, without previous notice. (*w*)

The justice is entitled to six days' notice of the motion; and the motion must be made in time to enable the party accused to answer during the same term. (*x*) And where the motion was made after two terms had been suffered to pass, and after a court of Oyer and Terminer had been held in the district, it was refused. (*y*)

A motion for a rule for a criminal information, once discharged for irregularity or insufficiency of proof, cannot be renewed by amending the irregularity or supplying the deficiency of proof (*z*)

If the conduct of the prosecutor has been blamable, the court will not grant a criminal information against a magistrate at his instance; but if the conduct of the magistrate is not justifiable, the rule will be discharged without costs. (*a*)

The person in whose behalf the application is made cannot move the rule in person. (*b*) The motion must be made by a barrister or counsel. (*c*)

To support a motion for leave to file a criminal information against a justice of the peace, the affidavits should not be entitled in a suit pending. (*d*)

A criminal information must be signed by the clerk of the Crown or master of the Crown office. (*e*)

(*v*) *Ex parte Gugy*, 9 L. C. R. 51; see also *Reg.* v. *Sparrow*, 2 T. R. 198; *Wakley* v. *Cooke*, 16 M. & W. 822.

(*w*) *Reg.* v. *Heming*, 5 B. & Ad. 666.

(*x*) *Reg.* v. *Heustis*, 1 James, 101; *Re Complaint Bustard* v. *Schofield*, 4 U. C. Q. B. O. S. 11.

(*y*) *Ibid.*

(*z*) *Ex parte Gugy*, 9 L. C. R. 51.

(*a*) *Reg.* v. *Munro*, Stev. Dig. 411.

(*b*) *Ex parte Gugy*, 9 L. C. R. 51.

(*c*) 1 Chit. Rep. 602.

(*d*) *Re Complaint Bustard* v. *Schofield*, 4 U. C. Q. B. O. S. 11; *Reg.* v. *Harrison*, 6 T. R. 60.

(*e*) *Reg.* v. *Crooks*, 5 U. C. Q. B. O. S. 733.

An information in the name of the Attorney General will be dismissed with costs, on an exception *à la forme*, it being signed by certain attorneys styling themselves "procureurs du Procureur Général," inasmuch as the Attorney General, when appearing for Her Majesty, cannot act by attorney. (*f*)

A criminal information by the Attorney General of New South Wales, against a member of the Legislative Assembly of that colony, for an assault on a member, committed within the precincts of the House while the assembly was sitting, in addition to charging the assault in fit and apt terms, averred that such assault was "in contempt of the said assembly, in violation of its dignity, and to the great obstruction of its business;" but the information was held good on demurrer, as the alleged contempt of the Legislative Assembly was the statement of a consequence resulting from the assault; and whether that consequence did or did not result from the assault, or whether it was a mere aggravation of the assault, was immaterial. The words did not alter the character, or the allegations with regard to the character, of the offence charged, and, if surplusage, they might be rejected. (*g*)

A criminal information, being the mere allegation of the officer who files it, may be amended. (*h*)

In an information for intrusion, the venue may be laid in any district, without regard to the local situation of the premises. (*i*)

Where there is no proof that the defendant has been out of possession for twenty years, the defendant cannot, under a plea of not guilty to an information of intrusion, give evidence of title under a Crown lease. (*j*)

On applications for criminal informations, the court is in the position of a grand jury, and requires the same amount

(*f*) *Attorney General* v. *Laviolette*, 6 L. C. J. 309.
(*g*) *Attorney General* v. *Macpherson*, L. R. 3 P. C. App. 268.
(*h*) *Re Conklin*, 31 U. C. Q. B. 167, per *Wilson*, J.
(*i*) *Attorney General* v. *Dockstader*, 5 U. C. Q. B. O. S. 341.
(*j*) *Reg.* v. *Sinnott*, 27 U. C. Q. B. 539.

of evidence as would warrant a grand jury in finding a true bill; (*k*) and the case for the prosecution may be disproved by affidavit on showing cause, and the application discharged with costs on such evidence. (*l*)

Criminal informations will be granted only when affecting persons occupying official or judicial positions, and filling some office which gives the public an interest in the speedy vindication of their character, or to cases of a charge of a very grave and atrocious nature; and the manager of a large railway company was therefore held not entitled to this special favor, (*m*) and one learned judge expressed grave doubts as to its propriety in any case. (*n*)

A rule *nisi* for a criminal information for libel having been obtained against J. S., on affidavits which stated that a copy of a newspaper had been purchased from a salesman in the office of the newspaper, and that, by a foot-note to the newspaper, J. S. was stated to be the printer and publisher of the newspaper, and that the deponent believed J. S. to be the printer and publisher, the court discharged the rule on the ground that the affidavit contained no legal evidence of publication, and that an affidavit on information and belief was not legal evidence. But a defect in the affidavits on which the rule *nisi* for a criminal information has been obtained, may be supplied by a statement in an affidavit of the defendant, made in showing cause against the rule. (*o*) The affidavit, upon which the application is made, must disclose all the material facts of the case, and if a material fact be suppressed or misrepresented, the court will discharge the rule, very probably with costs. (*p*)

Bail.—The object in committing parties to prison is to

(*k*) *Ex parte Guay*, 9 L. C. R. 51.
(*l*) *Rex* v. *Bates*, Stev. Dig. 411.
(*m*) *Reg.* v. *Wilson*, 43 U. C. Q. B. 583; following *ex parte Davidson*, London *Times* of 2nd August, 1878.
(*n*) *Ibid.*
(*o*) *Reg.* v. *Stanger*, L. R. 6 Q. B. 352.
(*p*) *Reg.* v. *Willett*, 6 T. R. 294; *Reg.* v. *Williamson*, 3 B. & Ald. 582; Arch. Cr. Pldg. 113.

ensure their appearance to take their trial, and the same principle is to be adopted on an application for bail. It is not a question as to the guilt or innocence of the prisoner, but of the probability of his appearing to stand his trial. (*q*) On this account, it is necessary to see whether the offence is serious and severely punishable, and whether the evidence is clear and conclusive. (*r*)

Where the charge against a prisoner is that he procured a person to set fire to his house, with intent to defraud an insurance company, and it is shown that the prisoner attempted to bribe the constable to allow him to escape, the probability of his appearing to stand his trial is too slight for the judge to order bail. (*s*) And this even though some months must elapse before a criminal court competent to try the case would sit. (*t*)

On an application by prisoners in custody on a charge of murder under a coroner's warrant, it is proper to consider the probability of their forfeiting their bail, if they know themselves to be guilty, and where, in such a case, there is such a presumption of the guilt of the prisoners as would warrant a grand jury in finding a true bill, they should not be admitted to bail. (*u*)

A prisoner confined upon a charge of arson may be admitted to bail after a bill found by a grand jury, if the depositions against him are found to create but a very slight suspicion of his guilt. (*v*) A prisoner in custody for larceny may be admitted to bail, when the evidence discloses very slight grounds for suspicion. (*w*) So upon a charge of aggravated assault. (*x*)

So a prisoner charged with murder may, in some cases, in the exercise of a sound discretion, be admitted to bail.

(*q*) *Ex parte Maguire*, 7 L. C. R. 59.
(*r*) *Reg.* v. *Brynes*, 8 U. C. L. J. 76; *Reg.* v. *Scaife*, 9 Dowl. P. C. 553.
(*s*) *Reg.* v. *Brynes*, *supra*.
(*t*) *Ibid.*
(*u*) *Reg.* v. *Mullady*, 4 U.C.P.R. 314.; *ex parte Corriveau*, 6 L.C.R. 249.
(*v*) *Ex parte Maguire*, 7 L. C. R. 57.
(*w*) *Rex* v. *Jones*, 4 U. C. Q. B. O. S. 18.
(*x*) *Re McKinnon*, 2 U. C. L. J. N. S. 324.

And where, on a trial for that crime, the jury disagreed, the court has admitted a prisoner to bail. (*y*) But usually, where a true bill has been found on an indictment for murder, bail will be refused. (*z*)

On an application for bail, the court may look into the information, and, if they find good ground for a charge of felony, may remedy a defect in the commitment, by charging a felony in it, so that the prisoner would not be entitled to bail on the ground of the defective commitment. (*a*) A person charged with having murdered his wife, in Ireland, will not be admitted to bail until a year has elapsed from the time of the first imprisonment, although no proceedings have in the meantime been taken by the Crown, and no answer has been received to a communication from the Provincial to the Home Government on the subject. (*b*)

A prisoner charged with felony may be released on bail, if it is satisfactorily established that, unless liberated, he will in all probability not live until the time fixed for his trial. (*c*)

Prisoners charged with murder cannot be admitted to bail, unless it be under very extreme circumstances, as where facts are brought before the court to show that the bill cannot be sustained. The fact that prisoners indicted for wilful murder cannot be tried until the next term, is no ground for admitting them to bail. (*d*) Accessories after the fact, who have merely harbored prisoners guilty of murder, may be admitted to bail. (*e*)

The court may order bail in a case of perjury. (*g*) And indeed, under 32 & 33 Vic., c. 30, it is obligatory upon justices of the peace to admit to bail in all cases of misde-

(*y*) *Ex parte Baker*, 3 *Revue Critique*, 45.
(*z*) *Reg.* v. *Keeler*, 7 U. C. P. R. 117.
(*a*) *Rex* v. *Higgins*, 4 U. C. Q. B. O. S. 83.
(*b*) *Rex* v. *Fitzgerald*, 3 U. C. Q. B. O. S. 300.
(*c*) *Ex parte Blossom*, 10 L. C. J. 71, per *Meredith*, J.
(*d*) *Reg.* v. *Murphy*, 1 James, 158.
(*e*) *Ibid.*
(*g*) *Reg.* v. *Johnson*, 8 L. C. J. 285.

meanors. The statute is equally binding upon the judges of the superior courts. (*i*)

The word "shall," in s. 56 of this statute, is imperative. (*j*) Therefore, where prisoners had been twice tried for misdemeanors, and the juries on both trials discharged because of disagreement, an order of the Court of Queen's Bench, Crown side, that the prisoners be committed to gaol without bail or mainprize, to stand their trial at the next term, and not to be discharged without further order from the said court, was held void. (*k*)

The word "may," in the 32 & 33 Vic., c. 30, s. 52, must be considered as conferring a power, and not as giving a discretion. The object of the Act is to declare that one justice cannot bail in felony, but may in misdemeanor. (*l*)

Although a statute may require the presence of three persons to convict of an offence, yet one has power to bail the offender in all cases of misdemeanor, by the common law unless prevented by some statute. (*m*)

Where two juries have disagreed and been discharged, on the trial of a person for misdemeanor, the law, from these circumstances, raises such a presumption of innocence as to entitle him to his discharge on bail. (*n*)

Where the prisoners were convicted at the sessions, on an indictment for felony, and a case reserved for the opinion of the Queen's Bench, which had not been argued, a judge in chambers refused to bail, except with the consent of the Attorney General, (*o*) for the Con. Stats. U. C., c. 112, vested the discretion to bail, upon a case reserved, in the court which tried the prisoners. (*p*)

The fact of one assize having passed over since the committal of the prisoners, without an indictment having been

(*i*) *Ex parte Blossom*, 10 L. C. J. 73, per *Meredith*, J.
(*j*) *Ibid.* 35, 67-8.
(*k*) *Ibid.* 35-46.
(*l*) *Ibid.* 67, per *Meredith*, J.
(*m*) *King* v. *Orr*, 5 U. C. Q. B. O. S. 724.
(*n*) *Ex parte Blossom*, 10 L. C. J. 29-45.
(*o*) *Reg.* v. *Sage*, 2 U. C. P. R. 138.
(*p*) *Ibid.* 139, per *Robinson*, C. J.

preferred, is in itself no ground for admitting them to bail; and it can have no other influence than to induce a somewhat closer examination of the evidence on which the prisoner is committed. Where the prisoner does not bring himself within the 31 Car. II., c. 2, s. 7, by praying, on the first day of the assizes, to be brought to trial, as the Crown is not therefore bound to indict him at that court, the granting of bail is discretionary, and cannot be claimed as a right. (*q*)

After the accused has pleaded not guilty to an indictment, no default can be recorded against him without notice, unless it be on a day appointed for his appearance. (*r*)

Where a party accused of perjury has been arraigned and has pleaded not guilty, and no day certain has been fixed for the trial, and no forfeiture of his bail has been declared, the mere failure of the party, when called upon to answer in the term subsequent to that in which he was arraigned, cannot operate as a forfeiture of such bail. (*s*)

If an offence is bailable, and the party, at the time of his apprehension, is unable to obtain immediate sureties, he may at any time, on producing proper persons as sureties, be liberated from confinement. (*t*)

A person accused of theft had given a recognizance of bail, but after the finding of the indictment against him by the grand jury, and before trial, had absconded. A rule *nisi*, to enter up judgment on the recognizance, was obtained, on an affidavit of the clerk of the Crown, of the fact of a recognizance having been entered into by the defendant, of the signature of the justices of the peace thereto, and its return into the superior court, and the non-appearance of the party to plead to the indictment. A copy of this rule, together with a copy of the affidavit, was served on each of the defendants. It was held that the rule *nisi* was proper, instead of a proceeding by *scire facias*, and that such judgment might be

(*q*) *Reg.* v. *Mullady*, 4 U. C. P. R. 314.
(*r*) *Reg.* v. *Croteau*, 9 L. C. R. 67.
(*s*) *Attorney General* v. *Beaulieu*, 3 L. C. J. 117.
(*t*) *Ex parte Blossom*, 10 L. C. J. 68, per *Meredith*, J.

properly entered on an affidavit of the service of the rule *nisi* therefor on the bail, and their failing to show cause. (*u*)

Where bail entered into a recognizance conditioned for the appearance of their principal to answer a charge of assault with intent to commit rape, and the only bill found against the accused was for the more serious offence of rape, and his recognizance was estreated for his non-appearance to answer that charge, a rule *nisi* was made absolute for their relief from the estreated recognizance, for they did not become bail for the appearance of the accused to answer a charge of rape, and therefore his non-appearance to answer that charge was no breach of the recognizance. (*v*)

In an ordinary recognizance of bail, on an indictable charge, the accused is not bound to appear unless a bill be found against him. Where, therefore, the accused was called, though the grand jury had not, owing to absence of witnesses, an opportunity of finding a bill, and the recognizance was estreated, a rule was made absolute for the relief of the bail. (*w*) And a recognizance which omits the words "to owe" is void. (*x*)

Defendant, having entered into a recognizance to appear at a certain assizes, attended until the last day, when he left, assuming, as no indictment had been found, that the charge against him was not intended to be prosecuted. He was, however, called, and his recognizance estreated. The court, under the circumstances, relieved him and his sureties, under the Con. Stats. U. C., c. 117, s. 11, on payment of costs, and on his entering into a new recognizance to appear at the following assizes. (*y*)

It is no ground for discharging the estreat of a recognizance of bail that the accused did not receive from the justice, who

---

(*u*) *Reg.* v. *Thompson*, 2 Thomson, 9; affirmed by *Reg.* v. *Cudihey*, 1 Oldright, 701.
(*v*) *Reg.* v. *Wheeler*, 1 U. C. L. J. N. S. 272.
(*w*) *Reg.* v. *Ritchie*, 1 U. C. L. J. N. S. 272.
(*x*) *Reg.* v. *Hoodless*, 45 U. C. Q. B. 556.
(*y*) *Reg.* v. *McLeod*, 24 U. C. Q. B. 458.

took the recognizance, the notice directed to be given by the 7 William IV., c. 10, s. 8. (z)

When a recognizance is entered into for the appearance of the accused in the Court of Queen's Bench, it is the duty of the judges of that court to estreat the recognizance in the event of forfeiture. (a)

Where a prisoner charged with felony had been admitted to bail upon an order of a judge in chambers, and an application was subsequently made to rescind such order and to recommit the prisoner to gaol, on the ground that he had not been committed for trial at the time such order was granted, being in custody only under a warrant of remand, and also upon the ground that the bail put in was fictitious; the court held that a judge in chambers had the power to make the order asked for; that when bail are insufficient or fictitious better sureties may be ordered; and the sureties in this case appearing to be fictitious, the order was conditional upon the failure of the prisoner to find new sureties within a specified time. (b)

An application for bail must be made upon affidavits entitled "In the Queen's Bench," verifying copies of the depositions. (c) The affidavits should be accompanied by a certified copy of the commitment. (d)

Where a prisoner makes application to a judge in chambers to be admitted to bail to answer a charge for an indictable offence, under the 32 & 33 Vic., c. 30, s. 61, the copies of information, examination, etc., may be received, though certified by the County Crown Attorney and not by the committing justice. Under ss. 38 and 58 of this statute, the committing magistrate has still power to certify copies of the information, examination and depositions close under his hand and seal. (e)

(z) *Reg.* v. *Schram*, 2 U. C. Q. B. 91.
(a) *Reg.* v. *Croteau*, 9 L. C. R. 67.
(b) *Reg.* v. *Mason*, 5 U. C. L. J. N. S. 205; 5 U. C. P. R. 125.
(c) *Reg.* v. *Barthelmy*, 1 E. & B. 8; Dears. 60.
(d) Arch. Cr. Pldg. 89.
(e) *Reg.* v. *Chamberlain*, 1 U. C. C. L. J. N. S. 157; *ibid.* 142; see also Con. Stats. U. C. c. 106, s. 9.

Juries.—The institution of grand juries, if not carefully guarded, is liable to abuse, as it furnishes facilities for fraud and oppression by giving an opportunity to a wicked person to go before a secret tribunal, and, without notice to the party accused, have a bill of indictment found against him, which, whether true or false, may be used as an engine of extortion; further proceedings may be abandoned if the prosecutor can be bribed, so that justice is defeated if the defendant be guilty, or an infamous wrong may be inflicted upon him if innocent. The 32 & 33 Vic., c. 29, s. 28, amended by the 40 Vic., c. 26, was passed with a view to suppress vexatious proceedings of this description. But it is not necessary that the performance of any of the conditions mentioned in this statute should be averred in the indictment, or proved before the petty jury. (*f*)

The proceedings of grand juries are subject to the revision of the courts, and will be quashed if irregular. Thus, where a prosecutor was on the panel of grand jurors, who found a true bill, the indictment was quashed; and it made no difference that he was not present when the bill was found. (*g*)

It is no objection, however, to a grand jury panel that a juror whose name is on the list has not been summoned, or that a person has been summoned whose name was by error omitted from the list, but afterwards added by the clerk of the court. (*h*)

Nor is it a ground for quashing an indictment that some of the grand jury were related to the officer who arrested the prisoner. (*i*) No more is a sheriff disqualified from summoning the jurors because he has directed the arrest. (*j*)

When the indictment is preferred by the direction, or with the consent in writing, of a judge of one of the superior courts, it is for the judge, to whom the application is made

(*f*) *Knowlden* v. *Reg.*, 5 B. & S. 532; 33 L. J. (M. C.) 219.
(*g*) *Reg.* v. *Cunard*, Ber. (N. B.) 326.
(*h*) *Reg.* v. *Mailloux*, 3 Pugsley, 493.
(*i*) *Ibid.*
(*j*) *Ibid.*

for such direction or consent, to decide what materials ought to be brought before him, and it is not necessary to summon the party accused, or to bring him before the judge. (*k*)

Where three persons were committed for conspiracy, and afterwards the Solicitor General, acting under this statute, 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 to be unobjectionable. (*l*)

It seems that where, in a civil action, the jury find a party guilty of a crime, as where in an action on a policy of insurance against fire arson is set up in the plea, and the jury find the party guilty thereof, the plaintiff may be tried on this finding for the criminal offence without the finding of the grand jury. (*m*)

The evidence offered to a grand jury is evidence of accusation only. It is to be given and heard in secret according to the oath administered. The accused has no right to appear before or be heard by the grand jury, either for the purpose of examining his accuser or of offering exculpatory evidence.

Evidence before a grand jury can only be received under the sanction of an oath, so that if any false statement be made, the person may be punished. The oath may be administered by the foreman ; but it can only be administered when the jury are assembled as such.

The law requires that twelve members should be present for the purpose of any inquiry, and twelve of them must assent to any accusation.

When a charge is presented to a grand jury, they should consider whether the accused is capable of committing the crime, and this involves the criminal liability of infants, persons *non compotes mentis*, married women, etc.

(*k*) *Reg.* v. *Bray*, 3 B. & S. 255 ; 32 L. J. (M. C.) 11.
(*l*) *Knowlden* v. *Reg.*, *supra* ; Arch. Cr. Pldg. 5.
(*m*) *Richardson* v. *Can. W. F. Ins. Co.*, 17 U. C. C. P. 34[illegible], per *J. Wilson*, J.

A reasonable conclusion only is required, and the rest is for the jury on the trial. They must have reasonable evidence of the *corpus delicti*, and that the accused is the guilty person. The intent laid or charged against the accused should clearly appear, either expressly or by necessary implication, from the circumstances. (*n*)

The record of a conviction for murder set out in the caption that the indictment was found at a general session of Oyer and Terminer and General Gaol Delivery, before the chief justice of the Common Pleas, duly assigned, and under and by virtue of the statute in that behalf, duly authorized and empowered to inquire, etc., setting out the authority to hear and determine, as formerly given in commissions, but not to deliver the gaol. It was then stated that, at the said session of Oyer and Terminer and General Gaol Delivery, the prisoner appeared and pleaded, and the award of *venire* was, "therefore let a jury thereupon immediately come," etc. This record was returned to a writ of error, directed, "To our Justices of Oyer and Terminer for our county of C., assigned to deliver the gaol of the said county of the prisoners therein being, and also to hear and determine all felonies, etc." On error brought, it was held that the authority of the justice sufficiently appeared without any statement whether a commission had issued or been dispensed with by order of the governor, for such courts are now held not under commissions, but by virtue of the statute, Con. Stats. U. C., c. 11, as amended by 29 & 30 Vic., c. 40, and as the record sufficiently showed the absence of any commission, it must be presumed that it seemed best to the governor not to issue one. The record showed the court to be held by a person competent to hold it, either with or without a commission, and was therefore sufficient. (*o*) But it would seem that if the court had been held by a Queen's counsel, or county court judge, it might have been necessary to show whether a commission had issued or not, because he would only have authority if

(*n*) See charge of Mr. Jus. *Burns*, 8 U. C. L. J. 6.
(*o*) *Whelan* v. *Reg.*, 28 U. C. Q. B. 2.

named in the commission, or appointed by one of the superior court judges.

It would seem, also, that if the caption had been defective, it might have been rejected altogether under Con. Stats. Can., c. 99, s. 52.

In the same case, it was objected that the only authority shown being that of Oyer and Terminer, the award, "therefore let a jury thereupon immediately come," was unauthorized, and a special award of *venire facias* was requisite; the court held, assuming, but not admitting, that in England there is a difference in this respect between the power of justices of Oyer and Terminer and of Gaol Delivery, and that the record showed no authority to deliver the gaol, that in this country, by the Jury Act, Con. Stats. U. C., c. 31, both have the same powers, the general precept to summon a jury being issued by both before the assizes. (*p*)

A judge of assize, as such, may, by force of the statute 27 Edw. I., c. 3, deliver the gaol without any special commission for that purpose. (*q*)

The court is bound to take judicial notice of the powers of a court of General Gaol Delivery, and, wherever it is recited on a record that anything was done at such a court, if it is found that such court has power to do the thing recited, it must be held to be rightly done. (*r*)

As to serving on juries, infancy has been considered a ground of disqualification, on account of the probable deficiency of understanding. Being over the prescribed age has been considered only a ground for not returning the juryman, and there is no known head of challenge under which the objection can be made to a juryman over the prescribed age, if otherwise competent. The statute 13 Edw. I., c. 38, being in the affirmative, leaves infants disqualified as at common law. (*s*)

(*p*) *Whelan* v. *Reg.*, 28 U. C. Q. B. 2.
(*q*) *Ibid.* 44, per *A. Wilson*, J.
(*r*) *Ibid.* 85, per *Richards*, C. J.
(*s*) *Mulcahy* v. *Reg.*, L. R. 3 E. & I. App. 315, per *Willes*, J.

This statute enacts, in peremptory terms, that old men above the age of seventy years shall not be put upon juries. But the prohibition in the statute was not intended as a disqualification, but merely as an exemption; for if they were put upon the panel, they could not be challenged. (*t*)

The R. S. O., c. 48, makes a clear distinction between disqualification and exemption. Where, therefore, a juryman was returned whose age exceeded sixty years, that fact only operated in his favor as an exemption, but was not a ground for challenge as a personal disqualification. By this statute every one between the ages of twenty-one and sixty was qualified. By sec. 7, every person upwards of sixty years of age is absolutely freed and exempted from being returned and from serving on juries, and shall not be inserted in the rolls to be prepared and reported by the selectors of jurors.

An alien, qualified and resident as the statute prescribes, may be a juror in Nova Scotia. (*v*)

By s. 11 of R. S. O., c. 48, no man, not being a natural born or naturalized subject of Her Majesty, shall be qualified to serve as a grand or petit juror; so that now, juries *de mediatate linguæ* having been abolished, an alien is never admitted as a juror in the Province of Ontario.

Objection to the jury panel, after verdict, can only be taken by writ of error. (*w*)

The object of a challenge is to have an indifferent trial. (*x*)

The right of peremptory challenge, at common law, was a principal incident of the trial of felony. This right cannot be taken away by implication from the terms of a statute, unless such implication is absolutely necessary for the interpretation of the statute. (*y*)

In felonies, as well as misdemeanors, the Crown had the right of challenging any number of jurors peremptorily, without assigning any cause, until the panel was exhausted. (*z*)

(*t*) *Mulcahy* v. *Reg.*, L. R. 3 E. & I. App. 325.
(*v*) *Reg.* v. *Burdell*, 1 Oldright, 126.
(*w*) *Reg.* v. *Kennedy*, 26 U. C. Q. B. 326.
(*x*) *Levinger* v. *Reg.*, L. R. 3 P. C. App. 287, per Sir *J. Napier*.
(*y*) *Ibid.* 289, per Sir *J. Napier*.
(*z*) *Reg.* v. *Fellowes*, 19 U. C. Q. B. 48.

The 32 & 33 Vic., c. 29, s. 38, enacts that, in all criminal trials, whether for treason, felony or misdemeanor, four jurors may be peremptorily challenged on the part of the Crown. 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, is not affected by this statute.

Even before the statute, on a trial for misdemeanor, as well as for felony, the Crown might, without showing cause, direct jurors, on their names being called by the clerk of the court, to "stand aside" until the panel was gone through, (*a*) and so a second time till the panel is exhausted; that is, till it appears that a jury cannot be obtained without such juror. (*b*)

This was the well understood practice on indictments for felony as well as misdemeanor, and it is said that, before the statute 33 Edward I., st. 4, (*c*) the King might challenge peremptorily, without showing cause, but that Act was construed to restrain the privilege, and to require the Crown to show cause if the panel was otherwise exhausted. (*d*) The restriction in practice thus imposed on the Crown is, that it shall not exercise its prerogative so as to make it necessary to put off the trial for want of a jury, such as the party arraigned is entitled to have on his trial. (*e*)

The 37 Vic., c. 38, s. 11, which enacts that the right of the Crown to cause jurors to stand aside shall not be exercised "on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel," applies to libels on individuals as distinguished from seditious and blasphemous libels; and it makes no difference that the Crown is represented by the Attorney General; (*f*) and if the judge at the trial on such a case allow the right and

---

(*a*) *Reg.* v. *Fraser*, 14 L. C. J. 245; *Reg.* v. *Benjamin*, 4 U. C. C. P. 179; *Reg.* v. *Chasson*, 3 Pugsley, 546; *Reg.* v. *Hogan*, 1 L. C. L. J. 70; *Reg.* v. *Dougall*, 18 L. C. J. 85.

(*b*) *Reg.* v. *Lacombe*, 13 L. C. J. 259.

(*c*) See Con. Stats. U. C., c. 31, s. 101.

(*d*) *Reg.* v. *Benjamin*, 4 U. C. C. P. 185, per *Macaulay*, C. J.

(*e*) *Levinger* v. *Reg.*, L. R. 3 P. C. App. 288, per Sir *J. Napier*.

(*f*) *Reg.* v. *Patteson*, 36 U. C. Q. B. 127.

afterwards doubt the propriety of his ruling, he may reserve the point for the decision of the court above. (*g*)

Calling the list over once is not exhausting the panel. (*h*)

The direction to stand aside is not, in fact, a challenge. (*i*) But it is, in effect, equivalent to a peremptory challenge if, without having to resort to such of the jurors as have been "set by" for the time, on the part of the Crown, there can be procured from those returned on the panel enough of jurors, not objected to, to make a jury. (*j*)

After the prisoner had been arraigned on his trial for murder, had pleaded not guilty, and received the usual notice of his right to challenge, two jurors were called who were not challenged by him, and were thereupon sworn. The name of John Hill was then called, and a person answering to that name came forward, and was sworn without challenge or objection. Some others were afterwards called, and on being challenged peremptorily by the prisoner, they withdrew; and, after another was called and sworn without challenge, the prisoner's counsel objected to John Hill, as he was a witness in the case for the prosecution. Upon inquiry it was found that there was a person named John Hill returned on the panel, but that he was a different person from the John Hill sworn on the jury, and that the latter was not only a witness but also a resident of another county, and therefore not qualified to act as a juryman. Upon consent of both the counsel for the Crown and the prisoner, he was allowed to retire, and other jurymen were called and sworn until the panel was full, the prisoner exercising the right of challenge until the jury was chosen. The juror was withdrawn before the prisoner was given in charge. The prisoner was tried and convicted, and, upon motion for a new trial, the court held, first, that the John Hill improperly sworn was

(*g*) *Reg.* v. *Patteson*, 36 U. C. Q. B. 127.

(*h*) *Reg.* v. *Lacombe*, 13 L. C. J. 261, per *Monk*, J.; and see *Mansell* v. *Reg.*, 8 E. & B. 54; Dears. & B. 375; see 32 & 33 Vic., c. 29. s. 41, as to supplying defect of jurors, if the panel is exhausted.

(*i*) *Reg.* v. *Lacombe*, *supra*, 261, per *Badgley*, J.

(*j*) *Levinger* v. *Reg.*, *supra*, 288, per Sir *J. Napier*.

legally discharged from the jury; second, that his discharge did not operate upon the jurors previously sworn, so as to render it necessary to reswear them, and thus reopen the prisoner's right of challenge to them; and third, that though thirteen persons were sworn to try the prisoner, the twelve by whom he was tried constituted the jury for his trial; in other words, that he was properly tried by the twelve who constituted the jury. (*k*)

If a jury be elected, tried and sworn, and charged with a prisoner, and afterwards discharged without giving a verdict, either because they cannot agree, or with the assent of counsel, a new jury will be called and sworn in the ordinary way, and the prisoner will have the usual right of challenge. (*l*)

A prisoner is entitled to challenge for cause before exhausting his peremptory challenges; and error will lie for the refusal of this right; but if the prisoner, after an erroneous decision of the judge on this point, peremptorily challenge a juror whom he might have challenged for cause, he waives his right in respect of such erroneous decision, and error cannot be brought. (*m*)

If, after the improper disallowance of a challenge for cause, the prisoner withdraw his plea of not guilty, and plead guilty, that would cure the objection, because the whole record must be looked at, and not a merely isolated part of it; for one part of it may be controlled by another, and that which may be a cause of exception in one place, may be no exception when read in connection with the rest of the record. (*n*)

A prisoner, arraigned for uttering forged paper, has a right to challenge peremptorily, on the trial of a preliminary question, to the effect that the prisoner had been extradited from the United States on a charge of forgery. (*o*)

(*k*) *Reg.* v. *Coulter*, 13 U. C. C. P. 299.
(*l*) *Ibid.*
(*m*) *Whelan* v. *Reg.*, 28 U. C. Q. B. 2; affirmed on appeal, *ibid.* 108.
(*n*) *Ibid.* 164, per *A. Wilson*, J.
(*o*) *Reg.* v. *Paxton*, 10 L. C. J. 212.

It is a good cause of challenge to a juror, if he has said he would hang the prisoner if on his jury. (*p*)

A statute directed a jurors' book to be made up in each year, for use in the year following, and declared that such book should be in use from the first of January, for and during one year. In November, 1865, at a sitting of a special commission, a panel was returned from the then existing jury book. The jurors were not then called, but the sitting was duly adjourned to the 19th of January, 1866, at which time the trial took place, when the jurors named in the return of November, 1865, were called. One of the jurors, who had been duly returned in November, 1865, not being in the list for 1866, it was held that this was not a ground of challenge to him. Nor did these facts show any ground for challenge to the array. (*q*)

The prisoner may challenge the array if affinity exists between the sheriff and himself; (*r*) and if he apprehend that the array will be challenged on that account, he may have the process directed to the coroner, with the consent of the other party; and if the other do not consent, but insists there is no cause for the change of process, he cannot afterwards take advantage of the objection which he has himself alleged to be futile. (*s*)

It is a ground of such challenge that the prisoner has had an action pending against the sheriff for assault. (*t*)

The inclusion of unauthorized names on a petit jury panel is not a ground of challenge to the array; (*u*) nor is the summoning of an excessive number, in which event the unnecessary ones may be struck off by the judge. (*v*)

Where a wrong juror by mistake answered the call of the clerk, and served on the jury, it was held by a majority of

(*p*) *Whelan* v. *Reg.*, 28 U. C. Q. B. 29.
(*q*) *Mulcahy* v. *Reg.* L. R. 3 E. & I. App. 306.
(*r*) *Wetmore* v. *Levi*, 5 Allen, 180.
(*s*) *Whelan* v. *Reg.*, 28 U. C. Q. B. 54.
(*t*) *Reg.* v. *Milne*, 4 Pugsley & B. 394.
(*u*) *Reg.* v. *Maillioux*, 3 Pugsley, 493.
(*v*) *Ibid.*

the court in Quebec that there had been a mis-trial ; (*w*) but in England, in a similar case, the majority held it only a ground of challenge. (*x*)

An order for an extra panel under R. S., c. 92, s. 37, of Nova Scotia, is valid if signed by three judges, though they do not constitute a majority. (*y*)

Where the Crown demurred to a challenge to the array, and the judge on overruling the demurrer granted leave to traverse, it was held a matter in the discretion of the judge, and not reviewable. (*z*)

Where the facts stated in the challenge would not of necessity disqualify the sheriff from summoning a jury, and might or might not render him partial, the challenge is to the favor, and it should, in addition to the facts relied upon, contain an allegation that the sheriff was not impartial, otherwise it will be bad. (*a*)

It is in the discretion of the judge whether to require a challenge to the polls to be in writing. (*b*)

Expressions used by a juryman are not a cause of challenge, unless they are to be referred to something of personal ill-will toward the party challenging ; and the juryman himself is not to be sworn when the cause of challenge tends to his dishonor, as whether he has been guilty of felony, or whether he has expressed a hostile opinion as to the guilt of the prisoner. (*c*) He may, however, be examined on the *voir dire* as to his qualification, or the leaning of his affections. (*d*)

If one of the jury be taken ill at the trial the judge cannot, even with the consent of the prisoner, swear another juror in his place and continue the trial ; and the objection

(*w*) *Reg.* v. *Feare*, 3 Q. L. R. 219, following *Reg.* v. *Miller*, 1 Dears. 468.
(*x*) *Reg.* v. *Mellor*, 4 U. C. L. J. 192 ; Dears. & B. 468.
(*y*) *Reg.* v. *Quinn*, 1 Russ. & Geld. 139.
(*z*) *Reg.* v. *Mailloux*, 3 Pugsley, 493.
(*a*) *Brown* v. *Maltby*, 4 Pugsley & B. 92.
(*b*) *Reg.* v. *Chasson*, 3 Pugsley, 546.
(*c*) *Ibid.*
(*d*) *Ibid.*

is not waived by the prisoner's counsel afterwards addressing the jury. (*e*)

A statement by one of the jury, previously to their giving their verdict, that a newspaper had been handed to them, cannot be recorded in the register of the court. (*f*) And an affidavit by a party to a suit, simply stating that he is informed and believes that one of the jurymen was under age, will not be considered evidence of the fact. (*g*)

At any time before a juror is sworn, he may be examined as to his qualification, whether before or after the peremptory challenges are exhausted, in order to ascertain whether he is a person qualified to be a juror. (*h*)

If thirteen jurors are sworn to try the prisoner, the swearing of the thirteenth would be void, and the other twelve would constitute the jury. (*i*)

Though a challenge has been improperly disallowed, yet, if no improper person get on the jury, their verdict, when none of them are disqualified, supports the judgment on the indictment. (*j*)

If, after a prisoner's challenge to a juror is disallowed, the Crown then challenged him, and the prisoner objected to it, unless the Crown showed cause, in the first instance, or the prisoner contended the cause shown by the Crown was insufficient, this would be a consenting to the juror as a proper juryman to be admitted to try the cause, or a waiver of all objection to him, and the prisoner could not, after that, revive his own original exception. (*k*)

So, after the improper disallowance of a challenge to one juror, the prisoner would be bound to renew his exceptions specifically to any jurors called afterwards, in order to establish a ground of error, or cause of complaint as to them. (*l*)

(*e*) *Noble* v. *Billings*, 3 Allen, 85.
(*f*) *Reg.* v. *Notman*, 4 C. L. J. 41.
(*g*) *Reg.* v. *Perley*, 2 Pugsley, 449.
(*h*) *Whelan* v. *Reg.*, 28 U. C. Q. B. 54.
(*i*) *Reg.* v. *Coulter*, 13 U. C. C. P. 303, per *Draper*, C. J.
(*j*) *Whelan* v. *Reg.*, 28 U. C. Q. B. 137, per *Draper*, C. J
(*k*) *Ibid.* 53-4.
(*l*) *Ibid.* 61, per *A. Wilson*, J.

It is settled law that a juryman must be challenged before he is sworn, and cannot afterwards be withdrawn except by consent. (*m*)

A prisoner cannot challenge at all until a full jury appears, and he must challenge to the array before he challenges to the polls. He must abide by his peremptory challenge when he makes it, and cannot withdraw it and challenge another juror instead. The prisoner must also show all his causes of objection before the Crown is called upon to show cause. The party beginning to challenge must finish all his challenges before the other begins, and all challenges of the same kind and degree must be suggested against the juror at the same time. (*n*)

When there are two prisoners for trial, it would not be ground of error if the judge directed one of them to challenge first, and to make his peremptory challenges before his challenges for cause, and then allow the other his challenges in like order. In such latter case, on a juror being called against whom there was a cause of challenge to the favor, he would not be challenged peremptorily, but would go into the jury box to abide the result of all the challenges; and, when the peremptory challenges were through, those for cause would be proceeded with, and the juror would then be reached. (*o*)

When a prisoner, on his trial, assumes to challenge a juror for cause, it is competent for the Crown either to demur or to counterplead; that is, set up some new matter consistent with the matter of challenge, to vacate and annul it as a ground of challenge, or to deny the truth, in point of fact, of what is alleged for matter of challenge. (*p*) The latter mode is the only one calling for the intervention of triors. (*q*)

(*m*) *Reg.* v. *Coulter*, 13 U.C.C.P. 301, per *Draper*, C.J.; *Reg.* v. *Mellor*, 4 Jur. N. S. 214.
(*n*) *Whelan* v. *Reg.*, 28 U. C. Q. B. 49.
(*o*) *Ibid.* 47-50.
(*p*) *Ibid.* 168-9, per *Gwynne*, J.
(*q*) *Ibid.*

The Con. Stats. U. C., c. 31, s. 139, provides that no omission to observe the directions of the Act, or any of them, as respects the "selecting jury-lists from the jurors' rolls," or "the drafting panels from the jury-lists," shall be ground for impeaching the verdict.

Possibly the array might be quashed, if the sheriff's return to the court contained the names of jurors resident out of the county for which they were summoned. (*r*)

In Ontario, the usual practice as to summoning jurors is as follows: A precept, signed by the judges, who are always named in both commissions of Oyer and Terminer and Gaol Delivery, goes to the sheriff, to return a general panel of jurors, and that precept is returned into court on the first day of the assizes with the panel, and from the names contained in that panel all the jurors, both in the civil and criminal side of the court, are taken; and as the criminal court always possesses the powers of courts of Oyer and Terminer and General Gaol Delivery, the jury process awarded in that court is entered on the roll, "therefore let a jury thereupon immediately come."

The judge sitting at Oyer and Terminer or Gaol Delivery, has power, after issue joined, to direct a jury to come for the trial of the prisoner, and the usual *venire facias*, "therefore let a jury thereupon immediately come," is sufficient, because under the Jury Act, Con. Stat. U. C., c. 31, there has been a previous precept issued for the return of jurors to that court; and justices of both these courts have the same powers by the Act. (*s*)

Where a court is held under a special commission, begun in one year and finished in the next, and no new precept has issued to the sheriff for the return of jurors, it is not necessary that the jury should be empanelled from the jury-book for the latter year. (*t*) This might be requisite if the Act

(*r*) *Reg.* v. *Kennedy*, 26 U. C. Q. B. 331, per *Draper*, C. J.
(*s*) *Whelan* v. *Reg.*, 28 U. C. Q. B. 84-5, per *Richards*, C. J.
(*t*) *Mulcahy* v. *Reg.*, L. R. 3 E. & I. App. 306.

forbade a juror, duly summoned, to serve after the delivery of the new book to the sheriff. (*u*).

Juries *de mediatate linguæ* are not now allowed in the case of aliens. (*v*)

Where a jury of this kind is allowed, a writ of *venire facias ad triandum* must be issued summoning thirty-six jurors. (*w*)

Where the defendant has asked for a jury composed one-half of the language of the defence, six jurors speaking that language may be put into the box before calling any juror of the other language. (*x*)

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 bound to show cause till the whole panel is exhausted. (*y*)

Where in a case of felony the prisoner had requested a jury *de mediatate linguæ*, and one of the jurors was discovered after verdict not to be skilled in the language of the defence, it was held that the trial was null and void. (*z*)

Where a prisoner has been arraigned on a charge of uttering forged paper, it is not competent for the Crown to order the trial by jury of a preliminary question raised by the prisoner's counsel, to the effect that the prisoner had been extradited from the United States on a charge of forgery, and could not therefore be legally tried here for any other offence. The question must be determined by the court. (*a*)

The maxim that judges shall decide questions of law and juries questions of fact, is one of those principles which lie at the foundation of our law. (*b*) The principle applies in criminal as well as civil cases, though, in some cases, it rests with the jury to determine a mixed question of law and fact. (*c*)

(*u*) *Mulcahy* v. *Reg.*, L. R. 3 E. & I. App. 316, per *Willes*, J.
(*v*) 32 & 33 Vic., c. 29, s. 39.
(*w*) *Reg.* v. *Vonhoff*, 10 L. C. J. 292.
(*x*) *Reg.* v. *Dougall*, 18 L. C. J. 85; but see 32 & 33 Vic., c. 30.
(*y*) *Reg.* v. *Dougall*, *supra*.
(*z*) *Reg.* v. *Chamaillard*, 18 L. C. J. 149.
(*a*) *Reg.* v. *Paxton*, 10 L. C. J. 212.
(*b*) *Winsor* v. *Reg.*, L. R. 1 Q. B. 303, per *Cockburn*, C. J.
(*c*) *Gray* v. *Reg.*, 1 E. & A. Reps. 504, per Sir *J. B. Robinson*, *Bart.*

The jury are bound to follow the direction of the court in point of law; and where a jury attempted to persist in returning a verdict contrary to the direction of *Pollock*, C.B., he told them they were bound to return a verdict according to his direction in point of law, and explained that the facts only were within their province and the law in his; and although he did not infringe on their province, he could not permit them to invade his. (*d*)

The jury have a right, after the summing up and conclusion of the case, and after retiring to their room to deliberate, to return to open court and re-examine any of the witnesses whose evidence was not well understood by them. (*e*)

The strictness of the rules regarding juries and the conduct of trials, has been much relaxed in modern times. (*f*)

The misconduct, or irregular and improper conduct of juries, will only have the effect of vitiating their verdict, when it is such that the result of the trial has been influenced by it, or when there is any sufficient and reasonable ground to believe that such influence or effect has been produced by it. (*g*)

There is a substantial distinction in regard to misconduct of the jury, whether the irregularity took place before or after the jury are charged by the judge. The indulgence in the way of separating, or otherwise, is much restricted after the charge. (*h*)

The fact that one of the jury, on a trial for felony, during a recess which took place in the progress of the trial, not being in charge of any officer or other person, entered a public house, and mentioned the subject of the trial to A., and had some slight conversation with other parties as to it, is, in the absence of evidence that the juror or the verdict was

(*d*) *Reg.* v. *Robinson*, 1 U. C. L. J. N. S. 53; 4 F. & F. 43.
(*e*) *Reg.* v. *Lamere*, 8 L. C. J. 281.
(*f*) *Reg.* v. *Kennedy*, 2 Thomson, 207, per *Haliburton*, C. J.
(*g*) *Ibid.* 212, per *Bliss*, J.
(*h*) *Ibid.* 221, per *Wilkins*, J.

influenced by this, not sufficient to vitiate the verdict, or amount to a mis-trial. (*i*)

When a juror has separated from his brethren, and conversed with others on the subject of the cause in a way calculated to influence him in forming an opinion upon it, it amounts to a mis-trial, let the consequences be what they may; but if the juror is not influenced by anything which occurred in consequence of the separation, there is no mis-trial. (*j*)

In all criminal trials less than felony, the jury may, in the discretion of the court, and under its direction as to conditions, mode, and time, be allowed to separate during the progress of the trial. (*k*) But in felony such latitude is not allowed, and if in such case the jury be permitted to separate, there is a mis-trial; and the court may direct that the party be tried as if no trial had been had. (*l*)

The Crown, as well as the prisoner, has a right to set aside a verdict vitiated by the jury's misconduct. (*m*)

There is no authority for ordering that a jury have refreshments during the period of their deliberation. (*n*)

As to discharging juries, there would seem to be no difference between misdemeanors and felonies. In both, the principles on which trial by jury is to be conducted are the same. (*o*)

If a juryman has merely fainted, because the court-room is hot and close, it would be proper to wait a short time, and then proceed; but if he is taken so ill that there is no likelihood of his continuing to discharge his duty without danger to his life, the jury must be discharged. (*p*)

Where the record of a conviction for felony showed that, on the trial of an indictment, the jury being unable to agree,

(*i*) *Reg.* v. *Kennedy*, 2 Thomson, 203.
(*j*) *Ibid.* 206-7, per *Haliburton*, C. J.
(*k*) 32 & 33 Vic., c. 29, s. 57.
(*l*) *Reg.* v. *Derrick*, 23 L. C. J. 239.
(*m*) *Reg.* v. *Kennedy*, 2 Thomson, 213, per *Bliss*, J.
(*n*) *Winsor* v. *Reg.*, L. R. 1 Q. B. 308, per *Cockburn*, C. J.
(*o*) *Ibid.* 307, per *Cockburn*, C. J.
(*p*) *Ibid.* 315, per *Blackburn*, J.

the judge discharged them; that the prisoner was given in charge of another jury at the next assizes, and a verdict of guilty returned, and judgment and sentence passed; on writ of error, it was held that the judge had a discretion to discharge the jury, which a court of error could not review; that the discharge of the first jury without a verdict was not equivalent to an acquittal; that a second jury process might issue, and that there was no error on the record. (*q*)

And it may be stated generally that when the discharge of a jury is warranted by the rules of law, it does not operate as an acquittal, or bar another trial; but if the jury are wrongfully discharged, the prisoner cannot be put a second time on trial. (*r*)

The illness of a juror, or the illness of a prisoner, has been held sufficient ground for discharging the jury. (*s*)

A jury sworn and charged, even in case of felony, may be discharged, without verdict, in case of death or illness of one of the jury, or their being unable to agree, or at the desire of the accused, with the consent of the prosecution. (*t*)

The jury cannot be discharged at the instance of the prosecutor in order to obtain evidence, of which, at the trial, there appears to be a failure. But it would seem that this is not a rule of positive law, and that there are exceptions to it; and where a witness is kept away by the prisoner, and by collusion between him and the prisoner, is tampered with, the rule should be relaxed, and the judge permitted to discharge the jury.

Where a jury are discharged in consequence of their not agreeing, it is not necessary to wait; and, on the contrary, the judge should not wait until the jury are exposed to the dangers which arise from exhaustion or prostrated strength of body and mind, or until there is a chance of conscience

(*q*) *Winsor* v. *Reg.*, L. R. 1 Q. B. 390 (Ex. Chr.)
(*r*) *Ibid.*
(*s*) *Ibid.* 305, per *Cockburn*, C. J.
(*t*) *Reg.* v. *Charlesworth*, 9 U. C. L. J. 53; 1 B. & S. 460.

and conviction being sacrificed for personal convenience, and to be relieved from suffering. (*u*)

The defendant was put on trial for a misdemeanor. At the trial a witness, called on behalf of the Crown, claimed his privilege not to give evidence on the ground that he would thereby criminate himself. The judge who presided at the trial refused to allow him the privilege; but the witness, still refusing to answer, was committed to prison for contempt of court, and a conviction of the defendant being under these circumstances impossible, the jury, at the request of the counsel for the prosecution, and against the protest of the counsel for the defendant, were discharged without giving any verdict. It was held that the defendant ought not to be allowed to put a plea upon the record stating the above facts, but that they ought to appear as an entry on the record. An entry was made upon the record accordingly; when it was further held that whether or not the judge had power to discharge the jury, what took place did not amount to a verdict of acquittal, nor was the prisoner entitled to plead *autrefois acquit* in respect thereof, and that the defendant was not entitled to judgment *quod eat sine die*, or to the interference of the court to prevent the issuing of a fresh process. (*v*)

The old doctrine, that if the jury could not agree, it was the duty of the judge to carry them from town to town in a cart, has been exploded in modern times. It is certainly not now the practice. (*w*)

In criminal cases, not capital, where the verdict is so inconsistent and repugnant, or so ambiguous and uncertain, that no judgment can be safely pronounced upon it, a *venire de novo* may be awarded. (*x*)

Where, on an indictment for murder, the jury returned a verdict, in writing, in the following words: "Guilty of

(*u*) *Reg.* v. *Charlesworth*, 9 U. C. L. J. 48.
(*v*) *Ibid. supra.*
(*w*) *Winsor* v. *Reg.*, L. R. 1 Q. B. 305, per *Cockburn*, C. J.; *ibid.* 320-1, per *Mellor*, J.
(*x*) *Reg.* v. *Healey*, 2 Thomson, 332-3, per *Bliss*, J.

murder, with a recommendation to mercy, as there was no evidence to show malice aforethought and premeditation," it was held that the verdict was too ambiguous and uncertain to allow the court to pronounce any judgment upon it. (*y*) A recommendation to mercy is no part of the verdict. (*z*)

If it were shown that, upon the jury delivering their verdict in open court, anything was openly said by them which could give the court to understand that they were not openly assenting to that verdict, and, nevertheless, by some error or misapprehension, it was received as their unanimous verdict, the court could and ought to interfere on such ground and grant a new trial, when such a course was authorized by our criminal practice. (*a*)

A jury may correct their verdict, or any of them may withhold assent and express dissent therefrom, at any time before it is finally entered and confirmed. (*b*)

It is irregular for counsel to question the jury directly, and not through the court, as to the grounds of their verdict. (*c*)

It would appear that the right of a jury to find a general verdict in a criminal case, and to decline to find the facts specially, cannot be questioned, especially when the verdict is one of acquittal. (*d*)

It is doubtful whether a verdict can be received and recorded on a Sunday. (*e*)

The Con. Stats. U. C., c. 113 (20 Vic., c. 61), has been repealed except sections 5, 16 and 17. By the 32 & 33 Vic., c. 29, s. 80, no appeal lies to the Court of Appeal in any criminal case where the conviction has been affirmed by either of the superior courts of common law, on any question of law reserved for the opinion of such court. But now by the Supreme Court Act, an appeal lies to the court thereby

(*y*) *Reg.* v. *Healey*, 2 Thomson, 331.
(*z*) See *Reg.* v. *Trebilcock*, 4 U. C. L. J. 168; Dears. & B. 453.
(*a*) *Reg.* v. *Fellowes*, 19 U.C.Q.B. 50, per *Robinson*, C. J.; and see *Reg.* v. *Ford*, 3 U. C. C. P. 217-18, per *Macaulay*, C. J.
(*b*) *Reg* v. *Ford*, *supra*, 217, per *Macaulay*, C. J.
(*c*) *Ibid.*
(*d*) *Reg.* v. *Spence*, 12 U. C. Q. B. 519.
(*e*) *Winsor* v. *Reg.*, L. R. 1 Q. B. 308, 317, 322.

constituted, where the decision of the court of final resort in the province is not unanimous. (*f*)

It has been held in England that no case can be stated for the opinion of the court for Crown cases reserved, except upon some question of law arising upon the trial. Where therefore, the prisoner had pleaded guilty, and the question asked was whether the prisoner's act, as described in the depositions, supported the indictment, the court held that they had no jurisdiction to consider the case. (*g*)

When a case is reserved, under the Con. Stats. U. C., c. 112, the court may arrest the judgment, with a view to a new indictment being preferred, or for other purposes. (*h*)

In *Reg.* v. *McEvoy*, (*i*) the court, under the facts shown, considered they might either enter an arrest of judgment under the statute, or direct judgment to be given as for a misdemeanor at common law; but the latter course was adopted because it was doubted whether the judgment could properly be arrested, where the indictment, though framed imperfectly, as for an offence against a statute, does contain a sufficient charge of an offence at common law.

It would seem that the objections, on a motion to arrest the judgment, are confined to the points reserved under the statute. (*j*)

Where, on an appeal from a conviction affirmed at the sessions, it appeared that the point in question was purely one of law, and there could be no object in sending the case down for a new trial, the judgment was arrested. (*k*)

The court may, in certain cases, stay the entry of judgment until a new indictment is preferred, but in such case, the indictment must be removed by *certiorari*. (*l*)

(*f*) *Reg.* v. *Amer*, 2 S. C. R. 593.
(*g*) *Reg.* v. *Clark*, L. R. 1 C. C. R. 54; 36 L. J. (M. C.) 16.
(*h*) *Reg.* v. *Rose*, 1 U.C.L.J. 145; *Reg.* v. *Spence*, 11 U.C.Q.B. 31; *Reg.* v. *Orr*, 12 U. C. Q. B. 57.
(*i*) 20 U. C. Q. B. 344.
(*j*) *Reg.* v. *Fennety*, 3 Allen, 132.
(*k*) *Reg.* v. *Rubidge*, 25 U. C. Q. B. 299.
(*l*) *Reg.* v. *Spence*, 12 U. C. Q. B. 519.

In criminal matters, foreign law should not be brought before the court. (*m*) American authorities, though entitled to respect, will not be received as binding in our courts. (*n*) Nor are English decisions absolutely binding in this country. (*o*)

If, after a verdict of guilty of felony, and when the judge is about to pass sentence, objections are made by the prisoner's counsel in arrest of judgment, but overruled by the judge trying the cause, the court in *banc* has authority to inquire into the validity of these objections, though the record does not state that the prisoner's counsel moved in arrest of judgment. The presence of the prisoner at the argument may be waived by consent of parties. (*p*)

The superior court will adjudicate on a reserved case of misdemeanor in the absence of the defendant, who has fled beyond the jurisdiction of the court. (*p*)

Where a man charged with felony is being tried, whatever may have been his position in life, he must take his place in the dock; but a misdemeanant, if on bail, is not obliged to do so. (*r*)

In criminal cases, it is always entirely in the discretion of the court to allow a view or not. It is therefore no irregularity to allow the jury to have a view of premises where an alleged offence has been committed, after the judge has summed up the case. (*s*)

The court ought to take such precautions as may be necessary to prevent the jury from improperly receiving evidence out of court. Where, at proceedings on a view, evidence was received in the absence of the judge, the prisoners, and their counsel, the court for Crown cases reserved held that it is for the court before which the trial takes place, to ascertain whether such irregularity has taken place, and that they could

(*m*) *Notman* v. *Reg.*, 13 L. C. J. 259, per *Duval*, C. J.
(*n*) *Roberts* v. *Patillo*, 1 James, 367; *Reg.* v. *Creamer*, 10 L. C. R. 404.
(*o*) *Reg.* v. *Roy*, 11 L. C. J. 92.
(*p*) *Reg.* v. *Kennedy*, 2 Thomson, 204.
(*q*) *Reg.* v. *Fraser*, 14 L. C. J. 245.
(*r*) *Ex parte Blossom*, 10 L. C. J. 69, per *Meredith*, J.
(*s*) *Reg.* v. *Martin*, L. R. 1 C. C. R. 378.

not reverse the conviction on the ground of a mere statement of what the judge was informed; and it is doubtful whether, if such irregularity had occurred, this court would have jurisdiction to order a *venire de novo*, as for a mis-trial; or whether, if the facts were thus tried, and found to be as alleged, they ought to be entered on the record, so as to give an opportunity of taking advantage of the defect by writ of error, or whether the question could be properly raised by a case stated for this court. (*t*)

The judge has a discretion to adjourn the trial when the counsel engaged in it becomes so ill as to be unable to proceed. One of the prisoner's counsel at the trial, whilst he was addressing the jury at the close of the case, was suddenly seized with a fit, and incapacitated from proceeding further. No adjournment, however, was applied for; but the other, who was the senior counsel, continued the address to the jury on the prisoner's behalf, without raising any objection that he was placed at a disadvantage by his colleague's disability. It did not, moreover, appear that the prisoner had been prejudiced by the absence of the counsel alluded to, and it was held no ground for a new trial; but in such case, if a postponement had been asked in consequence of the illness, it would have been in the discretion of the judge to have granted it or not, and to have adjourned it for an hour or two, or to another day, or for several days, or until the following court, as might have been thought reasonable. (*u*)

Objections which it is intended to insist on afterwards, must be distinctly raised at the trial; and as the judge presiding is authorized by the Con. Stats. U. C., c. 112, to reserve any question of law for the opinion of the court, it is the more necessary that his attention should be drawn to every matter of law which is relied on for the prisoner, whether by way of suggestion on the defence, or of exception to the judge's ruling, or direction at the trial. (*v*)

(*t*) *Reg.* v. *Martin*, L. R. 1 C. C. R. 378.
(*u*) *Reg.* v. *Fick*, 16 U. C. C. P. 379.
(*v*) *Reg.* v. *Craig*, 7 U. C. C. P. 241, per *Draper*, C. J.

The objections should also be noted by the judge, for the court cannot notice grounds of objections taken in rules unless they appear in the judge's notes; and it is the duty of counsel on moving, to ascertain whether the objections they rely on were noted by the judge who presided at the trial. If they do not appear to be noted, a reference should be made to the judge to have the notes amended before they are made the grounds of a motion. (*w*)

There is nothing to prevent the judge, on a criminal trial, having the notes of the evidence taken in writing by another person. (*x*)

The 32 & 33 Vic., c. 29, s. 32, provides that every objection to any indictment, for any defect apparent on the face thereof, must be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded, and not afterwards. The object of this statute was to prevent waste of time and labor in criminal trials, and to compel a legal defence to be resorted to at the earliest possible stage. The court, therefore, will not arrest judgment after verdict, or reverse judgment in error, for any defect apparent on the face of the indictment, which could have been taken advantage of under this clause. (*y*)

The defendant is not in all cases of acquittal entitled to a copy of the indictment laid against him; and where the charge was for obtaining goods by false pretences, copies of the indictment and papers were refused. (*z*)

A copy of an indictment for high treason may be obtained by consent of the Attorney General. (*a*) And the same rule seems to apply in felony; and his decision is not subject to review. (*b*) At any rate, unless the indictment were removed by *certiorari*, the Court of Queen's Bench would not

(*w*) *Reg.* v. *Des Jardins C. Co.*, 27 U.C.Q.B. 380, per *Morrison*, J.; see also *Cousins* v. *Merrill*, 16 U. C. C. P. 120.
(*x*) *Duval dit Barbinas*, v. *Reg.*, 14 L. C. R. 75, per *Meredith*, J.
(*y*) *Reg.* v. *Mason*, 32 U. C. Q. B. 246.
(*z*) *Reg.* v. *Seneeal*, 8 L. C. J. 286.
(*a*) *Rex* v. *McDonel*, Taylor, 299.
(*b*) *Reg.* v. *Joy*, 24 U. C. C. P. 78.

have jurisdiction. (*c*) The judge has power on acquittal to order the delivery of a copy. (*d*)

The 32 & 33 Vic., c. 29, s. 26, provides that on an indictment for any offence laying a previous conviction, the offender shall in the first place be arraigned upon so much only of the indictment as charges the subsequent offence, and if he pleads not guilty, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only.

If, when found guilty of the subsequent offence, the prisoner denies that he was previously convicted, or stands mute of malice, or will not answer whether he is guilty or not guilty, the jury should then be charged to inquire concerning such previous conviction. (*e*)

Where an indictment contains one count for larceny, and allegations in the nature of counts for previous convictions for misdemeanors, and the prisoner, being arraigned on the whole indictment, pleads not guilty, but is not tried till a subsequent assize, when he is given in charge on the count for larceny only, this does not amount to an error, for he was properly given in charge to the jury, and, having been arraigned and his plea entered at a previous assize, could not be prejudiced by any mistake in his arraignment. (*f*)

Under the English Acts, 5 Geo. IV., c. 84, s. 24, and 8 & 9 Vic., c. 113, s. 1, which are in substance the same as our 32 & 33 Vic., c. 29, s. 26, omitting the proof of the identity contained in the latter Act, it was held that the certificate of a previous conviction, required by these Acts, is sufficient, if it purports to be signed by an officer having the custody of the records, although that officer is therein described as the deputy clerk of the peace of a borough. (*g*)

The 32 & 33 Vic., c. 29, s. 45, provides that all persons tried for any indictable offence shall be admitted, after the

(*c*) *Reg.* v. *Joy*, 24 U. C. C. P. 78.
(*d*) *Heaney* v. *Lynn*. Ber. (N. B.) 27.
(*e*) See *Reg.* v. *Harley*, 8 L. C. J. 280.
(*f*) *Reg.* v. *Mason*, 32 U. C. Q. B. 246.
(*g*) *Reg.* v. *Parsons*, L. R. 1 C. C. R. 24; 35 L. J. (M. C.) 167.

close of the case for the prosecution, to make full answer and defence thereto, by counsel learned in the law.

Two counsel only can be heard on behalf of prisoners indicted for criminal offences, and persons tried for felonies may make their full defence by two counsel, and no more, before a jury wholly composed of persons skilled in the language of the defence. (*h*)

After two counsel had addressed the jury on behalf of the prisoner, a third rose to do so, but was stopped by the court. (*i*)

Two parties accused of the same offence have been held in Quebec not to be entitled to a separate defence. (*j*) But circumstances might exist which would render its allowance necessary for the attainment of justice.

At the close of the case for the prosecution of three prisoners, defended by separate counsel, one was acquitted, and was called as a witness on behalf of one of the two remaining. This witness criminated the other prisoner; and it was held that the counsel of the prisoner criminated had a right to cross-examine and address the jury on the evidence so given; and that, as this right had been refused, the conviction of the prisoner must be quashed, although the court had offered to put the questions suggested by his counsel. (*k*)

It has been held that, in cases of public prosecutions for felony instituted by the Crown, the law officers of the Crown, and those who represent them, were in strictness entitled to the reply, though no evidence was produced on the part of the prisoner. (*l*) But in Ontario, a counsel for the Crown, not being himself the Attorney or Solicitor General, had no right to reply in an ordinary prosecution for crime, where no witnesses were called for the defence. (*m*

(*h*) *Reg.* v. *D'Aoust*, 9 L. C. J. 85.
(*i*) *Ibid.*
(*j*) *Reg.* v. *McConohy*, 5 *Revue Leg.* 746.
(*k*) *Reg.* v. *Luck*, 1 U. C. L. J. 78; 8 F. & F. 483; see also *Reg.* v. *Coyle*, 2 U. C. L. J. 19.
(*l*) *Reg.* v. *Quatre Pattes*, 1 L. C. R. 317.
(*m*) *Reg.* v. *McLellan*, 9 U. C. L. J. 75.

Now, however, the right of reply shall always be allowed to the Attorney or Solicitor General, or to any Queen's counsel, acting on behalf of the Crown. (*n*)

A clerk of the Crown in Quebec, being a Queen's counsel, has a right to be heard in a criminal case, on behalf of the Crown, notwithstanding Con. Stats. L. C., c. 77, s. 75; and the duties and powers of clerks of the Crown not being defined in their commissions, nor by statute, the court will look to the English law, and the powers and duties of the master of the Crown office there, as a guide in deciding on the duties and powers of clerks of the Crown in Quebec. (*o*)

Crown prosecutions differ from ordinary civil suits; for, if the Queen be prosecutor, there can be no *non pros.*, or nonsuit or demurrer to evidence. The prosecutor may be a witness but not the defendant, and if the latter obtain judgment, he is not entitled to costs. (*p*)

Error.—A writ of error lies for every substantial defect appearing on the face of the record, for which the indictment might have been quashed, or which would have been fatal on demurrer, or in arrest of judgment. A writ of error is, therefore, the proper remedy for certain substantial defects appearing on the face of the record. (*q*)

A court of error is confined to errors appearing on the face of the record, and cannot exercise an appellate jurisdiction, and inquire into the facts of the case, (*r*) and affidavits for this purpose are inadmissible. Nor can the judge's notes be looked to, as they form no part of the record. (*s*)

Unless there be manifest error on the face of the record, it is the duty of the court to affirm the judgment. (*t*)

The matter is to be decided as a strictly legal proposition, and no consideration of the effect which the decision may

(*n*) 32 & 33 Vic., c. 29, s. 45, subs. 2.
(*o*) *Reg.* v. *Carter*, 15 L. C. R. 291.
(*p*) *Reg.* v. *Pattee*, 5 U. C. P. R. 295; 7 C. L. J. N. S. 124.
(*q*) *Duval dit Barbinas* v. *Reg.*, 14 L. C. R. 71.
(*r*) *Duval dit Barbinas* v. *Reg.*, 14 L.C.R. 79, per *Duval*, C. J.; *ibid.* 75, per *Meredith*, J.; *Dougall* v. *Reg.*, 22 L. C. J. 133.
(*s*) *Dougall* v. *Reg.*, 22 L. C. J. 133.
(*t*) *Whelan* v. *Reg.*, 28 U. C. Q. B. 139, per *Draper*, C. J.

have upon the parties will be permitted to be taken into consideration, to mould the judgment of the court by the exercise of discretion. (*u*)

No writ of error will be allowed in any criminal case, unless founded on some question of law which could not have been reserved, or which the judge presiding at the trial refused to reserve for the consideration of the court having jurisdiction in such cases, or unless it be a point which could not have been reserved at the trial. (*v*)

Whether the police court is a court of justice within 32 & 33 Vic., c. 21, s. 18, or not, is a question of law which may be reserved by the judge at the trial, under Con. Stat. U. C., c. 112, s. 1; and where it does not appear, upon the record in error, that the judge refused to reserve such question, it cannot be considered upon a writ of error. (*w*)

There is no case in which the discretion of a judge, exercised on a mixed question of law and fact, has been reviewed in error. (*x*)

It would seem that, when a judge has a discretion to do or omit to do a particular thing, his judgment, in the exercise of that discretion, is not subject to revision in error. Rules of practice or procedure, on a criminal trial, rest pretty much in the discretion of the judge, and cannot be made the foundation of a writ of error. (*y*)

The right of postponing the hearing and trial of the cause, urged by a prisoner as a ground of challenge, is discretionary with the judge, and the question is only one of practice or procedure, and, therefore, not examinable in error. (*z*)

A writ of error will lie where a *venire facias* for the summoning of jurors is addressed to improper parties. (*a*) So a

---

(*u*) *Whelan* v. *Reg.* U. C. Q. B. 94.
(*v*) 32 & 33 Vic., c. 29, s. 80; *Reg.* v. *Mason*, 32 U. C. Q. B. 246.
(*w*) *Reg* v. *Mason*, *supra*.
(*x*) *Winsor* v. *Reg.*, L. R. 1 Q. B. 316.
(*y*) *Ibid. Whelan* v. *Reg.*, 28 U. C. Q. B. 1, *et seq.*
(*z*) *Ibid.* 133.
(*a*) *Reg.* v. *Kennedy*, 26 U.C.Q.B. 332, per *Draper*, C. J.; *Crane* v. *Holland*, Cro. El. 138; see also *Willoughby* v. *Egerton*, Cro. El. 853.

challenge to the array overruled would be a ground of error, if the party did not afterwards challenge to the polls. (*b*) The improper granting or refusing of a challenge is alike the foundation of a writ of error. (*c*)

The proceedings on a rule for contempt, on the Crown side of the Court of Queen's Bench, do not constitute a criminal case within Con. Stats. L. C., c. 77, s. 56, and, as a writ of error does not lie, at common law, on an adjudication for contempt, for it is a judgment in immediate execution not examinable in any other tribunal, therefore a writ of error does not lie with respect to judgment rendered on such a rule. (*d*)

For an improper award of a *venire de novo*, a writ of error lies for the subject. (*e*)

The proper proceeding to reverse a judgment of the court of Quarter Sessions is by writ of error, not by *habeas corpus* and *certiorari*, as in the case of summary convictions. (*f*)

No writ of error lies upon a summary conviction, and it only lies on judgments in courts of record acting according to the course of the common law. (*g*)

A proceeding by writ of error is the more formal method of getting rid of an erroneous judgment, but, as the writ lies for error *in the judgment*, where the judgment is void perhaps it would not be the proper course. (*h*)

After judgment, the only remedy is by writ of error. But error only lies on a final judgment. (*i*)

The rule prevailing in civil cases, that when the error is in fact and not in law, the proceedings may be taken in the same court, but when the error is in the judgment itself, error must be in another and superior court, extends also to criminal cases.

(*b*) *Winsor* v. *Reg.*, L. R. 1 Q. B. 61, per *Wilson*, J.
(*c*) *Ibid.* 93.
(*d*) *Ramsay* v. *Reg.*, 11 L. C. J. 158.
(*e*) *Reg.* v. *Charlesworth*, 9 U. C. L. J. 51, per *Crompton*, J.
(*f*) *Reg.* v. *Powell*, 21 U. C. Q. B. 215.
(*g*) *Ramsay* v. *Reg.*, 11 L. C. J. 166.
(*h*) *Reg.* v. *Sullivan*, 15 U. C. Q. B. 435, per *Wilson*, J.; *Reg.* v. *Smith* 10 U. C. Q. B. 99.
(*i*) *Ex parte Blossom*, 10 L. C. J. 42, per *Badgley*, J.

Therefore, the Court of Queen's Bench for Ontario has no authority, in criminal cases, either at common law or by statute, to issue its own writ for the review of its own judgment upon error in law, returnable to a superior court. But the Court of Appeal for Ontario has full power to issue a writ of error in criminal as well as civil cases, and, when the error is in the judgment in the Court of Queen's Bench, the writ of error should be issued out of the Court of Appeal. The writ may be, as nearly as possible, in the form of a writ of appeal given by the orders of the court, as published in 1850. (*j*)

A writ of error cannot be granted without the fiat of the Attorney General. (*k*)

If, in an information of *quo warranto*, the Attorney General have granted his fiat that a writ of error may issue, the court will not interfere, the first being conclusive. (*l*)

The Attorney General (or, in his absence, the Solicitor General) alone can authorize the issue of a writ of error, and he cannot delegate that power to another. Where, therefore, a writ of error was issued and signed by T. K. Ramsay, acting for and in the name of Her Majesty's Attorney General, and not by the Attorney General himself, it was held illegal and void. (*m*)

On error, from the Court of Queen's Bench for Ontario to the Court of Appeal, the party is at liberty, in the latter court to assign new errors, in addition to those laid in the Court of Queen's Bench. (*n*)

It has been already shown that a court of error can only consider matters appearing on the face of the record. It follows, therefore, that matters which cannot be raised upon the record are not examinable in error. The pleadings, the proper continuance of the suit and process, the finding of the jury upon an issue in fact, if any such had been joined, and

(*j*) *Whelan* v. *Reg.*, 28 U. C. Q. B. 100.
(*k*) *Notman* v. *Reg.*, 13 L. C. J. 255; see also *Whelan* v. *Reg.*, *supra*.
(*l*) *Reg.* v. *Clarke*, 5 U. C. L. J. 263.
(*m*) *Dunlop* v. *Reg.*, 11 L. C. J. 271.
(*n*) See *Whelan* v. Reg., 28 U.C.Q.B. 110; *Reg.* v. *Mason*, 32 U.C.Q.B. 246.

the judgment, are the only matters which can be raised upon the record with a view to error. As a bill of exceptions does not lie in a criminal case, there is no mode of causing the rulings of the judge, upon questions of evidence, or his directions to the jury, to be made part of the record, and consequently such rulings or directions cannot be reviewed in error. (*o*)

It need not appear on the face of the record that the jury, when they retired at the judge's charge, were in the custody of sworn constables. An objection on this ground cannot, therefore, be reviewed in error. Though the improper allowance or disallowance of a challenge is ground of error, yet, strictly speaking, there ought to be an answer in law or in fact to the challenge, and a judgment upon the issue raised.

When the proceedings on a challenge are regular, they may be made a part of the record, and may be examined in error. (*p*)

If it is desired to take the opinion of the court on the rulings of the judge, or his directions to the jury, the proper course is to apply to him to reserve a case, under the statute for the opinion of the court. (*q*)

On the trial of a prisoner who had been extradited from the United States, it was held that no question of law could be reserved and heard until after conviction. (*r*)

To purge error, it would seem that a prisoner cannot consent to the evidence of witnesses given on a former trial being read in place of a new examination of the witnesses, although the witness was present in court, and was sworn and heard his evidence read over, and the parties were told they were at liberty further to examine and cross-examine him. (*s*)

(*o*) *Duval dit Barbinas* v. *Reg.*, 14 L. C. R. 72-4, per *Meredith*, J.
(*p*) *Ibid.* 74-5, per *Meredith*, J.
(*q*) *Ibid.* 74, per *Meredith*, J.
(*r*) *Reg.* v. *Paxton*, 2 L. C. L. J. 162.
(*s*) *Reg.* v. *Bertrand*, L. R. 1 P. C. App. 520; but see *Rex* v. *Streek*, 2 C. & P. 413; *Rex* v. *Foster*, 7 C. & P. 495; *Whelan* v. *Reg.*, 28 U. C. Q. B. 52, per *A. Wilson*, J.

A prisoner can consent to nothing manifestly irregular; as that his wife should be examined as a witness, or that the witnesses should be examined without being sworn, or that admissions made by his attorney to the opposite attorney out of court should be received as evidence in the cause. (*w*) He may, however, consent to withdraw or release his challenge altogether, or to accept a juror, on his challenge being overruled. He might consent too to secondary evidence being given, and, it would seem, although no notice to produce had been served. So he might consent to withdraw a plea in abatement, and he may withdraw his plea of not guilty, and plead guilty. He might also consent to the jury taking with them plans or writings not under seal, which were given in evidence. (*x*)

A *concilium* has been granted for the argument of errors in the Court of Queen's Bench. (*y*)

It would seem that the court may direct Crown cases to stand on the new trial paper for argument with ordinary suits between party and party. (*z*)

If a juror against whom there is a good cause of challenge is sworn, and sits on the jury, there would be a mis-trial, and the proceedings would amount to error, and on writ of error brought, the court would direct a *venire de novo*, if the party was not allowed to challenge for cause, and was directed to challenge peremptorily. (*a*)

A mis-trial vitiates and annuls the verdict *in toto*, and the only judgment is a *venire de novo*, because the prisoner was never, in contemplation of law, in any jeopardy on his first trial. (*b*)

The distinction between a *venire de novo* and a new trial is that the former must be granted in respect of matters appear-

(*w*) *Whelan* v. *Reg.* 128 U. C. Q. B. 52.
(*x*) *Ibid.* 53-4, per *A. Wilson*, J.
(*y*) *Ibid.* 15.
(*z*) *Reg.* v. *Sinnott*, 27 U. C. Q. B. 539.
(*a*) *Whelan* v. *Reg.*, 28 U. C. Q. B. 59-91.
(*b*) *Ibid.* 137.

ing upon the record, but a new trial may be granted upon things out of it. (*c*)

It seems that a *venire de novo* can be awarded in a case of felony on a defective verdict. (*d*) But unless there is such an irregularity as to annul all the proceedings on the record subsequent to the award of the jury process, and render the first trial an absolute nullity, a *venire de novo* should not be granted. (*e*)

There is no authority that an abortive trial prevents a *venire de novo* in a case of misdemeanor; (*f*) and if a trial proves abortive, a *venire de novo* may be awarded in a case of felony as well as misdemeanor. (*g*)

A verdict on a charge of felony has been held to be a nullity, and a *venire de novo* awarded, in cases of defect of jurisdiction, in respect of time, place or person, or where the verdict is so insufficiently expressed, or so ambiguous, that a judgment could not be founded thereon. (*h*)

A prisoner having been tried and convicted of a capital felony, by a court of Oyer and Terminer in New South Wales, and sentence of death passed and the judgment entered upon record, an application was made to the Supreme Court, sitting in *banc*, for a rule for a *venire de novo*, on an affidavit which stated that one of the jury had informed the deponent that, pending the trial and before the verdict, the jury having adjourned to an hotel, had access to newspapers which contained a report of the trial as it proceeded, with comments thereon. The Supreme Court made the rule absolute, considering that there had been a mis-trial, and ordered an entry to be made on the record of the circumstances deposed to, that the judgment on the verdict should be vacated, and a fresh trial had; but

(*c*) *Reg.* v. *Kennedy*, 2 Thomson, 215, per *Bliss*, J.
(*d*) *Winsor* v. *Reg.*, L. R. 1 Q. B. 319, per *Blackburn*, J.; *Campbell* v. *Reg.*, 11 Q. B. 799; *Gray* v. *Reg.*, 11 Cl. & F. 427.
(*e*) *Reg.* v. *Kennedy*, *supra*, 223, per *Wilkins*, J.
(*f*) *Reg.* v. *Charlesworth*, 9 U. C. L. J. 51.
(*g*) *Winsor* v. *Reg.*, L. R. 1 Q. B. 319.
(*h*) *Reg.* v. *Murphy*, L. R. 2 P. C. App. 548, per Sir *Wm. Erle*.

A prisoner can consent to nothing manifestly irregular; as that his wife should be examined as a witness, or that the witnesses should be examined without being sworn, or that admissions made by his attorney to the opposite attorney out of court should be received as evidence in the cause. (*w*) He may, however, consent to withdraw or release his challenge altogether, or to accept a juror, on his challenge being overruled. He might consent too to secondary evidence being given, and, it would seem, although no notice to produce had been served. So he might consent to withdraw a plea in abatement, and he may withdraw his plea of not guilty, and plead guilty. He might also consent to the jury taking with them plans or writings not under seal, which were given in evidence. (*x*)

A *concilium* has been granted for the argument of errors in the Court of Queen's Bench. (*y*)

It would seem that the court may direct Crown cases to stand on the new trial paper for argument with ordinary suits between party and party. (*z*)

If a juror against whom there is a good cause of challenge is sworn, and sits on the jury, there would be a mis-trial, and the proceedings would amount to error, and on writ of error brought, the court would direct a *venire de novo*, if the party was not allowed to challenge for cause, and was directed to challenge peremptorily. (*a*)

A mis-trial vitiates and annuls the verdict *in toto*, and the only judgment is a *venire de novo*, because the prisoner was never, in contemplation of law, in any jeopardy on his first trial. (*b*)

The distinction between a *venire de novo* and a new trial is that the former must be granted in respect of matters appear-

(*w*) *Whelan* v. *Reg.* 128 U. C. Q. B. 52.
(*x*) *Ibid.* 53-4, per *A. Wilson*, J.
(*y*) *Ibid.* 15.
(*z*) *Reg.* v. *Sinnott*, 27 U. C. Q. B. 539.
(*a*) *Whelan* v. *Reg.*, 28 U. C. Q. B. 59-91.
(*b*) *Ibid.* 137.

ing upon the record, but a new trial may be granted upon things out of it. (*c*)

It seems that a *venire de novo* can be awarded in a case of felony on a defective verdict. (*d*) But unless there is such an irregularity as to annul all the proceedings on the record subsequent to the award of the jury process, and render the first trial an absolute nullity, a *venire de novo* should not be granted. (*e*)

There is no authority that an abortive trial prevents a *venire de novo* in a case of misdemeanor; (*f*) and if a trial proves abortive, a *venire de novo* may be awarded in a case of felony as well as misdemeanor. (*g*)

A verdict on a charge of felony has been held to be a nullity, and a *venire de novo* awarded, in cases of defect of jurisdiction, in respect of time, place or person, or where the verdict is so insufficiently expressed, or so ambiguous, that a judgment could not be founded thereon. (*h*)

A prisoner having been tried and convicted of a capital felony, by a court of Oyer and Terminer in New South Wales, and sentence of death passed and the judgment entered upon record, an application was made to the Supreme Court, sitting in *banc*, for a rule for a *venire de novo*, on an affidavit which stated that one of the jury had informed the deponent that, pending the trial and before the verdict, the jury having adjourned to an hotel, had access to newspapers which contained a report of the trial as it proceeded, with comments thereon. The Supreme Court made the rule absolute, considering that there had been a mis-trial, and ordered an entry to be made on the record of the circumstances deposed to, that the judgment on the verdict should be vacated, and a fresh trial had; but

(*c*) *Reg.* v. *Kennedy*, 2 Thomson, 215, per *Bliss*, J.
(*d*) *Winsor* v. *Reg.*, L. R. 1 Q. B. 319, per *Blackburn*, J.; *Campbell* v. *Reg.*, 11 Q. B. 799; *Gray* v. *Reg.*, 11 Cl. & F. 427.
(*e*) *Reg.* v. *Kennedy*, *supra*, 223, per *Wilkins*, J.
(*f*) *Reg.* v. *Charlesworth*, 9 U. C. L. J. 51.
(*g*) *Winsor* v. *Reg.*, L. R. 1 Q. B. 319.
(*h*) *Reg.* v. *Murphy*, L. R. 2 P. C. App. 548, per Sir *Wm. Erle*.

ing upon the record, but a new trial may be granted upon things out of it. (*c*)

It seems that a *venire de novo* can be awarded in a case of felony on a defective verdict. (*d*) But unless there is such an irregularity as to annul all the proceedings on the record subsequent to the award of the jury process, and render the first trial an absolute nullity, a *venire de novo* should not be granted. (*e*)

There is no authority that an abortive trial prevents a *venire de novo* in a case of misdemeanor; (*f*) and if a trial proves abortive, a *venire de novo* may be awarded in a case of felony as well as misdemeanor. (*g*)

A verdict on a charge of felony has been held to be a nullity, and a *venire de novo* awarded, in cases of defect of jurisdiction, in respect of time, place or person, or where the verdict is so insufficiently expressed, or so ambiguous, that a judgment could not be founded thereon. (*h*)

A prisoner having been tried and convicted of a capital felony, by a court of Oyer and Terminer in New South Wales, and sentence of death passed and the judgment entered upon record, an application was made to the Supreme Court, sitting in *banc*, for a rule for a *venire de novo*, on an affidavit which stated that one of the jury had informed the deponent that, pending the trial and before the verdict, the jury having adjourned to an hotel, had access to newspapers which contained a report of the trial as it proceeded, with comments thereon. The Supreme Court made the rule absolute, considering that there had been a mis-trial, and ordered an entry to be made on the record of the circumstances deposed to, that the judgment on the verdict should be vacated, and a fresh trial had; but

(*c*) *Reg.* v. *Kennedy*, 2 Thomson, 215, per *Bliss*, J.
(*d*) *Winsor* v. *Reg.*, L. R. 1 Q. B. 319, per *Blackburn*, J.; *Campbell* v. *Reg.*, 1 Q. B. 799; *Gray* v. *Reg.*, 11 Cl. & F. 427.
(*e*) *Reg.* v. *Kennedy*, *supra*, 223, per *Wilkins*, J.
(*f*) *Reg.* v. *Charlesworth*, 9 U. C. L. J. 51.
(*g*) *Winsor* v. *Reg.*, L. R. 1 Q. B. 319.
(*h*) *Reg.* v. *Murphy*, L. R. 2 P. C. App. 548, per Sir *Wm. Erle*.

on appeal to Her Majesty in council, it was held by the judicial committee that a *venire de novo* cannot be awarded after verdict upon a charge of felony, tried upon a good indictment and before a competent tribunal, where the prisoner has been given in charge to a jury in due form of law empanelled, chosen and sworn; secondly, that if a *venire de novo* could be awarded upon an application, by way of error on appeal, the proceeding in the Supreme Court was defective in form, and not warranted by the suggestion entered on the record, and therefore, thirdly, that the order for vacating the judgment and for a *venire de novo* must be set aside. (*i*)

The application for a *venire de novo*, in this case, was considered as an attempt to obtain a new trial by the exercise of discretion, and the principal ground of the decision was that a new trial could not be granted in a case of felony. (*j*)

A sentence of death need not be conformable to the English Act, 23 Geo. II., c. 17, s. 1, and a sentence in these words "that you be taken to the place of execution at such time as His Excellency the Lieutenant-Governor may direct," is sufficient. (*k*)

A prisoner who has been convicted of felony at the assizes may be brought up into this court to receive sentence. (*l*)

No warrant is required to execute a sentence of death, for, in contemplation of law, there is a record of the judgment which may be drawn up at any time. It is not necessary that a judge of a criminal court should sign any warrant or sentence directing any punishment. (*m*) In Nova Scotia, the warrant for execution issued from the court, and the time and place of execution were endorsed on it by the fiat of the governor. (*n*)

(*i*) *Reg.* v. *Murphy*, L. R. 2 P. C. App. 535.
(*j*) See *Reg.* v. *Bertrand*, L. R. 1 P. C. App. 520.
(*k*) *Reg.* v. *Kennedy*, 2 Thomson, 218.
(*l*) *Rex* v. *Kenrey*, 5 U. C. Q. B. O. S. 317.
(*m*) *Ovens* v. *Taylor*, 19 U. C. C. P. 53-4, per *Hagarty*, J.
(*n*) *Reg.* v. *Kennedy*, 2 Thomson, 213.

In general, there can be no costs allowed in Crown cases; (*o*) but the rule that the King neither pays nor receives costs is not universal, nor inflexible. (*p*)

On putting off the trial of an information for penalties at the instance of the defendant, the court will make payment of costs a condition in the same way as in civil cases. (*q*) Therefore when a defendant, on an indictment for perjury, puts off the trial, he must pay costs on the principle that an indulgence is granted to him, which ought not to occasion additional expense. When the King is a party costs may be receivable, when there has been default on one side or an indulgence on the other, although, upon a conviction or acquittal, none would be taxable. (*r*)

Where, after a rule *nisi* for a *mandamus* had been served the applicant gave notice that it would not be proceeded with but did not offer to pay the costs, the court, on application, discharged the rule with costs up to the time of the notice, and costs of said application. (*s*)

The court will not entertain an application for costs of an appeal against the decision of a justice, under the 20 & 21 Vic., c. 43, in the term after that in which judgment is pronounced. (*t*)

An attachment cannot be granted against a corporation for a non-payment of costs. (*u*)

Under 32 & 33 Vic., c. 31, s. 65, and 33 Vic., c, 27, the Court of Sessions has no power to award costs, on discharging an appeal for want of proper notice of appeal, for the words "shall hear and determine the matter of appeal" mean deciding it upon the merits. (*v*)

The 5 & 6 W. & M., c. 33, s. 3, enacts that, if the defend-

(*o*) *Reg.* v. *Justices of York*, 1 Allen, 90.
(*p*) *Rex* v. *Ives*, Draper, 456, per *Macaulay*, C. J.
(*q*) *Ibid.* 453.
(*r*) *Rex* v. *Ives*, Draper, 454, per *Robinson*, C. J.
(*s*) *Reg.* v. *Justices of Huron*, 31 U. C. Q. B. 335.
(*t*) *Budenberg and Roberts*, L. R. 2 C P. 292.
(*u*) *Rector of St. John* v. *Crawford*, 3 Allen, 266; see also *Rex* v. *McKenzie*, Taylor, 70.
(*v*) *Re Madden*, 31 U. C. Q. B. 333.

ant prosecuting a writ of *certiorari* be convicted of the offence for which he was indicted, then the court shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, head borough tithing man, churchwarden, or overseer of the poor, or any other civil officer who shall prosecute upon the account of any fact committed or done that concerned him or them, as officer or officers, to prosecute or present. The defendants were indicted before the General Quarter Sessions of the Peace for a nuisance in obstructing a highway, and they removed the indictment into the Court of Common Pleas, where they were afterwards severally convicted and judgment given against them. A motion was made for a rule absolute, ordering the costs of prosecuting the indictment to be taxed by the master, and that the said costs should be allowed to the municipality as the prosecutors of the indictment, and paid by the said defendant to the said municipality. The court refused the rule, and laid down that the regularly established practice was to issue a side-bar rule to tax the costs, and when the side-bar rule is obtained, the officers do not proceed to taxation until notice has been given to the bail.

The question who, as prosecutors, were entitled to the costs might be discussed, on a motion to set aside the side bar rule, when both parties are before the court, or it might ome up on opposing a motion for an attachment, for non-payment of the costs taxed after demand made, as required by the statute. (*w*) The defendant, after a demand of costs, under a rule of court, by the plaintiff's attorney, paid the amount to the plaintiff. The attorney afterwards obtained a rule for an attachment for non-payment of the costs, but before the attachment issued, was informed of the payment to the plaintiff; and it was held that he was not justified in afterwards issuing an attachment for the

(*w*) *Reg.* v. *Gordon*, 8 U. C. C. P. 58.

costs of an affidavit of the demand of payment, and the costs subsequently incurred. (*x*)

The statutes authorizing the granting of new trials in criminal cases have been repealed, and now throughout the Dominion there is one uniform law, similar to that of England, on this point. (*y*) By the law of England, no new trial can be granted in the case of felony. (*z*) Such was also the law in Quebec, even prior to the recent statute, (*a*) and in Nova Scotia. (*b*)

When the record is on the civil side of the court, all the incidents of a civil cause attach to it. (*c*) Thus, when the indictment has been preferred in the Queen's Bench, or has been removed into the court by *certiorari*, and is sent down to be tried at *nisi prius*, as all the incidents of a trial at *nisi prius* attach to it, a new trial may be granted after conviction. (*d*) But these remarks can only hold when the charge is of misdemeanor. When the charge is of felony, no new trial can be granted, though the indictment has been removed by *certiorari*, and sent down for trial at the assizes, on a *nisi prius* record. (*e*)

In the case of felony or treason, if a conviction takes place against the weight of evidence, the judge passes sentence, and respites execution till application can be made to the mercy of the Crown; (*f*) and it would seem that this is the proper course to adopt now in Canada, in cases where formerly a new trial might be had by statute. (*g*)

(*x*) *Reg.* v. *Harper*, 2 Allen, 433.
(*y*) See 32 & 33 Vic., c. 29, s. 80.
(*z*) *Reg.* v. *Bertrand*, L. R. 1 P. C. App. 520; *Reg.* v. *Murphy*, L. R. 2 P. C. App. 535.
(*a*) *Reg.* v. *D'Aoust*, 10 L. C. J. 221; S. C. 9 L. C. J. 85, overruled; *Reg.* v. *Bruce*, 10 L. C. R. 117; *Gibb* v. *Tilstone*, 9 L. C. R. 244.
(*b*) *Reg.* v. *Kennedy*, 2 Thomson, 203.
(*c*) *Reg.* v. *D'Aoust*, 10 L. C. J. 223.
(*d*) S. C. 16 L.C.R. 494-5, per *Meredith*, J.; see also Arch. Cr. Pldg. 178.
(*e*) *Reg.* v. *Bertrand*, L. R. 1 P. C. App. 520, overruling; *Reg.* v. *Scaife*, 17 Q. B. 238.
(*f*) *Yearke and Bingleman*, 28 U. C. Q. B. 557, per *Richards*, C. J.
(*g*) See *Reg.* v. *Bertrand*, L. R. 1 P. C. App. 520-536; *Reg.* v. *Murphy*, L. R. 2 P. C. App. 552, per Sir *Wm. Erle*; *Reg.* v. *Kennedy*, 2 Thomson, 216, per *Bliss*, J.

The Court of Queen's Bench, in Lower Canada, sitting in appeal and error, as a court of error, in a criminal case, under Con. Stats. L. C., c. 77, s. 56, cannot exercise an appellate jurisdiction, but is confined, as a court of error, to errors appearing on the face of the record. (*h*)

It is the inherent prerogative right, and, in all proper cases, the duty of the Queen in council, to exercise an appellate jurisdiction in all cases, criminal as well as civil, arising in the colonies, from which an appeal lies, and where, either by the terms of a charter or statute, the power of the Crown has not been parted with. This right of appeal should be exercised with a view not only to ensure, as far as may be, the due administration of justice in an individual case, but also to preserve generally the due course of procedure. The exercise of this branch of the prerogative, in criminal cases, is to be cautiously admitted, and is to be regulated by a consideration of circumstances and consequences. Leave to appeal will only be granted under special circumstances, such as when a case raises questions of great and general importance in the administration of justice, or where the due and orderly administration of the law has been interrupted, or diverted into a new course, which might create a precedent for the future; and also when there are no other means of preventing these consequences, then it will be proper for the judicial committee to advise the allowance of such appeal. (*i*)

It is doubtful whether an appeal lies to the Queen in council, against a judgment of the Court of Queen's Bench in Quebec, quashing a writ of error against an order of the court of Queen's Bench, on the Crown side, fining and ordering an attachment against a counsel, for an alleged contempt of court. It would seem, however, that where a fine is imposed, the remedy is to petition the Crown for a

(*h*) *Duval dit Barbinas* v. *Reg.*, 14 L. C. R. 52.
(*i*) *Reg.* v. *Bertrand*, L. R. 1 P. C. App. 520; see also *Falkland Islands Co.* v. *Reg.*, 10 U. C. L. J. 167; 1 Moore's P. C. Cases, N. S. 299.

reference to the judicial committee, under the 3 & 4 Wm. IV., c. 41, s. 4. (*j*)

But where the court of final resort in criminal matters are not unanimous, an appeal lies to the Supreme Court of Canada, and from that court to the Privy Council. (*k*)

Special leave to appeal to the Privy Council was granted to the Attorney General of New South Wales, from an order of the Supreme Court in that colony, whereby a verdict of guilty of murder, obtained by the Crown, was set aside, and a *venire de novo* for a re-trial ordered to issue. The leave was granted on the same conditions as in *Reg.* v. *Bertrand*, and the proceedings in the colony were stayed, pending the appeal. (*l*)

Leave to appeal has been given from an order of the Supreme Court of Civil Justice of British Guiana, committing the publisher of a local journal to prison for six months, for an alleged contempt of court, in publishing in such journal comments on the administration of justice by that court, with liberty to the judges of the Supreme Court to object to the competency of such appeal at the hearing. (*m*)

Special leave to appeal will be granted where the question raised is one of public interest, such as the constitutional rights of a colonial Legislative Assembly. (*n*)

Permission was given to appeal, *in forma pauperis*, in a case in which the appellant was not heard in the court below, and was denied leave to appeal to Her Majesty in council, the decision being, in fact, *ex parte*. (*o*)

Leave to appeal from an order of the Supreme Court of Nova Scotia, suspending an attorney and barrister from practising in that court, has been granted, though, under the cir-

(*j*) *Re Ramsay*, L. R. 3 P. C. App. 427.
(*k*) *Reg.* v. *Amer*, 2 S. R. C. 593.
(*l*) *Reg.* v. *Murphy*, L. R. 2 P. C. App. 535.
(*m*) *Re McDermott*, L. R. 1 P. C. App. 260.
(*n*) *The Speaker of the Legislative Assembly of Victoria* v. *Glass*, L. R. 3 P. C. App. 560.
(*o*) *George* v. *Reg.*, L. R. 1 P. C. App. 389.

cumstances, it was incumbent on the appellant to apply to Her Majesty, in the first instance, to admit the appeal. On a suggestion of the injury and delay which an application to Her Majesty would create, the appeal was allowed by the Privy Council. (*p*)

Special leave to appeal was granted under the circumstances shown in *Reg.* v. *Murphy*. (*q*)

Special leave to appeal from a conviction of a colonial court for a misdemeanor having been given, subject to the question of the jurisdiction of Her Majesty to admit such an appeal, and it appearing at the opening of the appeal that, since such qualified leave had been granted, the prisoner had obtained a free pardon and been discharged from prison, the judicial committee declined to enter upon the merits of the case, or to pronounce an opinion upon the legal objections to the conviction, the prisoner having obtained the substantial benefit of a free pardon. They accordingly dismissed the appeal. (*r*)

It seems the Privy Council would entertain an appeal from a provincial Court of Appeal, without express leave of such court. (*s*)

No appeal to England is expressly given by our statutes, in criminal cases, but several appeals to the Privy Council have been made in the Dominion.

The Crown may issue *fi. fas.* for the sale of goods and lands in order to satisfy a fine imposed, and may include both classes of property in the same writ; and may make it returnable before the end of twelve months, the Crown not being bound by the 43 Edw. III., c. 1. (*t*) But the court may, at any time, interfere, as exercising the power of a Court of Exchequer, to restrain undue harshness or haste in the execution thereof. (*u*)

(*p*) *Re Wallace*, L. R. 1 P. C. App. 292-3.
(*q*) L. R. 2 P. C. App. 538.
(*r*) *Levien* v. *Reg.*, L. R. 1 P. C. App. 536.
(*s*) *Whelan* v. *Reg.*, 28 U. C. Q. B. 186, per *Draper*, C. J.; *Naiker* v. *Yettia*, L. R. 1 P. C. App. 1; *Ko Khine* v. *Snadden*, L. R. 2 P. C. App. 50.
(*t*) *Reg.* v. *Desjardins Canal Co.*, 29 U. C. Q. B. 165.
(*u*) *Ibid.*

INDEX.

INDEX.

PAGE.

ABANDONING CHILD—(*see* CHILD) 323

ABDUCTION—
Of girl under sixteen 214

ABORTION—
Administering noxious thing to procure 209
Noxious thing, what is 209

ACCESSORIES—
Before and after the fact 75
Only in felonies 75
In misdemeanors all are principals 75
May be to new statutory felonies 79
No accessory to felony unless felony committed 75
Manslaughter, no accessories before the fact in 75
But may be after the fact 75
Offence of accessory distinguishable from that of principal in second degree 75
What authority or procurement renders man liable as accessory 76
Distinction between civil and criminal cases 76
Procurement, how effected 76
Must be some active proceeding on part of 77
Consequences if authority not pursued 78
Or if accessory repent 78
After the fact, what constitutes 79
Wife not accessory for receiving her husband 78
Accessories, how far relieved from responsibility when principal does not pursue authority 78
Accessories to felonies created by statute 79
Statute as to trial of accessories 79

ACCOMPLICE—(*see* EVIDENCE).

ADJOURNMENT –
Of trial, when granted 507
Of Sessions (*see* SESSIONS).

ADMINISTERING—(*see* ABORTION).

PAGE.

ADMINISTRATION — (*see* SUMMARY ADMINISTRATION OF CRIMINAL JUSTICE).

ADMIRALTY COURTS—
Jurisdiction of (*see* PIRACY).

ADVOCATE—(*see* ATTORNEY).

AGENT—
Liable for act done under authority of his principal 76

AGGRESSIONS—
Lawless by subjects of foreign countries at peace with Her Majesty ..... 320 *et seq.*
31 Vic., c. 14, as to 320
British subject by birth may become citizen of foreign state 321
May be so treated at option of Crown 321
Evidence of being subject of foreign state 321-2
Of entering Canada with intent to levy war 322-3
Person acting in any character is liable 322
Evidence of engagement several hours before arrest of prisoner is admissible 323
Person acquitted as citizen U. S., cannot plead *autre fois acquit* when indicted as British subject 323
28 Vic., c. 1, as to repressing outrages on frontier 323

AMENDMENTS—(*see* Different Subjects).

ANNOTATIONS—
Of miscellaneous statutes ..... 317 *et seq.*

ANIMALS IN TRANSIT 345

APPEALS—
In cases of summary convictions 440
In matter not a crime 440
Procedure on ..... 440 *et seq.*
Recognizance to try form of 442
Enrolment if not necessary 442
Notice of appeal ..... 440 *et seq.*
Usually heard first day 443
Waiver of right to appeal 443
Jury, trial by, right to 444
Judge in chambers in liquor case 443
Adjourning appeal 444
Reinstating 444
Evidence on 444
Enlargement, what it waives 445
Costs on 446

APPEALS—*Continued.*

PAGE.

Allowing without affidavit 446
From sessions to superior courts of law 445
To superior court when question reserved at sessions or Court of Oyer and Terminer 445
Rules as to must be complied with 440-41
To Privy Council, when allowed ..... 523 *et seq.*
Under various statutes ..... 440 to 447

APPRENTICES AND MINORS—

Act Con. Stat. U. C., c. 76, as to 329
When apprentice is minor, articles must be executed by some one on his behalf 329
Absolute imprisonment not authorized 329

ARRAY—(*see* JURORS).

ARREST—

By magistrate, constable, etc., *et seq.* (*see* MANSLAUGHTER).

ARREST OF JUDGMENT—

When case reserved 505
Objections on motion, how limited 505
Presence of prisoner may be waived 506

ARSON—

Another, house of 291
Attempt to commit 296-7
Building, what is ..... 292 *et seq.*
Need not be a finished structure 293
Burglary, decisions as to apply to arson 292
Burning must be actual 292
And malicious and wilful 292
Construction of statutes 291
Definition 291
Evidence of intent to defraud when man sets fire to his own house 294
What is sufficient ..... 294 *et seq.*
Goods, setting fire to 296-7
In own use, with intent to defraud 297
Grain, setting fire to stack of 297
Indictment for setting fire to own house 295
Allegation of intent to defraud 296
Surplusage in 295
Arson not a term of art 296
Intent to defraud inferred from act itself, when house of third person set fire to 294
Act must be wilful 294

ARSON—*Continued.* PAGE.
When own house set fire to, must be actual evidence of intent 294
What is sufficient 294-5
Jury, finding of, conclusive as to what 294
Malicious burning must be 292
Married woman not liable for setting fire to house of husband ... 295
Negligence in burning 292
Occupied, house must be 293
Must be intention of returning 293
Owner of house, whether liable 291
Returning, must be intention of 293
Shop, what is 292
Statutes, construction of 291
Surplusage in indictment 295
Wife (*see* MARRIED WOMAN).

ASSAULT AND BATTERY—
Aggravated 223
On indictment for, may be convicted of common 217
Apprehension of violence no justification 222
Bodily harm, with intent to do grievous, what amounts to assault, with 220
Firing loaded pistol into group shows intention to do grievous bodily harm 220
Capital felony, assault may in some cases amount to 224
Carnal knowledge, attempt to have, may be assault 216
Charge of offence which includes assault 218
Common assault, when there may be conviction of 217
Con. Stat. Can., c. 91, did not apply to 221
Complaint of, under 32 and 33 Vic., c. 20, s. 43, cannot be withdrawn 410
Conductor on train when not liable for assault 216
Consent, can be no assault where there is (*see* RAPE) 217
Correction, moderate, is justifiable (*see* MASTER) 223
Crime, including assault, on indictment for, may be conviction for assault 218
But the crime must include assault 218
And the assault, in case of death, must conduce to the death 218
Indictment need not charge assault in terms 219
Definition of 215
Indictment, for carnally knowing girl, there may be conviction for assault upon 217
When indictment charges common assault 219
Need not charge assault in terms 219
For inflicting grievous bodily harm 220
For shooting with intent to do 220
Charging aggravated assault 217-23

ASSAULT AND BATTERY—*Continued.*
PAGE.
Intention necessary to make act assault..... 215
Intruder, assault upon..... 222
Justification of assault in self-defence, what amounts to..... 221
Of shooting with pistol..... 216
Malice, necessary in assault, under 32 & 33 Vic., c. 20, s. 19.... 220
Master, moderate correction by, is justifiable..... 223
Misdemeanor, assault is..... 224
Of officers in discharge of duty (*See* OBSTRUCTING, MANSLAUGHTER.)
Punishment of..... 224
School teacher..... 223
Servant, moderate correction of, justifiable..... 223
Sessions have power to try..... 224
Words cannot amount to..... 221
Turning intruder out when request to leave necessary..... 222

ASSEMBLY (*see* UNLAWFUL ASSEMBLY).

ATTACHMENT—(*see* CONTEMPT).

ATTEMPTING—
To commit crimes.....59 *et seq.*

ATTORNEY—
Cannot act as advocate in Court of Sessions..... 475
No right to appear before justices on charge of indictable offences. 407
But may in case of summary convictions..... 407

AUTREFOIS ACQUIT—(*see* PLEADING.)

BAIL—
Principles on which granted.....479-80
On charges of perjury, arson, larceny, murder, treason, felony, and misdemeanor.....480-81
On application for, court may look at information and remedy commitment..... 481
Lapse of year from imprisonment..... 481
If prisoner about to die..... 481
Accessories after the fact..... 481
Obligatory, in case of misdemeanor as well after as before indictment found..... 482
After two trials and discharges of jury for disagreement..... 482
One justice may bail in misdemeanor, but not in felony..... 482
When case reserved, court which tried prisoner must bail..... 482
One assize having passed over without committal of prisoner... 482-3
Forfeiting, after plea of not guilty..... 483
If offence bailable may be released at any time, on giving proper sureties..... 483

BAIL—*Continued.* PAGE.
Practice as to entering up judgment on the recognizance..... 483
Relief from estreated recognizance..... 484
When judges of Queen's Bench should estreat..... 484-5
Rescinding order for bail..... 485
When better sureties may be ordered..... 485
Application made on affidavits entitled in the Queen's Bench..... 485
Certifying commitment, information, etc..... 485

BANKING ACT—
Deceptive return under..... 329
Intent..... 330
Indictment..... 343-4

BARRISTER—(*see* COUNSEL.)

BATTERY—(*see* ASSAULT.)

BETTING..... 345

BIGAMY—
Absence of first wife, when defence..... 125
After absence for seven years, *onus* on whom..... 125-6
Banns, validity of marriage contracted by..... 127-8
In case of minors..... 127
Common law of England, as to marriages introduced..... 127
Consent, age of..... 130
Marriage, before age of, must be ratified..... 130
England, common and statute law of, introduced..... 127
Evidence—
Extract from register of marriage..... 124
Of reputation will not suffice..... 124
Must be direct proof..... 124
Admission of first marriage sufficient..... 124
But must be unequivocal..... 125
First wife, not admissible till proof of first marriage..... 124
What sufficient of marriage celebrated in State of New York 124
Onus of proof..... 125
Exiqi facias, when may issue..... 130
Foreign country, when marriage in will be held invalid here..... 130
Foreign jurisdiction, statute extends to bigamy committed in..... 130
Indictment for bigamy committed in States..... 130
Jewish marriage, written contract not essential to validity of..... 129
Marriage, first must be legal..... 122
Second need not..... 123
Laws in relation to..... 127
Going through form of marriage sufficient..... 123

BIGAMY—*Continued.* PAGE.
By man with sister of deceased wife 128
In Ireland 129
Jewish 129
Of squaw and Lower Canadian 130
In foreign country, by persons not British subjects 130
Successive marriage 127
Minors may marry by banns 127
Onus of proof, when on prosecution 125
Presumption of death after seven years' absence 125
But not that he is living 125
Sister, marriage with, of deceased wife 128
Soldier, convicted of bigamy not discharged from military service 130
Statutes 32 & 33 Vic., c. 20, s. 58 122
4 Ed. VI., Stat. 3, c. 5 122
3 Jac. I., c. 33 122
26 Geo. II., c. 54 127
5 & 6 Wm. IV., c. 54 122–7
Wife, first, not admissible as witness 124
Absence of first 125
Deceased, marriage with sister of 128

BILL OF EXCEPTIONS—
Does not lie in criminal cases 379

BIRTH—(*see* CONCEALING BIRTH).

BRITISH COLUMBIA—(*see* ENGLISH LAWS IN FORCE).

BURGLARY—
Breaking necessary 225-7
Must be actual 225
By fraud 225
Chimney, entrance by, is burglary 226
Conspiracy, entrance by, is burglary 227
Daytime, no burglary in 228
Only housebreaking 228
Definition 225
Dwelling-house, what is 228
Formerly included out-houses, etc 228
Must be inhabited 228
Entering necessary 225
By open door or window 225
Other cases of 225
By chimney 226
By conspiracy 227

BURGLARY—*Continued.* PAGE.
In night ... 228
Own house ... 230
Fraud, breaking by ... 225
Inhabiting house necessary ... 228
Occasional absence immaterial ... 228
Intent must be to commit felony ... 229
To commit trespass insufficient ... 229
Night, burglary can only be committed in ... 228
When night commences and ends ... 228
Breaking and entering need not be both in same ... 228
Own house, man cannot commit burglary in ... 230
Roof, entry through hole in, not burglary ... 226-7
Statutes ... 227 *et seq.*
Time of committing ... 228

CERTIORARI—
Whether it can issue in vacation ... 449
When granted, of course ... 456
When court has discretion ... 456
Must be obtained on affidavit ... 456
What words in statute take away right to ... 457
Void proceedings, removing by ... 457
When granted, though right to taken away ... 457
If conviction in court, no writ necessary ... 458
None after verdict or judgment, or acquittal ... 458
To remove order, quashing conviction on appeal to sessions ... 458
When conviction affirmed ... 450
When imprisoned for contempt of court ... 459
Mere irregularities not sufficient ... 459
Difficulties in point of law ... 459
What proceedings may or may not be removed by ... 458-59-60-61
Only substitutes superior for inferior court ... 462
Application for should be made in first term, or within six months after conviction ... 462-3-7
This rule does not apply to the Crown ... 463
Notice to convicting justice ... 463-4
And to chairman of sessions ... 463
No notice necessary when writ obtained by private prosecutor, or where conviction already in court ... 465
Application for should be by summons ... 465
Renewing on amended materials ... 465-6
Affidavit of service of notice ... 465
Where Christian name mis-stated ... 466
Entitling affidavits, rules, etc. ... 466-7
Addressing writ ... 467

CERTIORARI—Continued. PAGE.
Serving ... 468
Quashing conviction on return to ... 468
Affidavits may be used to show want of jurisdiction ... 466
Judgment on ... 468
Return of notice of motion for ... 469
Return to by justice ... 469
Amending return ... 469
Full faith and credit given to ... 469
If material evidence omitted ... 469-70
Returning conviction ... 470
Under seal ... 470
Attachment, for not returning ... 470
Costs ... 471
Amending, quashing ... 468-70
Decisions in Quebec ... 471-2

CHALLENGES TO JURORS—(*see* JURORS).

CHAMPERTY AND MAINTENANCE ... 117
Definition of ... 117
Are common law offences ... 118
Crown bound by law ... 118
Object and principles of law ... 117-18
Sharing in profits essential ... 120
Suit pending, whether must be ... 119
Titles, selling pretended ... 121
Act 32, Henry VIII., c. 9, as to ... 121
Practical repeal of in Ontario ... 122
What is offence within ... 121

CHEATS AND FRAUDS—
Actual prejudice must be ... 287
Common law offence ... 287
Definition ... 287
False token or mark ... 287
Indictment must allege that article passed off by false token ... 287
And that selling was by means thereof ... 288
Prejudice must be actual ... 287
Private fraud, what is ... 287
Token must be false ... 287

CHILD—
Unlawfully abandoning and exposing ... 323
Act only applies to persons bound to maintain ... 323
Does not apply if child dies ... 324
What is offence within statute ... 323-4
Refractory, in Province of Quebec ... 344

PAGE.

CHOSES IN ACTION—
Assignable at law (*see* LARCENY).

CHURCHES—
Maintenance of good order in 339
Act must be done during divine service 339
Commitment without first issuing warrant of distress 339

CIVIL ACTION—(*see* CRIMES).

COERCION—
By master or workman 116-17

COINAGE OFFENCES 80
Imperial statutes in force 80
Indictment should negative lawful authority or excuse 80
And bring offence within statute 80
Previous conviction 80
Resemblance to real coin 81

COLONIES—(*see* ENGLISH LAWS IN FORCE).

COMMITMENT—(*see* WARRANT).
Warrant for indefinite time 432
Need not show information on oath, but must state place of committing offence 424-5
Certainty and precision in 425
Should follow forms 426
Signing by one or two justices 427
Issuing of, when discretionary 427-8
Should ascertain amount of costs 422-3
Executed under Act after repeal 428
Should show before whom the conviction was had 428
Cannot be withdrawn from gaoler's hands 428
Should set forth day and year 429
And authority of magistrate 429
Should be in writing 429
Final for want of sureties to keep the peace (*see* WARRANT) 429

COMPLAINT OF ASSAULT—
Under 32 & 33 Vic., c. 20, s. 43, cannot be withdrawn 410
Justices will be ordered to hear it 411
Discretion of justice 411
Adjudication and certificate 411
What certificate bars 411
Amending information ..... 412 *et seq.*

COMPOUNDING FELONY 107
Compromising prosecution, only by leave of court 107
Informations on penal statutes 107

COMPOUNDING FELONY—*Continued.*
PAGE.
Misdemeanor, compounding of, illegal 107
Prosecution, compounding 107
Qui tam action 107

CONCEALING BIRTH—
Secret disposition depends on circumstances of each case 208
What is 208

CONCILIUM—
When granted 516

CONSENT—
By prisoner 516

CONSPIRACY—
Agreement, unlawful, is gist of offence 309
Indictable, though no offence without 310
Object need not be unlawful or criminal 310
Bymembers of copartnership 310
Common law offence 314
Concert, proof of 312
Contract, no objection that money was to be obtained by 315
Definition 309
Evidence when joint participation 312
Of concert 312
General nature of conspiracy 312
Of conspiracy to commit larceny 313
Execution of purpose not necessary 309-10
Need not be alleged in indictment 310
Felony committed in pursuance of 315
Gist of offence, unlawful agreement is 309
Illegal trading company 315
Indictment need not allege execution of conspiracy 310-1
Lies, where object is to effect legal purpose by illegal means 310-1
Must show object or means unlawful 311
When means should be set out 311
Laying property in municipal corporation 311-2
Showing object of conspiracy 311
Alleging unlawful agreement 311
And unlawful means 311
Setting out pretences in conspiracy to obtain money by false 312-3
Specifying goods 313-4
Inference, conspiracy matter of 312
Joint participation, all liable for 312
Legislative body, to intimidate, felony 316
Misdemeanor, conspiracy to kidnap is 314

CONSPIRACY—*Continued.* PAGE.
Object need not be unlawful ... 310
If unlawful, means need not be ... 311
When felonious, conspiracy not merged ... 315
One person cannot be guilty of ... 315
Participation, liability in case of joint ... 312
Purpose, when corrupt or illegal, indictment lies ... 311
Trespass, civil, conspiracy as to ... 315
Two persons must combine ... 315
Wife cannot be guilty of with husband ... 315

CONSTRUCTION OF STATUTES—
Rules as to ... 317 to 320

CONTEMPTS—
Before justices of the peace ... 439
By witness in not obeying subpœna ... 433-4
Of court ... 434 *et seq.*
Article in newspaper ... 435
Disobedience of order ... 433
Punishment of in Canada ... 436
Sessions may fine and imprison for ... 476

CONVICTIONS—
On application to quash, convicting justice should be made a party. 467
Convictions, return of by justices, Acts as to ... 334
Separate penalty for each conviction ... 424
Illegality of conviction ... 423-4
Orders for payment of money ... 335
To what court returnable ... 335
Convictions, summary, appeals from (*see* SUMMARY CONVICTIONS, APPEALS) ... 440
Annulling ...
Sufficient to follow forms ... 415
Where forms not followed ... 416
What must appear ... 416 *et seq.*
Certainty in ... 416-7
In alternative ... 417
Not sufficient to state legal result of facts ... 418-9
Following words of statute ... 419
Reversing effect of ... 421
Quashing ... 420 *et seq.*
Must be sealed ... 422
Costs ... 422 *et seq.*
Imprisonment awarding on ... 423 *et seq.*
Return of ... 334-5
Penalty for neglect ... 334
What must be returned ... 334-5

PAGE.

CORONER—
Inquisition of 430-31
Inquest on Sunday 431
Second on same body 431
Barrister cannot insist on being present at 431
Depositions before, proof of 368

CORPORATION—
Punishable for libel 131
Attachment against for non-payment of cost 519

COSTS—
On convictions before justices 422
In general, none allowed in Crown cases 519
When allowed in, application for, etc 519
When rule *nisi* for *mandamus* served 519
Against corporation 519
On dismissing appeal to sessions 519
By defendant prosecuting *certiorari* 519-20
Side bar rule to tax 520
Attachment for, when justified 520

COUNSEL—
No right to appear before justices on charges of indictable offences 407
But may in cases under "Summary Convictions Act" 407
Only two can be heard on behalf of prisoner 510
Motion for criminal information by 477
Right to cross-examine witnesses and address jury 510
Right of Crown counsel to reply 510

COUNTY COURTS—
Jurisdiction of 472

COURT—
Of record has power to fine and imprison for contempt 437

CREDITORS—ASSIGNMENT TO DEFRAUD.
Money bond is personality, within 13 & 14 Vic., c. 53 342

CRIMES IN GENERAL—
Attempt to commit misdemeanor is misdemeanor 59
Attempt to commit felony is misdemeanor 60
Attempt to procure a woman to make affidavit that A., father of illegitimate child, is misdemeanor 59
On indictment for felony or misdemeanor, jury may find prisoner guilty of attempt to commit it 60

CRIMES IN GENERAL—*Continued.* PAGE

Civil action—
Suspension of ... 50
When felony disclosed in evidence ... 50
Suspended till acquittal or conviction of felon ... 50-51
What sufficient prosecution ... 51
When rule applies ... 50
When it does not ... 51
Jury cannot try felony in civil action ... 51
Judge must decide whether case shall go to jury ... 52
Exceptions to general rule ... 52-3
Quebec, law in, different from other provinces ... 53
Crimes considered local ... 53
Cognizable only where committed ... 53
Mean offences punishable by indictment ... 53
Divided into felonies and misdemeanors ... 53
What are indictable ... 53 *et seq.*
Nature and incidents of ... 53
Criminal proceedings, what are ... 53
Definition ... 49
Election, neglecting or refusing to administer oath at, indictable ... 58
Felony defined ... 53
When crime becomes ... 53
Attempt to commit, is misdemeanor ... 60
On indictment for, jury may find prisoner guilty of attempt to commit ... 60
Attempt to commit, must tend to execution of principal crime ... 60
Must appear that attempt might have been completed ... 61
Attempting to commit distinguishable from intending to commit ... 62
Offence made which was before misdemeanor ... 55
Misdemeanor formerly merged ... 55
Now statute alters this ... 56
Effect of this statute ... 56
Inciting to commit misdemeanor is misdemeanor ... 59
Indictment, for what crimes it lies ... 56 *et seq.*
For whatever openly outrages decency ... 56
For violation of positive command in Act ... 56-7
For act not an offence at common law ... 56
Where a statute forbids or enjoins an act ... 57
Inference that every person intends the natural consequences of his own act ... 62-3
Intention, act resting in, not indictable ... 62
Misdemeanor, what is ... 56
Attempt to commit is ... 59

CRIMES IN GENERAL—*Continued.* PAGE.
Attempt to commit felony is ... 60
Inciting to commit misdemeanor is ... 59
When act not committed ... 62
On indictment for, jury may find prisoner guilty of lesser misdemeanor ... 59
Disregard of positive command in statute indictable as ... 62
How differs from felonies ... 63
Punishment of ... 63
Misprision of felony ... 56
Motives in criminal proceedings ... 62
When material and when not ... 62-3
Penalty, when annexed to offence in clause of Act creating it, no indictment lies ... 57
Public officer, refusing to discharge duties, indictable ... 59
Remedy when cumulative ... 57
Returning officer indictable for entering names in poll-book ... 58
Soliciting and inciting to commit felony when none committed, is misdemeanor ... 62
Statute on which indictment framed, effect of repeal of ... 54
Creating offence, repeal of ... 54
Altering quality of offence, substituting new mode of punishment ... 55
Annexing new punishment to common law misdemeanor ... 55
Making offence felony which was before misdemeanor, effect of ... 55

CRIMINAL INFORMATIONS ... 476 to 479

CRIMINAL LAW—
Right to legislate upon vested in the Dominion Parliament (*see* ENGLISH LAWS IN FORCE) ... 5

CROWN—
Application to for pardon, when proper ... 523
Right of counsel representing to reply ... 510
Prosecutions, how they differ from civil suits ... 510-11
Cases, may stand in paper for argument with civil suits ... 516

CUSTOMS OFFENCES—
Act as to ... 92
Breaking building, what justifies ... 93
Colonial legislature, power to impose additional grounds of forfeiture ... 94
Conviction under various Acts ... 94-5
Costs, revenue inspector not liable for ... 95
Entry indivisible ... 95

CUSTOMS OFFENCES—*Continued.* PAGE.
Gunpowder, importation of ... 94
Indictment, when lies ... 92
Allegations in what sufficient ... 92
Information, written on oath when necessary ... 92-3
Certainty in ... 95
Must specify, particular illegal act ... 95
Plea to evidence under ... 94
Justice, presence of at breaking required ... 93
When should demand admittance ... 92
Order, when indivisible ... 95
Penalty, when only one recoverable ... 95
Scienter proper question for jury ... 95
Seizure ... 93-5
Smuggling, what amounts to ... 92-3-4-5
Stress of weather, landing of goods under, may be shown ... 94

DAMAGING PROPERTY—(*see* MALICIOUS INJURIES).

DANGEROUS GOODS—
Carriage of ... 345

DEAF MUTES—
Criminal liability of ... 68

DEATH—
Warrant to execute sentence of not requisite ... 518

DEMANDING WITH MENACES—(*see* MENACES).

DIVISION COURT—(*see* COURT).

DOCK—
Prisoner should stand in ... 506

DOMINION—
Criminal jurisdiction in ... 5

DOMINION PARLIAMENT—(*see* ENGLISH LAWS IN FORCE).

DRUNKENNESS (*see* TEMPERANCE ACT)—
Effect of on criminal liability ... 67

EJUSDEM GENERIS—
Rule as to words—(*see* CONSTRUCTION OF STATUTES).

EMBEZZLEMENT—
Account, general deficiency of ... 257
Accounting for several sums ... 258-9
Acting on one occasion ... 255
Acts of embezzlement, not exceeding three within six months ... 259

EMBEZZLEMENT—*Continued.* PAGE.
"Agent, or other," the words do not extend meaning of previous words (*see* CONSTRUCTION OF STATUTES) ... 258
Banker, meaning of term in statute ... 258
Clerk, who is ... 254 *et seq.*
Commercial traveller ... 255
Quantum meruit sufficient ... 254
Construction of words "or other agent" ... 258
Counts for, joining with counts for larceny (*see* PLEADING).
Definition ... 253
Distinction between and larceny ... 270-71
Must be an ... 254-5
Employer may be corporation ... 256
Employment money must formerly have been received by virtue of ... 256
Not now necessary ... 256
To receive money sufficient ... 257
Entry in ledger of sum received ... 257
Form of indictment (*see* INDICTMENT).
Indictment for embezzling cheque ... 259
Laying property ... 259-60
Forms of, in statute ... 260
Only apply to one species of ... 260
Specifying coin in ... 260
Intrusting ... 257
Joint owners (*see* INDICTMENT) ... 257
Master, receiving money from and for ... 255
Money, embezzlement of ... 260
Property in ... 260
When sufficient to allege embezzlement to be of ... 260
Mortgagor cannot be guilty of ... 254
Particular sum, receipt of ... 257
Partners (*see* INDICTMENT).
Possession in master or owner ... 255
Receipt from third persons ... 255
From master or owner ... 255-6
Return, intention to ... 257
Servant, who is ... 254 *et seq.*

ENGLISH LAWS IN FORCE—
British Columbia ... 4
British North America Act ... 4-5
Constitution granted by ... 4-5
Colonies, modes of acquisition ... 1
Laws prevailing in each case ... 1-2
No precise rule as to ... 6

ENGLISH LAWS IN FORCE—*Continued.* PAGE.

Common and statute law extending to colonies, distinction between ... 7
Criminal law, right to legislate on, by Dominion parliament ... 4-5
By local legislature, to what extent ... 5
Dominion parliament ... 5
Right to legislate on criminal law ... 5
English laws, only such as are of general and universal application introduced by 14 Geo. III., c. 83 ... 6
Forcible entry, statutes as to in force ... 9
Imperial parliament has power to bind colonies by legislation ... 5
Imperial statutes affecting different provinces ... 2-5
When they extend to colonies ... 6
Introduction of English criminal laws on much same footing in all provinces ... 17
Local legislatures, how far have right to legislate on criminal law ... 5
Lotteries, Act as to, in force ... 7
Manitoba, how acquired ... 2
How formed ... 3
Jurisdiction of general court in ... 3
Marriage, common and statute law of England as to, introduced ... 9
New Brunswick, how acquired ... 2
Nova Scotia, how acquired ... 2
Ontario, how acquired ... 2
Prince Edward Island ... 4
Provinces, only such laws as are applicable and necessary introduced ... 6
English statutes of general and universal application apply to ... 6
Quebec, how acquired ... 2
Repeal in England of Act introduced into colony, effect of ... 7

Statutes introduced:
32 Henry VIII., c. 9 ... 20
20 Geo. II., c. 19 ... 8
5 & 6 Edward VI., c. 16 ... 8
49 Geo. III., c. 126 ... 9
1 W. & M., c. 18 ... 9
8 & 9 Wm. III., c. 27 ... 9
33 Hy. VIII., c. 20 ... 9
26 Geo. II., c. 33 ... 9
21 Geo. III., c. 49 ... 10
Mutiny Act ... 22

Statutes not introduced:
5 Eliz., c. 4 ... 8
28 Geo. III., c. 49 ... 8

ENGLISH LAWS IN FORCE—*Continued.* PAGE.
Statute, whole of, must be substantially applicable before it can be in force 8
Time, lapse of should render colonial courts cautious in adopting English statutes. 6-7
Titles, statutes as to buying disputed, in force here..... 8

ENLARGEMENT—
Waives all formal and technical objections..... 445

ERROR—
When indictment lays previous convictions..... 509
Writ of, lies for substantial defects appearing on the face of record 511
Matter decided as strictly legal proposition..... 511
Where *venire facias* addressed to improper parties.. 511
Must be founded on some question of law which could not have been reserved..... 512
Discretion of judge not reviewable in..... 512
Improper disallowance of challenge..... 513
On adjudication for contempt..... 513
For improper award of *venire de novo*..... 513
To reverse judgment of sessions..... 513
Upon summary convictions..... 513
On judgments..... 513
Where, in fact, and not in law, court in which proceedings taken. 513
Form of writ.. 514
Fiat of Attorney General.. 514
Assigning new, on argument... 514
What matters can be raised on record, so as to be examined in.... 514
Not the rulings of the judge or his directions to the jury..... 514-5
What a prisoner can consent to, to purge error..... 515
Concilium for argument..... 516

ESCAPE—
What is..... 187
High contempt and misdemeanor..... 187
Party must be actually arrested and legally imprisoned. 187
Imprisonment must be continuing. 187
Negligent and voluntary..... 187-8
What is negligent..... 188
Custody of law, how long it continues..... 188

EVIDENCE—
Accomplice, evidence of, sufficient..... 354-5
Should be corroborated..... 355
But evidence need not affect identity of accused, or show him guilty party 355

EVIDENCE—*Continued.* PAGE.
Rule only of practice ... 356
Acquittal of one prisoner in order to call him as witness for another jointly indicted ... 350
Discretionary at close of prosecutor's case ... 351
Obligatory at close of prisoner's ... 351
Copy of record of ... 375
Affirmative, burden of proof on party asserting ... 347
Application to Crown for pardon in case of improper conviction ... 379
Arson, verbal admission as to insurance admissible ... 372
Assault, defendant competent witness in cases of common ... 381
Authority, inducement held out by person in ... 362 *et seq.*
When confession to person in, admissible ... 362
Bill of exceptions does not lie in criminal case ... 379
Burden of proof, rules as to ... 347
Lies on party asserting affirmative ... 347
Except where negative proof is peculiarly within knowledge of party ... 347
Caution should be given to prisoner before making confession ... 363
Challenges, prisoners severing in, when one may be witness for the other ... 352-3
Charge not the same as that on which deposition taken ... 369
Child, when competent witness ... 353
Close of case, no evidence admissible after ... 378
Competency of witnesses ... 353-4, 7, 374, 380
Confessions, rule as to, different in criminal from that in civil cases ... 346
Must be free and voluntary ... 362
If under oath, inadmissible ... 362
But this rule only applies when charge is against prisoner himself ... 362-3
Inducements to confess ... 362 *et seq.*
Caution, what necessary ... 363-4
Examinations before commissioner in bankruptcy ... 367
Made under the hope of being permitted to turn King's evidence ... 364
To constable, by accused in his custody ... 365
Advice on moral grounds ... 365
Subsequent warning or caution, after inducement held out ... 366
Names of others in ... 367
Duty of magistrate, in receiving ... 367
Confidential communications, witness not compelled to disclose ... 357
Consistent with prisoner's guilt, all circumstances must be, and inconsistent with innocence ... 318
Contradicting witness, not by irrelevant question ... 359
Conviction of justice, when it is a record ... 375

EVIDENCE—*Continued.*

PAGE.

How proved 375
Proof of quashing 376
Copy of record of acquittal 375
Coroner, depositions before, how proved 368
Court, record of same and different, proof of 375
Credibility of evidence solely for jury 348
Credit of witness, impeaching 358
Criminatory questions, witness not bound to answer 357
Cross-examination as to previous statements in writing 359
Irrelevant questions should not be put to witness on 358
Crown, application to, for pardon 379
Deceased witness, statement of, when admissible 370
Depositions, object of taking 367
Inspection of 367
Evidence discovered after 367-8
Before coroner or magistrate, proof of 368
Reading before grand jury 368
Each need not be signed by justice 369
Admissible on different charge from that on which taken 369
Absence to render admissible 369
Illness necessary 369
Looking at, on return to *habeas corpus* 448
Of persons dangerously ill 370
Discrediting own witness 465
Documentary evidence, Act as to 381
Doubt, reasonable, prevents conviction 346
Dying declarations, when admissible 373
Must be no hope of recovery 373
Objections to this kind of evidence 374
Effect of evidence, difference between civil and criminal proceedings 346
Error, raising points to be examined in 379
Estoppel, doctrine of, has much larger operation in civil than in criminal proceedings 346
Explanation of circumstances pressing against accused person, when required 347
Fabrication of evidence 380
Felonies, when evidence of one admissible to show character of other 371-2
Proof of finding of indictment for 377
Finding of indictment, proof of 377
Formal record, when not necessary 376
Forms of depositions 367
Gazette, when evidence 378
Grand jury, depositions before 368

EVIDENCE—*Continued.* PAGE.
Guilty knowledge, how proved ... 371-2
Handwriting, proof of ... 362
Hearsay evidence not admissible ... 372
Illegal evidence may be ruled out ... 366
Illness sufficient to render deposition admissible ... 369
Impeaching credit of witness ... 358 *et seq.*
Witnesses may prove that they would not believe him on oath ... 360
Contradicting his statement ... 360
Formal and legal way of ... 361-2
Inadmissible evidence, correct course when it is received ... 366
Incompetent witness, evidence of, may be withdrawn from jury ... 366
Indian witness, when competent ... 353-4
Indictment, proof of finding ... 380
Inducement excludes confession ... 362 *et seq.*
Subsequent warning after ... 366
Inferences from facts proved ... 348
Information returned becomes record ... 377
Innocence, presumption of ... 347
Only obtains before verdict ... 347
Inspecting depositions ... 367
Instruments liable to stamp duty ... 381
Irrelevant question, answer to is conclusive ... 359
Joint charge against two prisoners, one may be acquitted and called for another ... 350-51-2
If one given in charge to jury, the other is an admissible witness against him ... 352
But not if both given in charge ... 352
Judge decides admissibility of confessions ... 366
And of dying declarations ... 373
Judicial notice taken of public statute ... 377
Judgment of sessions, when sufficient proof of breach of peace ... 375
Jury, weight and credibility of evidence for ... 348
Even where witness at trial directly confesses crime ... 348-9
Or in ordinary cases of confessions ... 366
Of dying declaration for ... 373
King's evidence, confession under hope of being ... 364
Knowledge, fact within must be proved ... 347
Proof of guilty ... 371-2
License or qualification must be produced, and proved by party having ... 347
Liquor, proof on prosecution for selling ... 374
Looking at depositions on return to *habeas corpus* ... 448
Material evidence, what is ... 349-50
Memoranda, witness may refer to ... 380

EVIDENCE—*Continued.*

PAGE.

Minutes of court of sessions, evidence in same court..... 375
Minute book of sessions..... 376
Moral grounds, inducement to confess on 365
Motives, evidence to show..... 371-2
Documentary evidence to show..... 372
Negative evidence not bound to give 347
Notes of judge, reading, to jury improper..... 380
Oath varied to meet religious scruples of witness..... 353-4
Administered to prisoner when making confession..... 362
Objections to judge's charge, must be taken at trial..... 379
Onus of proof 347
Own witness, discrediting..... 360
Pardon, effect of, in compelling witness to answer..... 358-9
Previous statements in writing, cross-examination as to 359
Printer, Queen's, gazette printed by 378
Prisoner jointly indicted, acquitted and calling as witness for other..... 350 *et seq.*
When one given in charge 352
When they sever in challenges..... 352-3
Public statute will be noticed judicially 377
Quashing of conviction, how proved..... 366
Ground for 379
Rape, on indictment for, prosecutrix not bound to disclose connections with other persons 360
Rebuttal, evidence in..... 347
Reception of improper evidence not necessarily ground for quashing conviction..... 379
Record, conviction by justice returned to sessions, is 375
How proved..... 375
Record of same, and different court 375
Of acquittal or conviction 375-6
Copy of..... 375-6
Formal record..... 376
Information returned is..... 377
Raising points on, to be examined in error..... 379
Reply, reception of evidence in..... 378
Secondary evidence when admissible..... 372-3
Several felonies connected together, evidence of one to show character of other 370-71
Sessions, minutes of 375
Severing in challenges..... 352-3
Skilled witness, what questions may be put to..... 361-2
Stamp duty, instruments liable to..... 381
Swearing witness according to ceremony which he considers binding 354

EVIDENCE—*Continued.* PAGE.
Threats more than six months before commission of crime. 378
Trial, all objections must be made at 379
Two prisoners jointly indicted, acquitting one and calling him as witness for the other 350
Veracity of witness, impeaching..... 360
Voluntary, confession must be..... 362
Weight of evidence, for jury..... 348
Wife cannot give evidence for or against her husband 354
On joint charge..... 354
Withdrawing improper evidence 366
Witness, credibility of..... 348
Who may be..... 353 *et seq.*
Competency of 353-4-7, 374, 381
Incompetent, evidence of..... 357
One is sufficient..... 357
Need not disclose confidential communications 357
What are confidential 357
Nor answer criminatory questions..... 357
Impeaching credit of ..... 358 *et seq.*
Cross-examining 359
Contradicting..... 359
Statement of deceased 370
Should be asked facts only..... 361
Reading judge's notes to..... 380

EXCISE OFFENCES—(*see* LIQUOR).
Conviction for, when sufficient 96
Amending..... 96
Crown may proceed by criminal information..... 96
Must allege sale by retail..... 97

EXCUSABLE HOMICIDE—
Of two kinds 208
Punishment for none 208

EXIGI FACIAS—
Writ of, when issued..... 130

EXTORTION—(*see* OFFICE, OFFENCES BY PERSONS IN).

EXTRADITION..... 10
Not of right unless by treaty..... 10
Accessory after the fact, not liable to..... 25
Accomplice, evidence of sufficient..... 39
Ashburton treaty now governs to U.S..... 11
Contains whole law of surrender 11
Assault with intent to commit murder, what within treaty 23

EXTRADITION—*Continued.* PAGE.
Arrest, warrant of, who may issue ... 25-9
Foreign, must issue before commitment ... 29
Bail may be granted when ... 46
Burglary not within treaty ... 22
Commitment (*see* WARRANT OF COMMITMENT).
Construction of treaty ... 17-21
Depositions when court will look at ... 43
Discharge if committed on insufficient evidence ... 39
Evidence, our law governs as to ... 14-36
Must be taken before magistrate issuing warrant ... 30
Viva voce may be received ... 37
And original depositions or authenticated copies ... 37
Need not be on particular charge ... 37
But no obligation to produce depositions ... 37
How Act as to depositions should be construed ... 37
Affidavit, admissibility of ... 38
Professional gentleman, evidence of ... 38
Foreign indictment not receivable ... 38
Examination of witnesses, how conducted ... 32
Sufficiency of evidence, by whom and how determined ... 33
Evidence in defence ... 38-9
Admissible to show that crime not within treaty ... 39
Or witness not to be believed ... 39
Or that charge brought, the result of a conspiracy ... 39
Accomplice, evidence of, sufficient ... 39
Slave, evidence of, sufficient ... 39
Expenses, how payment of, enforced ... 47
Extradition Act, 1870, construction of ... 16-17
Forgery, when within treaty ... 23
France, extradition to ... 47
Governor General, surrender only by ... 31
No power except over specified offences ... 31
Controlled by courts ... 31
Need not issue warrant authorizing magistrate to act ... 20
Habeas corpus, right of court to interfere by ... 39-43
Same as in other cases ... 40
Return to ... 41-2
Information, when too general ... 34
Jay's treaty related only to murder and felony ... 11
"Jurisdiction" and "territories," how used in treaty ... 13
Legislation, with regard to ... 12-17
Magistrate, who may act as ... 25-9
Duty and authority in committing prisoner ... 33
Cannot try case ... 33
Discharge by one does not prevent another from acting ... 33

EXTRADITION—*Continued.* PAGE.
Issuing warrant must hear evidence, and determine upon its sufficiency, and send copy to governor.... 30
Decision not binding on governor.... 30
Jurisdiction must be judicial as well as territorial.... 27
Offences to which treaty applies.... 19-25
Nature of.... 20
How treaty construed and carried out as to.... 20-21
Whether misdemeanor or felony immaterial.... 25
Piracy, when within treaty.... 23-4
Procedure, alterations made in, by Imp. Extradition Act, 1870.... 15
Requisition by Government of United States not necessary.... 29
Review by court of magistrate's committal of prisoners for extradition—(*see* HABEAS CORPUS).... 40
Slave, evidence of, sufficient.... 39
Statutes in aid of treaty—
Con. Stats. U. C., c. 96.... 13
How far now in force.... 13
6 & 7 Vic., c. 76.... 12
Not now in force in any of Provinces.... 12
12 Vic., c. 19.... 14
23 Vic., c. 41.... 13
24 Vic., c. 6, why passed, provisions of.... 13
31 Vic., c. 94, why passed, effect of, what it repeals.... 15
33 Vic., c. 25.... 15
6 & 7 Vic., c. 75.... 47
6 & 7 Vic., c. 34.... 48
Imperial Extradition Act, 1870 and 1873.... 15-17
40 Vic., c. 25 D.... 16
Surrender, none till fifteen days after commitment.... 31
Only for offence charged and proved.... 31
Can only be made by supreme authority.... 14, 30
Suspicion doubtful whether ground for detaining prisoner.... 35
Trial here, for offence for which prisoner not extradited.... 46-7
Warrant of arrest—(*see* ARREST).
Warrant of commitment, when good.... 43-5
When not within treaty.... 43
Should follow statute.... 42
Must show that magistrate deemed evidence sufficient to justify apprehension.... 44
And that offence committed in States.... 44
Need not set out evidence.... 44
Nor show previous charge or requisition or warrant of Governor General.... 44
Must mention day and limit time for confinement of prisoner. 44

EXTRADITION—*Continued.* PAGE.

What words in, involve "assault with intent to commit murder" ... 45
Authority of magistrate need not be shown on face of ... 45
Seconded or amended warrant may be delivered to gaoler by magistrate ... 45
Warrant of Governor General no proof that prisoner extradited for forgery ... 46

FACT—

Mistake in, is defence ... 70
Determined by jury (*see* JURY).

FALSE PERSONATION—

Of voter at municipal elections ... 288
Indictment for ... 289
Voting in name of another ... 288
When person dead ... 288
Personation need not be successful ... 288

FALSE PRETENCES—

Acquittal when facts show larceny ... 267
Acts may constitute pretence ... 266
Bank note, misrepresenting amount of ... 262
Pretending that piece of paper is ... 262
Cheque, what representation of ... 261-2
Construing law as to ... 260
Continuing, when pretences must be ... 265
Must continue till time of obtaining ... 265
Contract between parties with knowledge of false pretence ... 262
Court, pretending to be officer of ... 337
Acting under color of process ... 338
Delivering process ... 338
Credit in account ... 262
Distinction between, and larceny ... 270
Evidence, of note being of no value ... 262-3
Of obtaining coat by ... 263
Exaggerated praise ... 264
Existing fact, must be false pretence of ... 260 *et seq.*
False, pretence must be ... 260
Indictment, when facts show larceny ... 267
May be convicted of false pretences ... 267
Showing pretence of existing fact ... 268
When sufficient ... 267 *et seq.*
Laying property ... 260-70
Uncertain or doubtful ... 269

FALSE PRETENCES—*Continued.* PAGE.
Obtaining board ... 269
Must define goods ... 269
Need not allege ownership ... 269-70
For obtaining cheque ... 270
Induced to part with property by false pretence ... 264
Intention to pay immaterial ... 266
Jury, what questions are for ... 266-7
Larceny proved on indictment ... 267
Loan, obtaining of ... 262
Particulars of ... 269
Partner obtaining by ... 267
Pay (*see* INTENTION).
Pretence must be untrue ... 260
Prosecutor must be induced to part with property by ... 264
Of present or past fact ... 264
Need not be in words ... 266
Promise to do something *in futuro* ... 260
Property in chattel must pass ... 265
Proximate cause of loss, must be ... 265
Quality, specific representation of ... 264
Signature, obtaining of ... 266
Venue ..., 268
Verdict "guilty of larceny" ... 268

FEES—
To public officers ... 109

FELONY (*see* CRIMES).

FIERI FACIAS—
Crown may issue ... 524

FLOUR—
Seller of, in barrels not marked or branded ... 335

FOOD—
Adulteration of ... 345

FORCIBLE ENTRY OR DETAINER—
Complaint may be laid before justice for ... 153-4
Estate, inquisition must show what ... 153
Evidence, whether private prosecutor can give ... 153
Indictment lies for ... 152-3
Inquisition, when bad ... 153
Must show estate of party expelled ... 153
Misdemeanor, is a ... 152
Proceedings which may be taken for forcible entry ... 150

FORCIBLE ENTRY OR DETAINER—*Continued.* PAGE.
Prosecutor cannot be examined as a witness. 153
This not the case in Ontario now 153
Restitution, when writ of may be awarded, and by what courts 154-5
Riot, when amounts to 153
Statutes in force as to 152
Title, evidence of not admissible 154
Trespass will not support indictment for 156
Wife may be guilty of 156
Witness, private prosecutor cannot be 153

FOREIGN COUNTRY—
Lawless aggressions by subjects of, at peace with Her Majesty (*see* AGGRESSIONS).

FOREIGN ENLISTMENT OFFENCES—
Act now in force 81
Object of 85
Alternative part of Act in 84
Construction of 82
Local Act void, so far as repugnant to 82
Intent material 85
Warrant of commitment, requisites of 82-3
Under 28 Vic., c. 2, when bad 84
Must not be for too little penalty 84
Must specify amount of costs 84
When sufficiently shows jurisdiction 84-5
Direction to gaoler 85
Double offence 85
What is offence against Act 85-6
When ship employed in military or naval service 85-6
Releasing on bail 86

FORGERY—
Actual defrauding not necessary 279
Agreement for sale of timber 280
Altering of note 277-8
Assessment roll 284-5
Coining not forgery 278
Date, executing deed with false 276
Deed, executing in name of another 276
Definition 275
Document, forgery must be of 279
Engraving of notes 281
Evidence of party, purporting to have signed document 285-6
False date, executing deed with 276
False pretences, goods obtained by, through forged order 286-7

FORGERY—*Continued.* PAGE.
Fictitious name ... 276
Illegal instrument ... 279
Indictment need not allege intent to defraud particular person 278-86
Must allege that note was forged ... 285
And that defendant uttered it as true ... 285
Describing instrument in ... 286
For forging receipt ... 287
Surplusage in ... 287
Indorsement per procuration ... 282
Instrument illegal ... 279
Unstamped ... 279
Void ... 279
Intent to defraud, must be evidence of ... 277-9
Need not allege intent to defraud particular person ... 278
Letter of recommendation ... 279
Misdemeanor only at common law ... 285
Note, forgery of ... 277-8
Indictment for ... 285
Order for delivery of wheat ... 276
For payment of money ... 277-84
Pay, intention to ... 287
Receipt for payment of money ... 281
Recommendation, letter of ... 279
Request for payment of money ... 281-4
Semblance of genuine instrument ... 275
Sessions cannot try ... 286
Telegraph message ... 278
Undertaking for payment of money ... 282
Unstamped paper ... 279
Uttering, what is felonious ... 276-8
Validity of instrument immaterial ... 279
No offence, if wholly void ... 279
Void instrument ... 279
Witness, who may be ... 285-6
Writing, forgery must be of ... 279

FRONTIER—
Act for repressing outrages on ... 323
When court can order restoration of property seized ... 323-4-5

GAMBLING ... 344

GAME—Killing and taking, on Lord's Day ... 337

GAMING HOUSES, suppression of ... 344

GAOL DELIVERY ... 489

GOVERNOR— PAGE.
Of colony, power to suppress rebellion ... 152
Indictment against, for offences within 11 & 12 Wm. III., c. 12, where preferred ... 342

GRAND JURY—
Depositions admissible before ... 368
Act for preventing vexatious proceedings before ... 486
Conditions of, need not be proved ... 486
When provisions of complied with ... 486
Evidence before, how received and given ... 487
Accused has no right to give ... 487
Twelve jurors must assent to finding ... 487
Principles on which they decide ... 487-8
Quashing proceedings of ... 486
Panel objections to ... 486-7

HABEAS CORPUS—
Duty of judge on ... 448
Power of judge in chambers ... 449
In practice court during term ... 450
In vacation ... 450
Does not lie, when proper remedy by writ of error ... 451
Or in case of custody under civil process ... 451
Prisoner convicted of larceny ... 451
Prisoner for debt in close custody in another county ... 453
To keeper of prison to bring up convict as witness ... 453
Must be request in writing, etc ... 453
Affidavit on which obtained, entitling, etc ... 453
Return to, contradicting, etc ... 449
Showing commitment bad on face, or charging no offence ... 453
When prisoner in custody less than a year, on charge of offence in Ireland ... 454
General principles on which jurisdiction of justices reviewed on. 454-5

HIDES—Inspection of raw ... 345

HIGHWAYS—
Abolished, cannot be by placing gate across ... 171
Adjoining land may be travelled over, when out of repair ... 173
Allowances, original, continue to be public highways ... 163
By-law, district council could not lay out road except by ... 164
Changing by writ of *ad quod damnum* ... 172
Commissioners should remove fence on road ... 170
Conviction must show that place public highway ... 170
County road to be repaired by county ... 171-2

HIGHWAYS—*Continued* PAGE.
Crown, guarantees of must repair ... 173
Cannot grant to private individual so as to bar public right.. 162
Cul de sac ... 167
Dedication—
User for thirty days, evidence of ... 164
What is dedication ... 160
Must be intention to dedicate ... 160-66-7
Evidence of ... 160-67
Stronger evidence of, required in new than in old district ... 165
Presumed from long user and statute labor ... 167
Limited or partial ... 165
Right of passage only, parted with on ... 165
Reservation inconsistent with void ... 166
Mixed question of law and fact ... 167
Engineer, government, need not condemn road by certificate ... 173
Evidence of state of road before trial ... 175
Same as in civil action ... 183
Fire on side of road, not nuisance ... 169
Freeholders disinterested ... 182
Gas company, members of, liable to be convicted of nuisance in obstructing a highway ... 175
Gate on road does not abolish highway ... 171
Government survey against right of party in possession ... 163-4
Indictment for nuisance may be against three or four of several defendants ... 182
Evidence, variance, etc ... 183
Judgment on out of term ... 184
Proferring new indictment ... 184
Joint stock companies, roads of, not highways ... 162
Judgment, whether can give on indictment out of term ... 184
Minutes of boundary line commissioners are not ... 183
Jury must determine dedication ... 167
And whether road highway ... 167
Lake Ontario, no highway along beach ... 163
Mandamus, when proper to compel repair of ... 158
Minutes of boundary line commissioners not judgment ... 183
Municipal corporation, power to open new roads ... 172
Must keep same in repair ... 174
Corporation of county has jurisdiction over road between townships ... 172-6
Bridge between two counties ... 176
New trial, after verdict of acquittal ... 184
Non-repair, of indictable ... 172
Nuisances, to, of two classes ... 168
Ontario, how highways have accrued in ... 160

HIGHWAYS—*Continued.* PAGE.
Opening by municipal corporations..... 172
Petition, under 12 Vic., c. 35, to adjust surveys..... 176
Railway company, when bound to repair bridge..... 176
Return of laying out, not necessary..... 182
Road companies liable for non-repair of highways..... 173
Sea shore, whether highway on..... 163
Shutting up lane, street, public road by gate..... 171
Shutting up by by-law,..... 171
Under (N.B.) 1 Rev. Stat., c. 66..... 172
Statutes 5 & 6 Wm. IV., c. 50; 27 & 28 Vic., c. 100; 5 Wm. IV., c. 2..... 182
Statute labor on roads makes highway..... 167
But must be usually done..... 161-8
Surveyor, road laid out by..... 162
Thoroughfare, public highway need not be..... 166-7
Rule, when claimed by dedication..... 167
Toll companies, when liable to keep roads in repair..... 174
User for thirty years evidence of dedication..... 164
User for seventy years, when land in lease..... 164
User and dedication establish highway..... 165
But stronger evidence in newly settled district..... 165
Dedication may be presumed from..... 165
Variance on indictment..... 183
Velocipede may be obstruction..... 169
Via trita does not compose whole road..... 176
Waggon standing in highway is nuisance..... 169
What is highway..... 160
Width of road preserved..... 176

HOMICIDE—(*see* JUSTIFIABLE HOMICIDE AND EXCUSABLE HOMICIDE).

HOUSEBREAKING—(*see* BURGLARY)..... 229-30

IGNORANCE—
Of law no defence..... 70
But may be ground for application to Government..... 70
Of fact, is defence..... 70

IMPERIAL STATUTES—(*see* ENGLISH LAWS IN FORCE).

IMPRISONMENT—
Different purposes for which imposed..... 431
Reimprisonment..... 432
Period must be certain..... 432
Day of discharge..... 432
Where conviction for several offences..... 432

PAGE.

INDIAN LANDS—
Acts relating to sale of 333
Trespassing in 333

INDICTABLE OFFENCES—(*see* CRIMES IN GENERAL) 49
Duties of justices on charges of 414-5
Discharge by one does not prevent another from acting 415
Justice must proceed as directed by the statute 414
Indictment may be preferred, though justice refuse to proceed 415
Warrant of arrest 413-4
Trial by magistrate by consent 405

INDICTMENT—(*see* PLEADING, and the different titles through the book).
Copy of, when granted 508

INFANTS—
Criminal liability of (*see* PERSONS CAPABLE OF COMMITTING CRIMES, ABANDONING) 64

INFORMATION—(*see* CRIMINAL INFORMATION).

INFORMATION OR COMPLAINT—(*see* Chapter on PRACTICE).
Amending under ..... 412 *et seq.*

INSANE PERSONS—
Criminal liability of (*see* PERSONS CAPABLE OF COMMITTING CRIMES). 66

INTENDING TO COMMIT FELONY—(*see* CRIMES IN GENERAL) 62

INTOXICATING LIQUORS, SALE OF—(*see* LIQUORS).

JOINT PARTICIPATION—
In unlawful act renders all liable 72, 73, 312
When act committed in prosecution of unlawful purpose 73

JUDGE—
Decides law 499
Misconduct by (*see* OFFICE, OFFENCES BY PERSONS IN).

JUDGMENT—
Staying the entry of, arresting, etc 505

JURORS—
How summoned 489
Qualifications and exemptions 489
Aliens 490
Panel, objections to ..... 490 *et seq.*
Challenge, peremptory ..... 490 *et seq.*
For cause ..... 493 *et seq.*
To array 494-5

JURORS—*Continued.*

PAGE.

Stand aside, directing jurors to ... 490 *et seq.*
De mediatate linguæ ... 490 *et seq.*

JURY—

On charge of uttering forged paper ... 499
On appeals from summary convictions, can only decide on facts ... 499
Cannot try whether prisoner extradited from States for forgery ... 499
Must follow direction of court in point of law ... 500
After retiring may return and re-examine witnesses ... 500
Misconduct of, when vitiates verdict ... 500
Separation of ... 501
Refreshments to ... 501
Discharging, when proper ... 501-2
When it does not operate as an acquittal ... 502
Death or illness sufficient ... 502
To obtain evidence ... 502
Carrying from town to town in a cart ... 503
Right to find general verdict ... 504
May correct verdict ... 504

JUSTICES OF THE PEACE—

Appointment of ... 403
Oath of qualification ... 403
Jurisdiction in city and county ... 404-6
Circumstances affecting ... 404
Under commission of peace ... 404
Maxim *omnia præsumuntur rite esse acta* ... 404-7
Must have jurisdiction over individual ... 404
Information should be laid ... 404
Ousting by claim of right ... 410
By question as to title to land ... 410
Power to convict summarily ... 405 *et seq.*
Rendering judgment ... 406
Acting for division or county ... 404
Where statute empowers two, conviction by one ... 406
Duties of, in relation to indictable offences ... 407 *et seq.*
Powers of, to commit for contempt ... 438
Doubtful whether justice acting in his own house can commit ... 439
Commitment, requisites of ... 424 *et seq.*
Warrant to constable ... 413
Justice exclusive judge of contempt ... 439
Exceptions to jurisdiction, justice should decide ... 405
Criminal informations against ... 477 *et seq.*

JUSTIFIABLE HOMICIDE— PAGE.
Of three kinds ... 207-8

KIDNAPPING ... 224

LARCENY—
Act of stealing, must formerly have been separate indictment for each ... 247
Three may now be inserted in one indictment ... 247-8
Agreement unstamped ... 233
Attempting to commit ... 60
Animus furandi necessary ... 235
Bailee, porter is ... 243
Whether *animus furandi*, at the time of obtaining, is necessary ... 243
Hirer of horses from livery ... 244
Lessee of pawn ... 244
Married woman ... 245
Distinction between bailee and servant ... 246
Bailment, what is ... 243-4
Must be to redeliver same chattel or money ... 244
Delivery of goods for sale ... 244
Bond, when subject of larceny ... 233
Carrying away necessary ... 235
But least removing sufficient ... 235
Certificates, subject of ... 234
Choses in action not subject of ... 233
Consent, goods taken by ... 235-6
Continuous taking when thing not subject of (*see* TAKING) ... 234-5
Definition ... 232
Distinction between false pretences and ... 270-1
Felonious intent, goods must be taken with ... 235
Fraudulent obtaining of goods by which property does not pass ... 238
Possession parted with through fraud ... 238-9
Property so parted with ... 239
Property obtained by sale ... 241
Fruit, stealing growing ... 247
Goods subject of larceny must be personal ... 233
And subject of property ... 234
Dogs, stealing of ... 234
Animals *feræ naturæ* ... 234
Grand larceny abolished ... 235
Husband, stealing goods of, with wife's privity ... 245
Indictment lies for three takings within six months ... 247-8
For stealing many things, evidence of one sufficient ... 250
Must specify valuable security ... 233
What is surplusage in ... 248

LARCENY—*Continued.* PAGE.

Laying property in notes ... 249
In master or servant ... 249
In father or son ... 249-50
When gift of personal property *inter vivos* ... 249-50
When there is administratrix ... 250
Where goods are property of partners or joint owners ... 250
Or tenants in common, or parishioners of church ... 251
Or when larceny is committed by lodger ... 252
Injury done to two or three trees may be added together ... 247
Joint owners laying property in (*see* INDICTMENT) ... 250
Lodger, or theft by, property in goods laid in owner ... 252
Lost property, larceny of ... 236
General rule as to ... 236
Belief at time of finding that owner can be ascertained ... 236
Belief that goods abandoned ... 237
Property mislaid ... 237
Means of ascertaining owner ... 237
Felonious intent must be at time of finding ... 238
What is lost property ... 236-7
Married woman may be bailee ... 245
Cannot steal goods of husband ... 245
Menace, stealing by ... 232
Money, person may be bailee of ... 245
Proof on indictment for stealing ... 249
Notes ... 233
Obtaining possession lawfully ... 238
Obtaining fraudulently is ... 238-9
Partners, larceny by, laying property of, in indictment (*see* INDICTMENT) ... 250
Pawn, selling of, not larceny ... 244
Petty larceny abolished ... 235
Police Court, stealing or destroying information in ... 233
Possession obtained by trick ... 239-242
When lawful, no larceny ... 238
Potatoes, when subject of ... 235
Proof on indictment for stealing money ... 249
Property, larceny cannot be committed of things not the subject of ... 234
If property passes, there can be no larceny ... 238
If owner intends it to pass, it will pass, and no larceny be committed ... 238-9
Servant may pass ... 239
Or cashier of bank ... 240
But now larceny by statute ... 240

LARCENY—*Continued.* PAGE.
When property does pass ... 240-41-2
When obtained by false sale ... 240-41-2
When in bailee ... 243
Laying in indictment (*see* INDICTMENT).
Record, stealing or destroying ... 233
Restitution ... 248
Returning goods may negative *animo furandi* ... 236
But no evidence that prisoner intended to ... 236
Robbery, larceny included in ... 231-2
Sale, false, by fraud ... 241
Security, larceny of ... 233
Servant may pass property ... 239
May be guilty of larceny (*see* BAILEE) ... 246
Several takings may now be laid in indictment (*see* CONTINUOUS, ETC., TAKINGS, ETC.) ... 247-8
Shareholder in company, larceny by ... 247
Subjects of ... 233-4
Surplusage, what is ... 248
Taking must not be continuous act with severance, when thing not subject of larceny ... 234-5
Should be interval ... 235
What is continuous taking ... 235-248
Trespass, larceny includes ... 238
Trick, possession obtained by ... 239-242
Venue, when goods stolen on journey ... 251-2
Wife (*see* HUSBAND).
Will, must be taken against ... 235

LAW—
Foreign, not binding ... 506
Mistake in, no defence ... 70
But may be ground for application to Government ... 70

LAWLESS—
Aggressions by subjects of foreign country at peace with Her Majesty (*see* AGGRESSIONS).

LIBEL—
Action, when lies for against Corporation ... 131
Between corporations ... 131
Affidavit in judicial proceeding is privileged ... 136
Bill of rights, principle of, applies to petition to Lieutenant Governor ... 137
Malice destroys privilege in petition ... 137
Intended to protect petitioners applying to Crown ... 138

LIBEL—*Continued.* PAGE.
Applies to public rights only ... 138
Bona fides necessary when matter otherwise libellous ... 141
Commons, House of, staying proceedings for publishing votes of. 139
Comparison of disputed writing ... 146-7
Libel may be proved by ... 146-7
Courts, reports of proceedings may be published ... 133
Grounds of privilege ... 134
Ex parte proceedings of ... 134
Dignity of court cannot be regarded ... 134
Privilege protects publication of proceedings of open police court on charge of indictable offence ... 135
Corporation, action for libel lies against and between ... 131
May also be indicted ... 131
Criminal information, on application for court in position of grand jury ... 148
Must have same evidence as grand jury ... 148
Libel itself must be filed ... 148
Legal, evidence of publication ... 148
Granted only where person libelled occupies a public position ... 148
Time within which application must be made ... 148
Debate in parliament, publication of privileged ... 139
But must be fair report of ... 139
Defence, to show that publication without defendant's authority. 139
What sufficient defences to render conviction illegal ... 149
Ex parte proceedings of courts, publication of, privileged ... 134
House of Commons, staying proceedings for publishing votes of... 139
Indictable offence, proceedings on charge of, may be published... 135
Indictment, lies for libel whenever action lies ... 131
May be maintained against all concerned in joint publication of libel ... 131
Inuendo in ... 149
Individual, libel upon, what is ... 131
Information (*see* CRIMINAL INFORMATION).
Ingratitude, to charge man with, is libellous ... 133
Inuendo, use of ... 149
For court to say whether capable of bearing meaning assigned to it (*see* INDICTMENT) ... 149
Joint publication of libel, all liable for ... 131
Judicial proceedings, fair report of, protected ... 133
Judge to determine privilege ... 144
Should ask jury whether matter published *bona fide* ... 144
Judges, acts, words, or writing of, in judicial capacity, privileged. 136
Jury, what questions are for ... 144

LIBEL—*Continued.* PAGE.

Jurymen, acts, words, and writing of, in judicial capacity, privileged 136
Magistrates, reports of proceedings before, privileged, but must act within jurisdiction 135
Malice, proof of express 142
When libel privileged, proof of express malice must be given 142-3
Meaning of, in legal sense 143
To prove express malice may show that libel untrue 143
Libellous expressions in a privileged communication may be evidence of actual malice 143
Judge to determine whether inference of malice repelled 144
When jury decide 144
Members of parliament not liable for statements in parliament (*see* PARLIAMENT) 139
Memorial to Secretary of State privileged 136
Military officer, report by, in ordinary course of duty, privileged. 136
Minister of religion, utterances by, in pulpit 141
Obscene writings, publication of, indictable 133
Test of obscene publication 133
No defence that object laudable 133
Open police court, proceedings of, on charge of indictable offence, may be published 135
Magistrate's court, proceedings of, may be published 135
But not, if inquiry carried on in private 135
Parliament, members of, not liable for statements in 139
Publication of debates in, privileged 139
Publication of speech in, with intent to injure, is unlawful 140
Report of proceedings in, may be published 140
Personal libel, what is 131-9
Petition to Lieutenant Governor, when privileged (*see* BILL OF RIGHTS) 137
Plea, to information for 149
Police court, when proceedings of, may be published 135
Presumption that party intends what libel is calculated to effect 133
Privileged communication, what is ..... 141 *et seq.*
Report in writing by military officer 136
Statement *bona fide*, where party interested 141
Memorial to Secretary of State 136
Communications to executive government 137
Petition to governor 137
Petition to Queen 138
Resolution of incorporated association 142
When privileged, must be proof of express malice 142
Presumption of privilege in some cases conclusive 145

LIBEL—*Continued.* PAGE

As to proceedings in parliament and in courts of justice..... 139
Defence, when not absolutely privileged..... 145
Instances of privileged communications..... 145-6
Comments on acts of public men..... 136
Proceedings in courts of justice, publication of, privileged (*see* COURTS, JUDICIAL PROCEEDINGS)..... 131
Publication (*see* JOINT ACTION, INDICTMENT, OBSCENE).
Public men, comments on acts of, privileged..... 136
Religion, utterances by ministers of, from pulpit..... 141
Reports of parliamentary proceedings, debates, etc., may be published (*see* DEBATES, PARLIAMENT)..... 140
Secretary of State, memorial to, privileged..... 136
Senate, staying proceedings for publishing votes of..... 139
Sessions cannot try..... 473
Speech in parliament, when may be published..... 140
Trial, proper course at, in case of privileged communication..... 144
Truth of libel important in determining malice..... 143
Question is whether defendant honestly believed it true..... 144
When material for plaintiff to prove that statements are not true..... 143-4
Witnesses, acts, words and writings of, may be published..... 136
Writing, comparison of disputed, with that proved genuine..... 146-7

LIQUOR—
Selling without license..... 97
Canada Temperance Act:
Proof that Act is in force, necessity of..... 103
Of expiry of license..... 103
Certiorari under, taken away..... 103
Except in questions of jurisdiction..... 103
Costs under..... 103
Certiorari:
Return under conclusiveness of..... 106
Taken away under Canada Temperance Act in certain cases... 103
Conviction for, sufficient, if it follow statutory forms..... 97
If not, what it must contain..... 97, 99, 100-4
Certainty in..... 98, 100
Statement of offence..... 99
How far it must conform to information..... 98
Several offences in..... 98-99
Against two jointly..... 99
Against partner..... 99
Contra forma statuti..... 99
Costs under..... 99
Of commitment..... 100

LIBEL—*Continued.*

PAGE.

Of druggist... 102
Amendment of. 102
First or subsequent offence... 102-5
Appeal against... 106-7
Druggist, conviction of... 102
Fines... 98, 100-1-4-5
Gambling... 104
Information for... 103
Legislature, local, competency of, in these matters... 101-2-3
As to delegating power... 102
License generally ... 100-1
What premises it covers... 100
Brewer, what required by... 101
Expiry of Canada Temperance Act... 103
Married woman, conviction of ... 102
Occupant ... 103
Offence, what amounts to... 104-5
First or subsequent... 102-5
Penalties for (*see* FINES)... 100-1-2
Quebec License Act, constitutionality of... 103
Decisions under... 104
Servant, may be convicted... 102
Witness, purchaser competent as ... 102
Informer competent... 106
Defendant not... 106

LOCAL—
Crimes are considered ... 53

LOCAL LEGISLATURES—(*see* ENGLISH LAWS IN FORCE).

LORD'S DAY, PROFANATION OF—
R. S. O., c. 189... 336
Conviction should negative exceptions... 336
Travellers, who are... 336
Note or mortgage on Sunday... 336
Sales or agreements for ... 337
Killing or taking game... 337
Farmer, not within Act... 337
Druggists not within... 336
Amusements Act, as to enforce ... 337

LOTTERIES—
Are public nuisances... 157-8
Act as to in force... 7

MAGISTRATES—(*see* JUSTICES OF THE PEACE). PAGE.

MAINTAIN OBLIGATION TO—(*see* VAGRANTS).

MAINTENANCE—(*see* CHAMPERTY).

MALICIOUS INJURIES—

Act must be wilfully and maliciously done..... 289
But malice against owner, not necessary..... 289
Damage need not be of permanent kind 289
Instrument need not be used..... 290
Machine or engine..... 289-90
Malice, what amounts to..... 289
Summary remedy..... 290
Wound, meaning of..... 290
Claim of right, summary jurisdiction ousted..... 290

MANITOBA (*see* ENGLISH LAWS IN FORCE).

MANSLAUGHTER—

Accessories in..... 75, 201
Must be active proceeding to constitute..... 201
Apprehension without warrant by constable 203
By private person..... 205
Arrest without warrant 203-4
Not on mere suspicion..... 203-5
Must show felony actually committed..... 205
By magistrate for misdemeanor committed in his view..... 204
Must be breach of peace..... 204
When illegal..... 204-5
By constable for breach of peace..... 204
By policeman..... 204
By constable, without warrant on reasonable charge..... 205
In civil proceeding 205
Offender must be taken before justice..... 205
By private person 205
By clerk in service of railway company 205-6
Must show felony actually committed..... 205
By person who is assaulted..... 206
Assaulting wife does not justify..... 206
When illegal..... 207
Assault, when it justifies arrest (*see* ARREST) 206-7
Authority, officer arresting must have..... 203-5
Breach of duty..... 201
Civil proceeding, arrest by constable in 205

MANSLAUGHTER—*Continued.* PAGE

Constable may arrest for breach of peace 204
For suspicion of felony 205
Definition of..... 199
Director of railway for omission 201
Felony, arrest for suspicion of..... 205
When actually committed (*see* ARREST)..... 205
Involuntary manslaughter..... 200
Knowledge of character in which officer acts 203-7
Malice, none in..... 200
Medical aid 202
Neglect to provide food..... 201-2
Distinction in these cases between children and servants..... 202
Negligence, culpable, may amount to 200
Officer of justice, killing of..... 203
Peace, arrest for breach of 204
Private person, arrest by (*see* ARREST)..... 205
Removal of person unlawfully in house..... 207
Suspicion of felony, arrest for 205
Voluntary manslaughter 200

MARRIAGE—

English law as to, introduced (*see* BIGAMY)..... 9

MASTER AND SERVANT—

Act Con. Stat. U. C., c. 75, as to, repealed..... 329
Substituted enactment..... 329

MEDICAL PRACTITIONER—

Registration of, what amounts to representation of..... 344

MENACES—

Demanding with 341
"Reasonable cause" applies to thing demanded..... 341
What amount to..... 341-2
Truth of threatened accusation, no defence..... 342

MERGER—

Of lesser offence in greater..... 55
Of false pretences in larceny 267
When object of conspiracy felonious..... 315

MILITIA—

Officer of, competency of, to sit on court martial..... 344
Discharge of members of..... 344

MINORS—(*see* APPRENTICES).

PAGE.

MISDEMEANOR—
What is (*see* CRIMES IN GENERAL) ... 56

MISPRISION OF FELONY ... 56

MIS-TRIAL—
Venire de novo for ... 516
Vitiates and annuls verdict ... 516

MOLESTATION OR OBSTRUCTION—
By master or workman (*see* STRIKES, TRADES' UNION ACT) ... 116-7

MONOPOLY—
For exempting new manufactures ... 115
Rules in restraint of trade ... 115
Strikes not necessarily illegal ... 115
Trades' union Act, 1872, provisions of ... 116

MOTIVES, WHEN IMPORTANT ... 62-3

MURDER—
Administering poison ... 197
Agent, must be a free ... 193
Attempting another act ... 195
Corporal injury ... 194
Death from threats of violence ... 194
Definition ... 192
Degrees, persons may be liable in different ... 193
Disease by which death accelerated ... 195
Evidence as to cause of death ... 198
Indictment need not set forth manner of death ... 198
Must state act done feloniously, and of malice aforethought ... 199
For wounding, with intent to murder ... 199
Infant in womb, when subject of ... 193
Jury, what questions are for ... 196
Killing, different means of ... 194
Malice, necessary ingredient in ... 192
Express and implied ... 192
Medical evidence of cause of death ... 198
Presumption that all homicide is malicious ... 193
Provocation reduces offence to manslaughter ... 195-6
Punishment of ... 199
Queen's peace, must be under ... 193
Sudden quarrel, when killing in, amounts to ... 197
Wounding, with intent to murder ... 199
Year, must die within ... 194

NEW BRUNSWICK— (*see* ENGLISH LAWS IN FORCE).

PAGE.

NEW TRIAL—

Abolished in criminal cases 521

NOTES OF EVIDENCE—

Reading to witnesses those taken at former trial 380
Judge may have them taken by third person 509

NOVA SCOTIA—(*see* ENGLISH LAWS IN FORCE).

NOXIOUS THING—(*see* ABORTION).

NUISANCES—

Abatement of 159
Compelling through sheriff 159
Action lies for, to navigable waters 156
Fresh actions for continuing nuisance 159
Where action lies indictment lies 159
Civil right, course when indictment for trial of 182
Convenience no defence 158
Court, questions for 178
Disorderly houses 157
Evidence on indictment for 183
Examples of ..... 156 *et seq.*
Exposing person 157
Highway, non-repair of, is (*see* HIGHWAYS) 158
Ill-fame, conviction for keeping house of 157
Indecent exhibitions 157
Indictment lies for public 158
Lies when action lies for 159
Is proper remedy for 158
Course, when proceeding by, is substantially for trial of civil right 182
Lewdness, open and scandalous, indictable 157
Lotteries are public nuisances 157-8
Act as to, in force 7
Magistrate, jurisdiction of 159
Mandamus (*see* HIGHWAY).
Navigable rivers, obstruction of 156
New trial after verdict of acquittal 184
Private and public 156
Remedy (*see* INDICTMENT).
Summary conviction by justice illegal 159
Time of erecting nuisance immaterial 158
No length of legitimates nuisance 160
User will not legitimate 160

OBSTRUCTING ENGINE OR CARRIAGE— PAGE.
Act 32 & 33 Vic., c. 22, s. 40, as to.. 332
What is offence within..... 332-3
Not limited to physical obstructions..... 333

OBSTRUCTING THE EXECUTION OF PUBLIC JUSTICE—
Aid, indictment for refusing to..... 185
Is a misdemeanor..... 185
Constable, refusing to aid..... 185
Disobeying order of justices 187
Order of Queen in Council 187
Excise, indictment for obstructing officer of 186
Indictment for refusing to aid constable..... 185
For obstructing officer of excise..... 186
What is necessary to support. 185
Knowledge of character in which officer acts not necessary..... 185
Officer must act under proper authority..... 186
Order, disobeying, indictable 186-7

OFFENCES—(*see* OFFICE, ETC.)

OFFICE, OFFENCES BY PERSONS IN—
Attachment granted against commissioners for trying cause in which interested..... 113
Bailiff, conviction of..... 110
When quashed..... 110
Clerk of Crown agreeing to resign office for reward, illegal 112
Clerk of peace cannot charge any fees not given by law..... 109
Not entitled to any fees for striking special jury..... 109
Table of fees contains all charges 109
Criminal information will lie against officer for misconduct..... 108
When granted against judge..... 113
Deputy returning officer indictable for refusing to administer oath. 108
Extortion, what is..... 108
Indictment for..... 108
Is misdemeanor..... 108
Two or more may be guilty of 108
Fees in different cases..... 109-10
Indemnity, would be illegal for judge to take..... 109
Indictment, when lies, when good..... 108
Lies at common law for sale of office..... 110
Judge taking indemnity..... 109
Misconduct by..... 113
Cannot act in his own case..... 113
Exception..... 113

OFFICE, OFFENCES BY PERSONS IN—*Continued.* PAGE.

Must be direct pecuniary interest ... 114
If really biassed, wrong to act ... 115
If remotely connected with one of parties, no objection ... 115
Justice, when can act, if himself assaulted ... 115
Neglect to execute duties indictable ... 108
Registrar and deputy may be jointly guilty of misdemeanor ... 108
Removal of officers ... 112
Sessions competent to try charge against clerk of peace ... 112
Sheriff, sale of office illegal ... 110
Statutes as to ... 111

OFFICERS OF JUSTICE—

Killing of (*see* MANSLAUGHTER).

ONTARIO—(*see* ENGLISH LAWS IN FORCE).

OVERSEER OF POOR OF PARISH—

Liable to indictment for not accounting ... 343

OYER AND TERMINER—

Whether commissions now necessary for holding court of ... 498-9

PARDON—

Application to Crown for ... 521
Effect of, on appeal to Privy Council ... 524

PARLIAMENT—

Publication of debates in (*see* LIBEL).

PARLIAMENTARY OFFENCES—

Members of Parliament not liable for statements in House ... 189
Attachment against ... 189
Penalty for voting without property qualification ... 189
Privilege from arrest ... 190
Does not apply to criminal cases ... 190
Evidence of being member ... 190
Warrant of commitment ... 190
Prorogation, discharge of prisoner by ... 190-91
Courts, power of, to inquire into commitments by parliament ... 191
Habeas corpus ... 191
Conspiracy to intimidate provincial legislature ... 191

PARTNER—

Agreement to defraud copartner ... 310
Conviction for selling liquor without license will lie against ... 99
Laying property of, in indictment for larceny ... 250

PAWNBROKERS' ACT— PAGE

An enabling Act 334
May take any rate of interest agreed upon 334
Only applies to persons "exercising trade of pawnbroker" 334

PEACE—

Final commitment for want of sureties to keep 429
Must be in writing 439
And show date on which words spoken 429
Articles of peace exhibited in open court 429-30

PENAL ACTIONS—

County courts cannot try 472

PERJURY—

Accomplices, none in 304
Affidavits, before whom sworn 301
Taking without authority 303
Need not be read or used 303-4
Which court would not receive 304
Evidence of place of swearing 304
Ambiguous, oath must not be 303
Amending indictment 307
Assignment of perjury, proof of 301-8
Must be two witnesses 308
Authority (*see* JURISDICTION).
Belief of fact 302
Church of England (*see* PRAYER BOOK).
Common law offence, when affidavit not sworn in judicia proceeding 259
Definition 298
Deliberate, false swearing must be 303
Evidence, on assignment of perjury 301-8
As to place of swearing affidavit 304
Must be two witnesses, or proof of material facts 308
Of existence of proceedings 298
False, matter sworn must be ..... 298-302 *et seq.*
Indictment, showing authority to administer oath 299
When sufficient ..... 304 *et seq.*
Certainty in 304-5
Substance of offence charged 306
Quashing, amending, etc. 306
Insurance cases, perjury in 308
Insurance company, affidavit as to loss by fire 300-301
Judicial proceeding, swearing must be in ..... 298 *et seq.*

PERJURY—*Continued.* PAGE.

Jurat stating place of swearing ... 302-4
Need not state such place ... 302-4
No part of affidavit ... 302-4
Jurisdiction, oath must be taken before a person having jurisdiction on ... 298
Must be competent in matter in which oath administered ... 299
When there is ... 298 *et seq.*
Of court, must be submitted to ... 304
Justice, where may take affidavit ... 301
Magistrate taking affidavit without authority ... 303
Jurisdiction of, over person committing perjury in another county ... 307
Materiality of matter sworn ... 302
All evidence now material ... 302
Misdemeanor, perjury is ... 298
Affidavit not taken in judicial proceeding is ... 299
Oath must be taken deliberately and intentionally ... 303
Must be clear and unambiguous ... 303
Place, jurat stating ... 302
Pleading, must first submit to jurisdiction ... 304
Prayer book of Church of England, oath taken on ... 303
Quashing indictment ... 306-7
Sessions cannot try ... 473
Surplusage in indictment ... 307
Variance in charge of ... 306-7
Venue ... 307
Voter, false swearing by ... 298
When two required ... 308

PERSONATION—(*see* FALSE PERSONATION).

PERSON—Stealing from the ... 252-3

PERSONS CAPABLE OF COMMITTING CRIMES—

Drunkenness, how it affects criminal liability ... 67-8
Feme covert not liable for certain crime committed in her husband's presence ... 68
But this only presumption and may be rebutted ... 69
Protection does not extend to crimes *mala in se*, as treason, murder, etc ... 69
Nor *semble* to misdemeanors ... 69
Ignorance, how it affects criminal liability ... 70
Infants, general rule as to criminal liability of ... 64
Statute creating new felony does not bind ... 66
Or giving corporal punishment ... 66
Under seven, not liable ... 65

PERSONS CAPABLE OF COMMITTING CRIMES—*Continued.* PAGE.
Rule between seven and fourteen 65
Under fourteen cannot commit rape 65
But may be principal in second degree 65
Cannot be prosecuted for defrauding creditors 66
Non compotes mentis, rule as to criminal liability of persons 66-7-8
Deaf mute cannot be convicted 68
Must be treated as non-sane 68

PERSONS SUBJECT TO THE POWER OF OATHS—
Rule as to criminal liability of 68-70
Wife, when accessory 69

PERSONS IN OFFICE, OFFENCES BY (*see* OFFENCES, ETC.) .. 108-9-10

PETTY TRESPASSES—
Where there is *bona fide* claim to the land 410

PIRACY—
Acts in force as to 89
Admiralty jurisdiction 89-90
British court, no power to punish foreigner for offence against British subject on foreign ship 91
Commissions, not necessary 89
Inland lakes of Canada within admiralty jurisdiction 92
Jurisdiction, over ships in rivers of foreign territory 90
Over British ship, though no proof of register, or ownership of vessel 90
Over vessel in harbor 91
Where sea flows between two points of land 91
Magistrates may take cognizance of all offences committed on lakes of Canada 91

PLEADING—
Acquittal on good indictment is bar to subsequent, for same offence 387
Act of Parliament, indictment on 382
Limitation or exception in distinct clause of, need not be stated 396
Against form of statute, indictment concluding 387
Amendment of indictment, not at common law 392
Defect in laying property 392
Case must be decided on indictment in amended form 393
Must be made before verdict 393
Arrest of judgment when indictment charges no offence against law 401

PLEADING—*Continued.* PAGE.

Assault, conviction of, no bar to indictment for manslaughter..... 389
Autrefois acquit, test of validity of plea..... 387
Must be in legal peril on first indictment..... 387
Trial must proceed to its legitimate conclusion by verdict... 388
Meaning of legal jeopardy..... 388
Only pleas known to law..... 388
When good..... 389
Only apply when decision on same accusation in substance.... 389
First indictment insufficiently laying property..... 389
Proof of pleas..... 389
Caption of indictment, objection to..... 399
Certainty essential to charge..... 382
Charge of offence, what sufficient..... 382
Conjunctive statement, when proper..... 384
Contra formam statuti, effect of omission of..... 387
Conviction, previous, may be good plea in bar (*see* PREVIOUS CONVICTION)..... 387
Counts joining..... 394
Demurrer..... 390-401
Pleading not guilty, when overruled..... 390
Description of offence in words of statute..... 382-3
Matter of, must be proved as laid..... 391
Duplicity..... 395
Election, when prosecutor put to..... 395
Enacting clause of statute, exception or proviso in, must be expressly negatived..... 396
Need not, if in subsequent clause..... 506
Exceptions negativing..... 396
Formal defects in indictment, when objected to..... 401
Forms of indictments intended as guides only..... 401
Use of discretionary..... 401
Homicide, indictment for, need not set forth manner of death..... 396
Indictment, when should follow words of statute..... 382-3
On statute creating new offence..... 382-3
Conjunctive statement in..... 384
Christian and surname must be stated..... 384
Obscene words must be set out..... 384
Surplusage in..... 386
Forms of..... 401
Caption, quashing..... 399
Laying previous conviction..... 400
Quashing is discretionary with court..... 400
When and for what objections the court will quash..... 400-401
Jeopardy, meaning of term..... 388

PLEADING—*Continued.* PAGE.
Jurisdiction must be submitted to before pleading 402
List of persons entitled to vote 390-91
Material allegations only require proof 386
Means of committing offence, when to be set out 397
Misjoinder of counts 394-5
Motion, quashing indictment on 400
Names must be stated in indictment 384
Objection to indictment, when taken 401
Offence created by statute 382
Indictment should bring it within statute 382-3
One plea only can be pleaded 402
Order of pleading 402
Plea, of *autrefois acquit* 387
If overruled may plead not guilty 390
Describing statute passed in two years 390
Only one can be pleaded 402
Postponement of trial on amendment of indictment 393
Previous conviction, indictment for 395
Proof need not in all cases tally with statements in indictment 391
Quashing indictment for duplicity 395
For variance between information and indictment 400
How and when quashed 400
Statute, indictment on 382-3
Creating new offence 382-3
Surplusage does not vitiate an indictment 386
Time of committing offence need not be averred 396
Trial, postponement of, on amending indictment 393
Variance, quashing indictment for 400
Venue in indictment 397
Order to change 399
In case of offences committed on carriages, etc 398-9
Voters, feloniously omitting names from list of 390-91

POISON—
Administering of 249-50

POLICE COURT—
Stealing records of 233

POLICE MAGISTRATE—
Jurisdiction of 405, 419, 472
Power of single justice to sit for 405

POOL-SELLING 345

PRACTICE—(*see* the different titles throughout the book).

PREVIOUS CONVICTION— PAGE.
Statement of, added to count for larceny 509
Indictment laying..... 509
Practice on..... 509
Certificate of..... 509

PRINCE EDWARD ISLAND—(*see* ENGLISH LAWS IN FORCE).

PRINCIPAL—
Liable for what he authorizes..... 76
Agent also liable (*see* AGENT)..... 76

PRINCIPALS—
In first degree, must be present, assisting..... 70
And participating..... 70-71-2-3
Principals in second degree..... 70
Indictment against..... 74

PRISON BREACH—
Is escape by force 187
Is of same degree as offence for which party confined..... 189
Must be actual breaking. 189
Need not be intentional..... 189
"Article or thing," in Prison Act, includes crowbar..... 189

PRIVY COUNCIL—
Appeals to..... 523
When and under what circumstances leave to appeal to, granted. 524

PRIZE FIGHTING..... 345

PROCEDURE IN CRIMINAL CASES—
Act as to..... 325

PROCESS—
Penalty under 22 Geo. II., c. 45, for suing out..... 343

PROPERTY—
Damaging, conviction for (*see* MALICIOUS INJURIES).

PROSECUTION—
All liable for act committed in prosecution of unlawful purpose. 72 *et seq.*

PROSECUTIONS—
By Crown, how they differ from civil suits..... 511

PROVINCIAL LEGISLATURE—
Conspiracy to intimidate..... 191

PUBLIC EMPLOYMENT—

PAGE.

Persons holding office in, how prosecuted 342

QUARTER SESSIONS—(*see* SESSIONS).

QUEBEC, PROVINCE OF—(*see* ENGLISH LAWS IN FORCE).

RAPE—

Age of consent (*see* INFANT).
Assault, having connection with woman who believes it is her husband is 210
Attempt to commit, may be convicted of on indictment for 60
Attempt to ravish child from ten to twelve, even if consent 213
Consent, must be absence of 210
Even in case of idiot 210
Obtaining by fraud 213
By wife under supposition that it is her husband 210
Child under ten cannot give 213
But may to render attempt no assault 213-4
Child from ten to twelve, consent is defence on charge of assaulting 213-4
Contradiction (*see* PROSECUTRIX).
Definition 210
Emission of seed need not be proved 214
Evidence, statement of prosecutrix 214
Force, necessary ingredient in 210
Constructive 210
Fraud, consent obtained by 210-11
Infant under fourteen cannot commit 64
Idiot, must be evidence that without consent of (*see* CONSENT) 213
Prosecutrix cannot be contradicted if asked as to connection with other persons 214
Wife (*see* HUSBAND).
Will, must be against 210

RECEIVING STOLEN GOODS—

Accessory, mere receipt did not constitute 272
Embezzled goods 272
Evidence of thief, convicting on 275
Felony, principal crime, must be 272
Husband adopting wife's receipt 274
Joint receipt need not be proved 273-4
Knowledge that goods stolen 274
Misdemeanor at common law 272
Mixture of grains partly stolen, receiving 273
Possession must be parted with by thief 274

RECEIVING STOLEN GOODS—*Continued.* PAGE.

Receipt must be of stolen goods 272-3
Separate receipts 273-4
Stolen goods (*see* RECEIPT).
Wife receiving in presence of husband 274
Witnesses may prove that other articles found in prisoner's possession (*see* EVIDENCE).

RECOGNIZANCE—

Enrolment of (*see* BAIL) 442

RECORD—

What is ..... 365 *et seq.*
Proof of 375
Court of, has power to fine and imprison for contempts 437
What power of fining and imprisoning necessary to constitute 476

REMAND—

By justices 415

REPEAL OF STATUTE—

When effected 54

REPLY—

Reception of evidence in 378
Right of Crown counsel to 510

RESERVATION OF POINTS OF LAW—

Act as to, only authorizes sessions to reserve case when original hearing and conviction there 447-8
No other court can interfere till case is heard and finally determined 475
Court can only decide on points raised 505
Cannot order new trial or prevent verdict from going into effect 505
What points can be reserved 505
Arrest of judgment 505

RESTITUTION—

Writ of, in case of forcible entry 154
Jurisdiction of Court of Queen's Bench as to 154-5

RETURN TO *HABEAS CORPUS*—

Disputing truth of 448

REVERSING CONVICTION—

Effect of 421

RIOT—

PAGE.

Defined 149
Difference between and unlawful assembly 149
Must relate to private quarrel 150
Three persons or more must be engaged in 150
Must be force and violence 150
And violence must be premeditated 150
Presence among rioters, does not render a person liable 151
Riot Act need not be read 151
Suppressing riot, power of private persons, and governor of colony to 151
When forcible entry amounts to 153

RIVERS—(*see* NUISANCES, HIGHWAYS, ETC.)

Benefit of obstruction immaterial 181
Capacity of, material 178
Court must decide what constitutes navigable 178
Freshet, capacity of stream in 179
Jury, under direction of court, must find whether navigable 178
Lake Ontario 178
Navigable, what are 178
Piers, indictment will not lie for erecting 180
Portages, whether stream, navigable 188
Tide, flux and reflux of, not necessary to constitute navigable water 179,180-81
Rivers above, flow of 179
Usage, immemorial, not necessary 177-8
Weirs, only prohibited in navigable rivers 181
What is navigable water 178-9
Not such as may be obstructed by ploughing and harrowing. 179
Capacity in spring freshets 179
Must be capable of transporting property 179

ROBBERY—

Aggravated larceny 231
Animus furandi necessary 232
Carrying away, necessary in 232
Definition 231
Duress, obtaining signature by 232
Election on indictment 232
Felonious taking necessary 231-2
Fear necessary ingredient 231
Must precede taking 231
Force necessary ingredient 231
Goods must be of some value 231

ROBBERY—*Continued.* PAGE.
Indictment, election on ... 232
Several counts in ... 232
Person, goods must be taken from ... 231
Presence, goods must be taken in ... 231
Sudden taking, when robbery ... 231
Taking, actual, necessary ... 232
Value, goods must be of some ... 231
Will, goods must be taken against ... 231

ROUT—
How distinguished from riot (*see* RIOT).

SAILORS—(*see* SEDUCING SOLDIERS, ETC.)

SALE—
Of office (*see* OFFICE, OFFENCES BY PERSONS IN).

SEDUCING SOLDIERS OR SAILORS TO DESERT—
Act now in force, how construed ... 86
Imprisonment under ... 86
Trial by court of Oyer and Terminer ... 86-7
Summary conviction of offender ... 87
Indictment, when not sufficiently certain or precise ... 87
Mutiny Act of '67, to whom it relates ... 87-8
Warrant of commitment ... 88
Soldier must first answer to constituted tribunals ... 88
Volunteer triable by court martial ... 88
Foreign vessels ... 88-9

SENTENCE—
Of death, warrant to execute ... 518
Of prisoner convicted of felony ... 518

SESSIONS—
Jurisdiction and powers of ... 472 to 474
Is court of Oyer and Terminer ... 473
Can alter judgments at same sessions or sittings ... 474-5
Adjourn, has general power to ... 473-4
Cannot make any order except during the sessions, regular or adjourned ... 474
Bench warrant, seal to ... 475
Attorney acting as advocate in ... 475
When case stated for opinion of superior court, jurisdiction gone 475-6
May fine and imprison for contempt ... 476
Awarding costs on discharging appeal ... 446

PAGE.

SMUGGLING—(*see* CUSTOMS OFFENCES).

SOLDIERS—(*see* SEDUCING SOLDIERS, ETC.)

STATUTES—

Annotations of miscellaneous ..... 317 *et seq.*
Construction of—(*see* CONSTRUCTION OF STATUTES) ..... 317 *et seq.*
Court will judicially notice public 377
What are public 377-8
Various 343

STATUTE LABOR—(*see* HIGHWAY).

STEALING FROM THE PERSON 252-3

STRIKES—

Act as to 116
Construction of—(*see* MONOPOLY) 116-7

SUBORNATION OF PERJURY—(*see* PERJURY) 298

SUMMARY ADMINISTRATION—

Of criminal justice ..... 325 *et seq.*
Act 32 & 33 Vic., c. 32, as to 325
Extension of to various provinces 325-6
Commitment under 326
Conviction under ..... 326 *et seq.*
Impeaching proceedings 327
Decisions as to collected ..... 325 *et seq.*

SUMMARY CONVICTIONS—(*see* PRACTICE, JUSTICES' CONVICTIONS, ETC.)

SUMMONS—

Proof of service of 461

SUNDAY—(*see* LORD'S DAY).

SURETIES TO KEEP PEACE—

Final commitment for want of 429
What is 429-30
Should show date 429-30

SUSPENSION OF CIVIL REMEDY—(*see* CRIMES).

TELEGRAPHIC DESPATCH—

Divulging contents of 340
Con. Stats. Can., c. 67, s. 16, does not apply between third parties 341

TEMPERANCE ACT—(*see* LIQUOR). PAGE.

TITLES—
Selling pretended ..... 121 *et seq.*

TOLLS ON ROADS OF JOINT-STOCK COMPANIES—
R. S. O., c. 153 330
Place of worship, going to, or returning from 330
Waggon conveying manure 330-1
Conviction under, what it must set out 331-2
No offence to exact tolls fixed by commissioners 331
If once acquitted on appeal, no *certiorari* 332

TRADES' UNION ACT 116-7

TRIAL—
Objections at 379, 507
Should be noted by judge 507-8
Adjournment of, granted for illness of counsel 507

UNLAWFUL ASSEMBLY—
Assemblage of persons to witness prize fight is 151
How distinguished from riot—(*see* RIOT) 149

UNLAWFUL PURPOSE—
All liable for acts committed in prosecution of 70-71-2-3

VAGRANCY—
Act 32 & 33 Vic., c. 28, as to 330
Extended to various provinces 340
Maintain obligation to 340
Ability 440
Wife when 340
Witness not competent 340
Child 340
Servant 340
Others 340
Conviction should show that person asked to give account of himself 339
Evidence should show where person found 339
And that person is common prostitute 339

VARIANCE—
On indictment for nuisance to a highway 183

VENIRE DE NOVO—

PAGE.

Where verdict uncertain and ambiguous ... 517
In case of improper disallowance of challenge ... 516
In case of mis-trial ... 516
Distinction between, and new trial ... 516
In case of abortive trial for misdemeanor or felony ... 517
After verdict, on charge of felony upon a good indictment before competent tribunal, etc ... 517

VENIRE FACIAS—

Award of ... 488-9

VENUE—

Of legal proceedings ... 397

VERDICT—

Ambiguous or uncertain ... 503-4
Recommendation to mercy, no part of ... 504
Court should be careful that it is unanimous ... 504
May be corrected before recorded ... 504
Counsel questioning jury as to grounds of ... 504
Right to find general ... 504
Recording on Sunday ... 504

VIEW—

Always discretionary to grant, in criminal cases ... 506-7
Evidence, now taken on ... 506

WARRANT (*see* COMMITMENT)—

Amendment of ... 426
Setting forth day and year when made, and authority of magistrate ... 429
Direction of ... 413
Though irregular, it is justification ... 414
Is only *prima facie* evidence of its contents ... 413
Of commitment for indefinite time ... 432
Should show place where offence committed ... 425
Technical precision of indictment not required ... 425
Not sufficient to call the offence a felony or misdemeanor ... 425
Particularity in ... 424-5
One or two justices issuing and signing ... 427
How justice compelled to issue ... 427-8
To execute sentence of death ... 518
Backing warrant ... 414

WIFE— PAGE.
Accessory, when may be..... 69
Criminal liability of..... 68-9-70
Neglecting to provide for..... 324

WITHDRAWING—
Complaint for assault..... 410

WITNESSES—(*see* EVIDENCE).

THE END.

PRINTED BY THE GLOBE PRINTING COMPANY, TORONTO, ONT.