TRIAL OF JOINT RECEIVERS.

715. If, upon the trial of two or more persons indicted for jointly receiving any property, it is proved that one or more of such persons separately received any part or parts of such property, the jury may convict, upon such indictment, such of the said persons as are proved to have received any part or parts of such property. R. S. C. c. 174, s. 200. 24-25 V. c. 96, s. 94, (Imp.).

See s. 314, *et seq.*, as to the offence of receiving stolen goods.

PROCEEDINGS AGAINST RECEIVERS.

716. When proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given, at any stage of the proceedings, that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property which forms the subject of the proceedings taken against him to be stolen: Provided, that not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such other property, stolen within the preceding period of twelve months, having been found in his possession; and such notice shall specify the nature or description of such other property, and the person from whom the same was stolen. R. S. C. c. 174, s. 203. 34-35 V. c. 112, s. 19, (Imp.).

See s. 314, *et seq.*, for the offence of receiving stolen goods.

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

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

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

of the indictment: R. v. Drage, 14 Cox, 85; R. v. Carter, 15 Cox, 448, Warb. Lead. Cas. 183.

THE SAME AFTER PREVIOUS CONVICTION.

717. When proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has, within five years immediately preceding, been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen: Provided, that not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary, for the purposes of this section, to charge in the indictment the previous conviction of the person so accused. R. S. C. c. 174, s. 204. 34-35 V. c. 112, s. 19 (Imp.).

See s. 314, *et seq.*, as to the offence of receiving stolen goods.

EVIDENCE UNDER SECTIONS 460, ET SEQ.

718. Upon the trial of any person accused of any offence respecting the currency or coin, or against the provisions of Part XXXV., no difference in the date or year or in any legend marked upon the lawful coin described in the indictment, and the date or year or legend marked upon the false coin counterfeited to resemble or pass for such lawful coin, or upon any die, plate, press, tool or instrument used, constructed, devised, adapted or designed for the purpose of counterfeiting or imitating any such lawful coin, shall be considered a just or lawful cause or reason for acquitting any such person of such offence; and it shall, in any case, be sufficient to prove such general resemblance to the lawful coin as will show an intention that the counterfeit should pass for it. R. S. C. c. 174, s. 205.

See s. 460, *et seq.*, for offences relating to the coin. This s. 718 is not in the English Act. It was s. 31 of 32 & 33 V. c. 18 of Canada.

719. Verdict in case of libel, *see ante*, under s. 302, p. 305.

IMPOUNDING DOCUMENTS.

720. Whenever any instrument which has been forged or fraudulently altered is admitted in evidence the court or the judge or person who admits the same may, at the request of any person against whom the same is admitted in evidence, direct that the same shall be impounded and kept in the custody of some officer of the court or other proper person for such period and subject to such conditions, as to the court, judge or person admitting the same seems meet. R. S. C. c. 174, s. 208.

This clause is not in the Imperial statutes. It was originally taken from c. 101, s. 2, C. S. U. C; *see* s. 569, s-s. 5.

DESTROYING COUNTERFEIT COIN.

721. If any false or counterfeit coin is produced on any trial for an offence against Part XXXV., the court shall order the same to be cut in pieces in open court, or in the presence of a justice of the peace, and then delivered to or for the lawful owner thereof, if such owner claims the same. R. S. C. c. 174, s. 209.

See ss. 460, *et seq.*, as to offences relating to the coin, and s. 569, s-s. 6, as to search warrant. The repealed clause applied to all courts. This one applies only to criminal courts.

VIEW.

722. On the trial of any person for an offence *against this Act* the court may, if it appears expedient for the ends of justice, at any time after the jurors have been sworn to try the case and before they give their verdict, direct that the jury shall have a view of any place, thing or person, and shall give directions as to the manner in which, and the persons by whom, the place, thing or person shall be shown to such jurors, and may for that purpose adjourn the trial and the costs occasioned thereby shall be in the discretion of the court. R. S. C. c. 174, s. 171.

2. When such view is ordered, the court shall give such directions as seem requisite for the purpose of preventing undue communication with such jurors: Provided that no breach of any such directions shall affect the validity of the proceedings. R. S. C. c. 174, ss. 171, 172.

This is more a re-enactment of the Imperial Act, 39 & 40 V. c. 18, s. 11, (for Ireland) than of s. 171, c. 174, R. S. C. *Quære*, if evidence is improperly received by the jury during such view: R. v. Martin, 12 Cox, 204. View ordered in R. v. Whalley, 2 Cox, 231 (*see* this case as to forms); *Anon*, 2 Chit. Rep. 422. If witnesses accompany the jury so as to give explanations to them the prisoner has a right to be present: *see* R. v. Petrie, 20 O. R. 317.

VARIANCE AND AMENDMENTS AT TRIAL.

723. If on the trial of any indictment there appears to be a variance between the evidence given and the charge in any count in the indictment, either as found or as amended, or as it would have been if amended in conformity with any particular supplied as provided in sections six hundred and fifteen and six hundred and seventeen, the court before which the case is tried may, if of opinion that the accused has not been misled or prejudiced in his

defence by such variance, amend the indictment or any count in it or any such particular so as to make it conformable with the proof.

2. If it appears that the indictment has been preferred under some other Act of Parliament instead of under this Act, or under this instead of under some other Act, or that there is in the indictment, or in any count in it, an omission to state or a defective statement of anything requisite to constitute the offence, or an omission to negative any exception which ought to have been negatived, but that the matter omitted is proved by the evidence, the court before which the trial takes place, if of opinion that the accused has not been misled or prejudiced in his defence by such error or omission, shall amend the indictment or count as may be necessary.

3. The trial in either of these cases may then proceed in all respects as if the indictment or count had been originally framed as amended: Provided that if the court is of opinion that the accused has been misled or prejudiced in his defence by any such variance, error, omission or defective statement, but that the effect of such misleading or prejudice might be removed by adjourning or postponing the trial, the court may in its discretion make the amendment and adjourn the trial to a future day in the same sittings, or discharge the jury and postpone the trial to the next sittings of the court, on such terms as it thinks just.

4. In determining whether the accused has been misled or prejudiced in his defence the court which has to determine the question shall consider the contents of the depositions, as well as the other circumstances of the case.

5. Provided that the propriety of making or refusing to make any such amendment shall be deemed a question for the court, and that the decision of the court upon it may be reserved for the Court of Appeal, or may be brought before the Court of Appeal like any other decision on a point of law. R. S. C. c. 174, ss. 237, 238, 239. (*Amended*).

AMENDMENT TO BE ENDORSED.

724. In case an order for amendment as provided for in the next preceding section is made it shall be endorsed on the record; and all other rolls and proceedings connected therewith shall be amended accordingly by the proper officer and filed with the indictment, among the proper records of the court. R. S. C. c. 174, s. 240.

FORMAL RECORD IN SUCH CASE.

725. If it becomes necessary to draw up a formal record in any case in which an amendment has been made as aforesaid, such record shall be drawn up in the form in which the indictment remained after the amendment was made, without taking any notice of the fact of such amendment having been made. R. S. C. c. 174, s. 243.

These clauses are taken with alterations from the 14 & 15 V. c. 100, of the Imperial statutes (Lord Campbell's Act), in relation to which Greaves remarks :—

"This is one of the most important sections in the Act, and, if the power given by it be properly exercised, will

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

"The provisions as to the amendment of variances in criminal cases have been gradually extended. The first statute which introduced the power of amendment was the 9 Geo. IV. c. 15, which empowered any judge at *nisi prius*, or any court of oyer and terminer and general gaol delivery, to amend any variance, in cases of misdemeanour, between any matter *in writing or in print*, and the recital thereof on the record. After this statute had been in opera-

tion for the full period of twenty years, and no injurious consequences had been found to arise from it, the 11 & 12 V. c. 46, s. 4, empowered any court of oyer and terminer and general gaol delivery to amend any variance, *in any offence whatever, between any matter in writing or in print* and the recital thereof on the record. And the provisions of this Act were extended to the sessions, as far as they are applicable to offences within their jurisdiction, by the 12 & 13 V. c. 45, s. 10."

"As these enactments only applied to variances between matters in writing and the record a very numerous class of variances was left unprovided for, and the first clause in this Act was intended to apply to all such variances."

"It is to be carefully noticed, also, that an amendment is only prohibited where the defendant may be prejudiced in his defence upon the merits, not in his defence simply. (S. 723 is to be read, it is assumed, as if the words "upon the merits" were therein inserted after "defence" in the eighth line.) Indeed, wherever any variance occurs which makes an amendment necessary it may be truly said that the defendant may be prejudiced in his defence by making it, for if the amendment be not made the defendant would be entitled to be acquitted. The prejudice, therefore, to the defendant, which is to prevent an amendment, is properly confined to a prejudice in his defence *upon the merits*, which plainly means a substantial, and not a formal or technical, defence to the charge made against him."

"With regard to the cases in which an amendment ought to be made or refused, as the questions whether the variance be material to the merits of the case, and whether the defendant may be prejudiced in his defence on the merits by making an amendment, are questions which must necessarily depend on the particular charge and particular circumstances of each case, it is impossible to lay down any general rule by which the court may be guided in all cases; indeed it is very possible that the very same iden-

tical variance which ought unquestionably to be amended in one case, ought just as clearly not to be amended in another, as it may so happen that the amendment in the one case could not possibly prejudice the prisoner in his defence on the merits, but in the other might materially prejudice the prisoner in such defence."

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

"Before determining upon making an amendment the court should receive all the evidence applicable to the particular point, otherwise it might happen that that which appeared to be a variance upon the evidence at one stage of the trial might afterwards be shewn to be no variance by the evidence at a later period of the trial; and if the court were to amend on the evidence at the earlier period,

it would be obliged to direct an acquittal upon the evidence at the subsequent period, for *the clause gives no power to amend the same identical particular more than once.*"

"Again, in order to ascertain whether the prisoner may be prejudiced in his defence by the amendment, the court ought to look, not only to the facts in evidence on the part of the prosecution at the time when the amendment is applied for, but also to the defence already set up, or intended to be set up; for which purpose it may, perhaps, in some cases be necessary to examine a witness or two on behalf of the defendant and the contents of the depositions: s. 723 s-s. 4."

"It must be remembered that the question is one entirely for the court, and that the court must decide it itself; and, generally speaking, where this is the case the court will not determine the question before it on the evidence on one side, but will permit the other side immediately to introduce any evidence that may bear upon the question, so that the whole facts relating to the particular question may be before the court at once."

"Thus—to mention an analogous case—where the plaintiff proposed to put in evidence an account signed by the defendant, and the defendant proposed to exclude the account, on the ground that it had been delivered to the plaintiff, an attorney, in his character of attorney for the defendant, Erle, J., held that the defendant was entitled immediately to put in a letter, and call a witness to prove that the account was so delivered, though the plaintiff's case was not closed: Cleave v. Jones, Hereford Summer Assizes, 1851. It must be noticed, also, that the power to amend clearly does not extend to altering the charge in the indictment from one offence to another offence. For instance, an indictment for 'forging' could not be altered into an indictment for 'uttering,' nor an indictment for 'stealing' into an indictment for 'obtaining by false pretenses.'"

"Equally clear is it that the amendment ought not to be made so to apply to a different transaction. Every offence, however simple it may be, consists of a number of particulars; it must have time, and place, and its component parts, all of which together constitute one individual transaction. Now the real meaning of the clause is that, provided you keep to the same identical transaction, you may amend any such error as is mentioned in the clause as to one or more of the particulars included in such transaction. For instance, a burglary is charged in the house of James Jones, in the parish of Winkill, and stealing the goods of John Jeffs. The evidence shows that a burglary was committed in every respect as alleged, except that the goods were the property of James Jeffs. There an amendment would clearly be right. But suppose, instead of such a case, it was proposed to prove a burglary at another time, at another place in another man's house, and the stealing of other goods; this clearly would not be a case for amendment. The proper mode to consider the question is this: the grand jury have had evidence of one transaction upon which they found the bill; the case before the petty jury ought to be confined to the same transaction, but if it is, it may turn out that, either through insufficient investigation or otherwise, the grand jury have been in error as to some particular or other, and upon the trial the error is discovered. Now this is just the case to which the clause applies. A civil case may afford an apt illustration. The plaintiffs declared on a promissory note for £250, made by *the defendant*, dated the 9th of November, 1838, payable to the plaintiffs, or their order, on *demand*; the defendant pleaded that he did not make the note; the plaintiffs proved on the trial a *joint and several* promissory note for £250, made by the defendant *and his wife*, dated the 6th of November, payable *twelve months after date*, with interest. There was no proof of the existence of any other note. Although it was objected that there was a material variance in the substantial parts of the note, the date, the parties, and the period

of its duration, it was held that the declaration was properly amended so as to make it correspond with the note produced; for it was a mere misdescription, and it was just the case in which the Legislature intended that the discretionary power of amendment should be exercised: Beckett v. Dutton, 7 M. &. W. 157."

"The following appear to be the sort of variances which are amendable. In an indictment for bigamy, a woman described as a 'widow' who is proved to be unmarried: R. v. Deeley, 1 Moo. 303; or as 'Ann Gooding,' where the register described her as 'Sarah Ann Gooding': R. v. Gooding, Car. & M. 297. In an indictment for night poaching describing a wood as 'The Old Walk,' its real name being 'The Long Walk': R. v. Owen, 1 Moo. 118. In an indictment for stealing 'a cow,' which was 'a heifer'; Cooke's case, 1 Leach, 105; 'a sheep," which turned out to be 'a lamb': R. v. Loom, 1 Moo. 160; or 'ewe': R. v. Puddifoot, 1 Moo. 247; 'a filly,' which was a 'mare': R. v. Jones, 2 Russ. 364; 'a spade,' which turned out to be the iron part without any handle: R. v. Stiles, 2 Russ. 316. So in an indictment for a nuisance, by not repairing, or by obstructing a highway, the termini of the highway might be amended. So where an indictment alleges a burglary, or house-breaking, in the parish of St. Peter, in the county of W., and it appears that only part of the parish is situated in such county, the indictment may be amended: R. v. Brookes, Car. & M. 543; R. v. Jackson, 2 Russ. 49, 76."

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

the same, and liable to the same punishment, is obviously as different as if it were different in law, and liable to a different punishment."

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

"It has been well laid down by a great judge, that the fairest test of whether a defendant can be prejudiced by an amendment is this: 'Supposing the defendant comes with evidence that would enable him to meet the case as it stands on the record unamended would the same enable him to meet it as amended': *per* Rolfe, B., Cooke v. Stratford, 13 M. & W. 379. If whatever would be available as a defence under the indictment, as it originally stood, would be equally so after the alteration was made, and any evidence the defendant might have would be equally applicable to the indictment in the one form as in the other, the amendment would not be one by which the defendant could be prejudiced in his defence, or in a matter material to the merits: Gurford v. Bayley, 3 M. & G. 781. If the transaction is not altered by the amendment, but remains precisely the same, the amendment ought to be allowed: Cooke v. Stratford, 13 M. & W. 379. But if the amendment would substitute a different transaction from that alleged it ought not to be made: Perry v. Watts, 3 M. & G. 775; Brashier v. Jackson, 6 M. & W. 549; and the court will look at all the circumstances of the case to ascertain whether the transaction would be changed by the amendment. If the amendment would render it necessary to plead a different plea the amendment ought not to be made: Perry v. Watts, 3 M. & G. 775; Brashier v. Jackson, 6 M. & W. 549."

"It was laid down in two cases of perjury, which were tried some years ago, that amendments in criminal cases

ought to be made sparingly under the 9 Geo. IV. c. 15; R. v. Cooke, 7 C. & P. 559; R. v. Hewins, 9 C. & P. 786. These cases occurred at a time when amendments in criminal cases were looked upon with great disfavour; but the opinion of the Legislature, evidenced by the 11 & 12 V. c. 46, s. 4, the 12 & 13 V. c. 45, s. 10, and the present statute, clearly is in favour of amendments being made in all cases where the amendment is not material to the merits, and the prisoner is not prejudiced by it. In civil suits, the 9 Geo. IV. c. 15, and the 3 & 4 Wm. IV. c. 42, s. 23, *being remedial acts*, have always received a liberal construction; Smith v. Brandram, 2 M. & G. 244; Smith v. Knowlden, 2 M. & G. 561; Sainsbury v. Matthews, 4 M. & W. 343; and it has been held, that the fact of an action being a harsh and oppressive proceeding on the part of a landlord, who was taking advantage of a forfeiture in order to get possession of property on which the defendant had laid out a large sum of money, was not a consideration which ought to influence a judge against allowing an amendment; for if the amendment did not prejudice the defendant in his defence it ought to be allowed: *Doe d.* Marriott v. Edwards, 5 B. & Ad. 1065. . . . . "The amendment must be made in the course of the trial, and certainly before the jury give their verdict, because the trial is to proceed and the jury are to give their opinion upon the amended record: *per* Alderson, B., Brashier v. Jackson, 6 M. & W. 549. It would be better, indeed, in all cases to make it immediately before any further evidence is given, and where the amendment is ordered in the course of the case for the prosecution it certainly should be made before the defence begins, for it is to the amended record that the defence is to be made."

In England the provision re-enacted in s. 725, *ante*, applies to all amendments including those made in virtue of the enactment re-produced in s. 629, *ante;* but it is clear that the substitution of the words "as aforesaid" in the said s. 725 of our Act for the words "under the provi-

sions of this Act" in the English corresponding clause has the effect of rendering the enactment of s. 725 not applicable to amendments made under the said s. 629, and that in the case of such an amendment having been made it must so appear if a formal record has to be drawn up.

Sub-section 2 of s. 723 extends the power of amendment to a very large extent. In practice, however, it may not be acted upon frequently. If the indictment charges no offence the courts will not replace the grand jury. And it will not often happen that a case will come to trial before it is discovered that the indictment is so defective that it really charges no offence. Should that happen, all that the counsel for the defence has to do, is not then to notice the defect at all. If a verdict is given against his client the objection will be open to him on arrest of judgment: s. 733. The court, on that motion, will not have power to make amendments of which no mention has been made before the verdict.

Sub-section 5 of s. 723 makes the propriety of making or refusing to make any such amendment a question for the court: it does not seem clear how it could ever have been a question for the jury.

The right to reserve a case upon such an amendment is *new*. Any decision upon such a question was always held not to be a question of law but one entirely in the discretion of the judge.

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

"It has been well laid down by a very learned judge (Byles, J., in R. v. Welton, 9 Cox, 297,) that a statute like the 14 & 15 V. c. 100, should have a wide construction, and should not be interpreted in favour of technical strictness, and there are very strong reasons why a liberal construction should be made on such a statute. If a prisoner is acquitted on the ground of a variance he may be again more correctly indicted, and wherever this course is adopted

the effect of an acquittal on such a variance is to put both the prosecutor and prisoner to additional trouble and expense. And in case where no fresh indictment is preferred the result is that the costs of the prosecution are thrown away, and an offender, possibly a very notorious one, escapes the punishment he deserves. In every case where an acquittal takes place in consequence of a variance the court may order a fresh indictment to be preferred, and the prisoner to be detained in prison or admitted to bail till it is tried, and it may be well for the court, where a variance occurs, to consider whether the prisoner might not fairly be presented with the option either of having the amendment made or of being indicted anew in a better form."

In R. v. Russel, 1 Moo. 356, the prisoner consented to a sentence though he had been unlawfully convicted, and the court sentenced him accordingly.

WHEN THE AMENDMENT MUST BE MADE.

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

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

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

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

DECISIONS ON THE STATUTE.

The clause gives no power to amend the same identical particular more than once, and the court will not amend an amendment: R. v. Barnes, L. R. 1 C. C. R. 45.

And when an indictment is amended at the trial the court of Crown cases reserved cannot consider it as it originally stood, but only in its amended form: R. v. Pritchard, L. & C. 34; R. v. Webster, L. & C. 77.

Under this statute, an amendment in the name of the owner of stolen property, by substituting a different owner than the one alleged, may be made at the trial: R. v. Vincent, 2 Den. 464; R. v. Senecal, 8 L. C. J. 287; *see* Cornwall v. R., 33 U. C. Q. B. 106, and R. v. Jackson, 19 U. C. C. P. 280.

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

An indictment alleged that a footway led from a turnpike-road into the town of Gravesend, but the highway was

a carriage way from the turnpike-road to the top of Orme House Hill, and from thence to Gravesend it was a footway, and the nuisance alleged was between the top of Orme House Hill and Gravesend; it was held that the indictment might be amended by substituting a description of a footway running from Orme House Hill to Gravesend as this appeared to be the very sort of case for which the statute provides: R. v. Sturge, 3 E. & B. 734.

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

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

In an indictment for perjury the perjury was alleged to have been committed at a petty sessions of the peace, at Tiverton, in the county of Devon, before John Lane and Samuel Garth, then respectively being justices of the peace assigned to keep the peace in and for *the said county*, and acting in and for the borough of Tiverton, in the said county. It appeared by the proof that these gentlemen were justices for the borough of Tiverton only, and were not justices for the county. Blackburn, J., allowed the indictment to be amended by striking out the words, *the said county*, so as to make the averment be, "justices assigned to keep the peace in and for, and acting in and for the borough of Tiverton, in the said county." The court of criminal appeal held that the judge had power so to amend: R. v. Western, 11 Cox, 93.

The secretary of a friendly society, of which A. B. and others were the trustees, was charged with embezzling

money belonging to the society. In the indictment, the property was laid as of "A. B. and others," without alleging that they were trustees of the society: *held*, that the indictment might be amended by adding the words, "trustees of:" R. v Marks, 10 Cox, 367; *see* R. v. Senecal, 8 L. C. J. 287.

The description of an Act of parliament in an indictment may be amended: R. v. Westley, Bell, 193.

In an indictment for larceny of property belonging to a banking company the property was laid to be in the manager of the bank; the banking business was carried on by a joint-stock banking company, and there were more than twenty partners or shareholders. The judge amended the indictment by stating the property to be in "W. (one of the partners) and others:" *held*, that this amendment was right: R. v. Pritchard, L. & C. 34, 8 Cox, 461.

But an amendment changing the offence charged to another offence should not be allowed. Where the prisoner was indicted for a statutable felonious forgery, but the evidence only sustained a forgery at common law, the prosecutor was not allowed to amend the indictment by striking out the word "feloniously," and thus convert a charge of felony into one of misdemeanour: R. v. Wright, 2 F. & F. 320.

So upon an indictment for having carnal knowledge of a girl between ten and twelve years of age, it appearing by the proof that she was under ten, Maule, J., held that the indictment could not be amended: R. v. Shott, 3 C. & K. 206.

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

When an indictment against two bankrupts alleged that they embezzled a part of their personal estate to the value of £10—to wit, certain bank-notes and certain

moneys, and it rather seemed that the money converted was foreign money, it was held that "moneys" meant English moneys, and the court refused to amend the indictment: R. v. Davison, 7 Cox, 158. But Greaves is of opinion that the case seems to be one in which an amendment clearly might have been made: 3 Russ. 327.

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

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

Where, in an indictment for false pretenses, the words "with intent to defraud" are omitted, the indictment is bad, and cannot be amended under this statute: *per* Lush, J., R. v. James, 12 Cox, 127. The form given in form F. F. schedule one under s. 611, *ante*, omits the words "with intent to defraud."

An indictment charged the prisoner with stealing nineteen shillings and sixpence. At the trial, it was objected by the prisoner's counsel that there was no case, for the evidence showed that if the prisoner was guilty of stealing anything it was of stealing a sovereign. Thereupon the court amended the indictment by striking out the words nineteen shillings and sixpence," and inserting in lieu thereof "one sovereign." The jury found the prisoner guilty of

stealing a sovereign: *held*, that the court had power to amend under the 14 & 15 V. c. 100, s. 1: R. v. Gumble, 12 Cox, 248.

The words "with intent to defraud" allowed to be struck out of an indictment: R. v. Cronin, 36 U. C. Q. B. 342.

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

Where two or more names are laid in an indictment under an *alias dictum*, proof of one only will be sufficient: R. v. Jacobs, 16 S. C. R. 433.

FORM OF RECORD.

726. In making up the record of any conviction or acquittal on any indictment it shall be sufficient to copy the indictment with the plea pleaded thereto, without any formal caption or heading; and the statement of the arraignment and the proceedings subsequent thereto shall be entered of record in the same manner as before the passing of this Act, subject to any such alterations in the forms of such entry as are, from time to time, prescribed by any rule or rules of the superior courts of criminal jurisdiction respectively,—which rules shall also apply to such inferior courts of criminal jurisdiction as are therein designated. R. S. C. c. 174, s. 244.

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

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

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

2ndly. The grand jurors by whom it was found.

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

(*These three particulars form the caption.*)

4thly. The indictment.

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

6thly. The arraignment.

7thly. The plea.

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

9thly. The award of the jury process.

10thly. The verdict.

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

12thly. The sentence.

It is probably now only to prove *autrefois acquit or autrefois convict* that it will be necessary to draw up a formal record, as ss. 694, 695 and 743 take away the necessity of so doing in the other cases where it could have been wanted.

The necessity of a formal caption or heading to a made-up record is taken away by section 726.

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

The form of the caption is as follows:

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

District of Quebec.—Be it remembered, that at a term of the Court of Queen's Bench, crown side, holden at the

city of Quebec, in and for the said district of Quebec, on the day of , (*the first day of the term,*) in the year of our Lord , upon the oath of (*insert the names of the grand jurors*) good and lawful men of the said district, now here sworn and charged to inquire for our Sovereign Lady the Queen, and for the body of the said district, it is presented in the manner following, that is to say: (*this ends the caption*).

Then the record continues to recite the indictment, etc., as follows, and by s. 726, may commence here:

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

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

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

Then the record, when made up, instead of the words "whereupon the sheriff of the aforesaid district is commanded," etc., as in the above form, must read "Where-

upon, to wit, on the said day of , at the same term of the said Court of Queen's Bench, before the said Court of Queen's Bench here cometh the said John Jones under the custody of William Brown, Esquire, sheriff of the district aforesaid (in whose custody, in the gaol of the district aforesaid, he stood before committed)," etc.

In the report of the case of Mansell v. R., Dears & B. 375, may be seen a lengthy form of a record with all the proceedings on the challenges of jurors; also in R. v. Fox, 10 Cox, 502; Whelan v. R., 28 U. C. Q. B. 2; Holloway v. R., 2 Den. 289; and 4 Blacks. Appendix.

By s. 673 no formal adjournment need be entered.

In the case of Whelan v. R., cited *supra*, it was held in Upper Canada that if, notwithstanding s. 52, c. 99, Con. Stat. Can), (now s. 726 of this Code) a formal caption is prefixed to the indictment this caption may be rejected if it proves defective.

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

JURY RETIRING.

727. If the jury retire to consider their verdict they shall be kept under the charge of an officer of the court in some private place, and no person other than the officer of the court who has charge of them shall be permitted to speak or to communicate in any way with any of the jury without the leave of the court.

2. Disobedience to the directions of this section shall not affect the validity of the proceedings: Provided that if such disobedience is discovered before the verdict of the jury is returned the court, if it is of opinion that such disobedience has produced substantial mischief, may discharge the jury and direct a new jury to be sworn or empanelled during the sitting of the court, or postpone the trial on such terms as justice may require.

JURY UNABLE TO AGREE.

728. If the court is satisfied that the jury are unable to agree upon their verdict, and that further detention would be useless, it may in its discretion discharge them and direct a new jury to be empanelled during the sittings of the court, or may postone the trial on such terms as justice may require.

2. It shall not be lawful for any court to review the exercise of this discretion.

PROCEEDINGS ON SUNDAY.

729. The taking of the verdict of the jury or other proceeding of the court shall not be invalid by reason of its happening on Sunday.

See remarks, *ante*, under s. 675. S. 729 removes a doubt that was raised in Winsor v. R., 10 Cox, 276; and R. v. Cropper, 2 Moo. 18.

The closing of the term discharges the jury from giving a verdict, and the defendant may be tried again: Newton's Case, 13 Q. B. 716; 3 Wharton, 3168.

That a witness is not sufficiently advanced in years or religiously instructed to understand the nature of an oath, if found out only after the jury has been sworn, is no ground for discharging a jury and ordering the trial to be postponed: R. v. Wade, 1 Moo. 86; R. v. Oulaghan, Jebb, 270. The case of R. v. White, 1 Leach, 430, does not support the summary given by the reporter.

JURY DE VENTRE INSPICIENDO.

730. If sentence of death is passed upon any woman she may move in arrest of execution on the ground that she is pregnant. If such a motion is made the court shall direct one or more registered medical practitioners to be sworn to examine the woman *in some private place*, either together or successively, and to inquire whether she is with child of a quick child or not. If upon the report of *any of them* it appears to the court that she is so with child execution shall be arrested till she is delivered of a child, or until it is no longer possible in the course of nature that she should be so delivered.

731. After the commencement of this Act no jury *de ventre inspiciendo* shall be empanelled or sworn.

This is the law in Ireland, 39 & 40 V. c. 78, s. 13, with the exception of the words "in some private place" which, it seems, were thought necessary in Canada. The oath to be administered to the medical practitioner or practitioners in open court may be as follows:

"You swear that you will search and try the prisoner at the bar whether she be with child of a quick child or not, and thereof a true verdict give according to your skill and understanding. So help you God." Quick with child is having conceived; with quick child is when the child is quickened: *per* Gurney, B., in R. v. Wycherley,

8 C. & P. 262; *see* R. v. Russell, 1 Moo. 356, and the reporter's note to R. v. Wycherley, *ubi supra*. S. 730 would seem to allow of the execution of a pregnant woman if the child has not quickened. That construction no court would give however. The law of England does not punish fœticide as a crime but it does not authorize it or legalise it. As a jury of matrons always did, formerly, the medical practitioner will always, when the woman is pregnant, report that she is with child of a quick child. *Enceinte* with a quick child, or quick with child, mean the same thing, says 2 Hale, 413. After the woman has been delivered, or when the time within which in the course of nature she should have been delivered, has elapsed she must be brought into court again to be sentenced *de novo*, or that a day be fixed for her execution: 1 Hale, 368. She could not, at common law, plead pregnancy a second time; but under s. 730 it seems that it could now be done.

NOLLE PROSEQUI. (*New*).

732. The Attorney-General may, at any time after an indictment has been found against any person for any offence, and before judgment is given thereon, direct the officer of the court to make on the record an entry that the proceedings are stayed by his direction, and on such entry being made all such proceedings shall be stayed accordingly.

2. The Attorney-General may delegate such power in any particular court to any counsel nominated by him.

The words "Attorney-General" include the Solicitor-General, s. 3.

On an indictment for a public nuisance or any offence of a public nature, or in which the public have an interest, the Attorney-General can proceed with the case if the private prosecutor refuses or neglects to do so: R. v. Wood, 3 B. & Ad. 657.

The Attorney-General may in his discretion, and should as a general rule, not give such a direction at the request of the defendant without hearing the private prosecutor, if any there is: R. v. Allen, 1 B. & S. 850; 1 Chit. 479; *see* R. v. Rowlands, 2 Den. 364.

A *nolle prosequi* does not operate as an acquittal, and a fresh indictment may be preferred; but it puts an end to the indictment upon which it is fyled: R. v. Mitchell, 3 Cox, 93, and cases there cited. There is no plea of *lis pendens* or *autrefois arraigned* allowed in criminal cases, and that an indictment for the same offence is pending is no bar. The court will see that the defendant is not punished twice or unjustly harassed: *see* R. v. Sirois, 27 N. B. Rep. 610.

MOTION IN ARREST OF JUDGMENT.

733. If the jury find the accused guilty, or if the accused pleads guilty, the judge presiding at the trial shall ask him whether he has anything to say why sentence should not be passed upon him according to law; but the omission so to ask shall have no effect on the validity of the proceedings.

2. The accused may at any time before sentence move in arrest of judgment on the ground that the indictment does not (after any amendment which the court is willing to and has power to make) state any indictable offence.

3. The court may in its discretion either hear and determine the matter during the same sittings or reserve the matter for the Court of Appeal as herein provided. If the court decides in favour of the accused, he shall be discharged from that indictment. If no such motion is made, or if the court decides against the accused upon such motion, the court may sentence the accused during the sittings of the court, or the court may in its discretion discharge him on his own recognizance, or on that of such sureties as the court thinks fit, or both, to appear and receive judgment at some future court or when called upon. If sentence is not passed during the sitting, the judge of any superior court before which the person so convicted afterwards appears or is brought, or if he was convicted before a court of general or quarter sessions, the court of general or quarter sessions at a subsequent sitting may pass sentence upon him or direct him to be discharged.

4. When any sentence is passed upon any person after a trial had under an order for changing the place of trial the court may, in its discretion, either direct the sentence to be carried out at the place where the trial was had or order the person sentenced to be removed to the place where his trial would have been had but for such order, so that the sentence may be there carried out.

Sections 743, *et seq.*, provide for reserving a case for the Court of Appeal. The court has no power to make any amendment on a motion in arrest of judgment. S-s. 4 relates to a change of venue under s. 651.

The defendant, after conviction, may move at any time in arrest of judgment before the sentence is actually pronounced upon him. This motion can be grounded only on

some objection arising on the face of the record itself, and no defect in the evidence, or irregularity at the trial, can be urged at this stage of the proceedings But any want of sufficient certainty in the indictment, as in the statement of time or place (where material), or of the facts and circumstances constituting the offence, by omitting to state or not stating definitely anything requisite to constitute the offence, or by omitting to negative any exception which ought to have been negatived or otherwise, will be a ground for arresting the judgment, if not amended before verdict or cured by the verdict.

The court will, *ex proprio motu*, arrest the judgment, even if the defendant omits to move for it, when it is satisfied that the defendant has not been found guilty of any offence in law. If a substantial ingredient of the offence does not appear on the face of the indictment the court will arrest the judgment: R. v. Carr, 26 L. C. J. 61. Judgment will also be arrested if the court does not appear by the indictment to have had jurisdiction over the offence charged: 8th Crim. L. Com. Report, 162; R. v. Fraser, 1 Moo. 407; R. v. Lynch, 20 L. C. J. 187.

A party convicted of felony must be present in court, in order to move in arrest of judgment; so a party convicted of a misdemeanour unless his presence be dispensed with at the discretion of the court: 1 Chit. 663; Cr. L. Com. Rep. *loc. cit.*

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

Section 245, c. 174, R. S. C. as to formal defects cured by verdict has not been re-enacted.

When the verdict is quashed for informalities, or any other grounds than the real merits of the case, the entry on the record should state it in these words, "and because it

appears that the said indictment is not sufficient (*or as the case may be*), therefore it is considered and adjudged that the defendant go thereof without delay," so as to prevent a plea of "*autrefois acquit*": 1 Chit. 719.

See cases under next section.

JUDGMENT NOT TO BE ARRESTED FOR FORMAL DEFECTS.

734. Judgment, after verdict upon an indictment for any offence *against this Act*, shall not be stayed or reversed for want of a *similiter*, nor by reason that the jury process has been awarded to a wrong officer, upon an insufficient suggestion—nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors,—nor because any person has served upon the jury who was not returned as a juror by the sheriff or other officer; and where the offence charged is an offence created by any statute, or subjected to a greater degree of punishment by any statute, the indictment shall, after verdict, be held sufficient, if it describes the offence in the words of the statute creating the offence, or prescribing the punishment, although they are disjunctively stated or appear to include more than one offence, or otherwise. R. S. C. c. 174, s. 246. 7 Geo. IV. c. 64, s. 21 (Imp.).

The repealed section applied to any indictable offence. This one applies only to offences under the code.

See Heymann v. R., 12 Cox, 383, and R. v. Knight, 14 Cox, 31 as to aider by verdict and what defects are cured by verdict; also Nash v. R., 9 Cox, 424.

Verdict will only cure defective statements. An absolute and total omission in the indictment is not cured by verdict: R. v. Bradlaugh, 14 Cox, 68. *See* R. v. Montminy, *ante*, p. 677.

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

In an indictment for perjury, alleged to have been committed in a certain cause, "wherein one Adrien Girardin, of the Township of Kingsey, in the district of Arthabaska, trader, and Thomas Ling, of the same place, farmer, *was defendant*." The omission of the words *was plaintiff* in the description of the plaintiff held fatal, and conviction quashed: R. v. Ling, 5 Q. L. R. 359, 2 L. N. 410.

In an indictment for obstructing an officer of excise under 27 & 28 V. c. 3: *held*, that the omission in the indictment of the averment that at the time of the obstruction

the officer was acting in the discharge of his duty under the authority of the said statute was not a defect of substance, but a formal error, which was cured by the verdict: Spelman v. R., 13 L. C. J. 154.

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

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

Defect in an indictment cured by verdict: R. v. Stansfeld, 8 L. N. 123; also in R. v. Stroulger, 16 Cox, 85.

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

Under this clause, the first defect cured by verdict is the want of a similiter. The similiter is the joinder in issue, contained in the record (*see ante*, under s. 726 for form of a record) in these words: "And , who prosecutes for our said Lady the Queen in this behalf, doth the like."

The second defect cured by verdict under this clause is the wrongful award of the jury process upon an insufficient suggestion. The jury process is usually directed to the sheriff, but if one of the parties represents that the sheriff is interested, or of kin to one of the parties, or in any way disqualified to act in the case, an entry of this suggestion is made on the back of the indictment first, and then on the record, when it is made up formally; and then the jury process is awarded to the coroner, if not disqualified, and if disqualified then to two elisors named by the court and sworn, in which last case the return is final, and no challenge to the array is allowed: Jervis, Coroners, 54; 1 Chit. 514;

Wharton, Law Lexicon, *Verbo* "elisors;" Archbold, 154. By the above clause these formalities cannot be questioned or investigated after verdict, and no misnomer or misdescription of the officer returning the process or of any of the jurors can invalidate the verdict: *see* now s. 666, and remarks thereunder; *see* s. 735, *post*.

This clause says thirdly that no motion in arrest of judgment or writ of error will avail on the ground that any person has served upon the jury who was not returned as a juror by the sheriff or other officer: *see* Dovey v. Hobson, 2 Marsh. 154; R. v. Brisebois, 15 S. C. R. 427.

The fourth and most important part of this section consists in the words: "And where the offence charged is an offence *created by any statute*, or subjected to a *greater* degree of punishment *by any statute*, the indictment shall, *after verdict*, be held sufficient, if it describes the offence in the words of the statute creating the offence, or prescribing the punishment, although they be disjunctively stated or appear to include more than one offence, *or otherwise*": *see* ss. 611 to 626.

What is the meaning of these two last words "*or otherwise*," is not clear. "Although *they* be disjunctively stated" means "although *the words* be disjunctively stated" "as unlawfully or maliciously" instead of "unlawfully and maliciously."

The words "or appear to include more than one offence" are not new law: *see* R. v. Ferguson, Dears. 427; R. v. Heywood, L. & C. 451; and remarks under s. 626, *ante*.

The words "subjected to a greater degree of punishment" mean greater than it was at common law.

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

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

An indictment under 14 & 15 V. c. 100, s. 49, for procuring the defilement of a girl by false pretenses, false representations or other fraudulent means, did not set out or allege what were the false pretenses, false representations or other fraudulent means. The defendant, having been found guilty, brought a writ of error on this ground, and the conviction was quashed: Howard v. R., 10 Cox, 54. *See* now, s. 616, *ante*.

In R. v. Warshaner, 1 Moo. 466, an indictment for having unlawfully in possession *five florins*, was held sufficient after verdict, though not showing what *florins* were and their value, it being a foreign coin, as the indictment described the offence in the words of the statute creating it.

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

Formerly, if in an indictment for obtaining property by false pretenses it did not appear who was the owner of the property so alleged to have been unlawfully obtained, the defect was not cured by verdict, and notwithstanding the above clause in such a case a conviction, upon a writ of error, would have been quashed; R. v. Bullock, Dears. 653; Sill. v. R., Dears. 132; R. v. Martin, 8 A. &. E. 481.

In R. v. Bowen, 13 Q. B. 790, the indictment was for obtaining by false pretenses, and did not contain the word "knowingly" with "unlawfully" but the court held the conviction good after verdict, as the indictment was in the words of the statute: *see* Hamilton v. R., 9 Q. B. 271 and R. v. Martin, 8 A. & E. 481.

But an indictment for felony must always allege that the act which forms the subject matter of the indictment

was done feloniously; if an indictment for felony does not contain the word "feloniously" it is bad, though in the words of the statute creating the offence, and is not cured by verdict: R. v. Gray, L. & C. 365.

If an indictment under s. 83 of the Larceny Act, c. 164, R. S. C., alleges the goods to have been "unlawfully obtained, taken, and carried away, and that the receiver knew them to have been unlawfully obtained" instead of "unlawfully obtained by false pretenses" the indictment is bad and not cured by verdict: *see* R. v. Wilson, 2 Moo. 52.

An indictment under the same section charged that defendant "unlawfully did receive goods which had been unlawfully, and knowingly, and fraudulently obtained by false pretenses with intent to defraud, as in this count before mentioned," but omitting to set out what the particular false pretenses were: *held*, that the objection, if at any time valid, was cured by the verdict of guilty: R. v. Goldsmith, 12 Cox, 479.

In R. v. Carr, 26 L. C. J. 61, the court quashed the indictment on the ground of the omission therein of the words "feloniously, wilfully, and of his malice aforethought," though the form given in the schedule of the Procedure Act then in force for the offence created by the clause under which the prisoner was indicted had not these words.

There is a difference between an indictment which is bad for charging an act which as laid is no crime, and an indictment which is bad for charging a crime defectively. The latter may be aided by verdict, the former cannot: R. v. Waters, 1 Den. 356; *see ante*, remarks under s. 629.

When an indictment is quashed or judgment upon it arrested for insufficiency or illegality thereof, the court will order that a new indictment be preferred against the prisoner, and may detain the prisoner in custody therefor: 1 Bishop, Cr. Proc. 739; 2 Hale, 237; 2 Hawk. 514; R. v. Turner, 1 Moo. 239; *see* Greaves' note in 3 Russ. 321.

In R. v. Vandercomb, 2 Leach, 708, the jury, by the direction of the court, acquitted the prisoners, as the charge as laid against them had not been proved; but as it resulted from the evidence adduced that another offence had been committed by the prisoners, and as the grand jury were not discharged, the prisoners were detained in custody in order to have another indictment preferred against them.

In R. v. Semple, 1 Leach, 420, the court quashed the indictment, upon motion of the prisoner, upon the ground of informality, but ordered the prisoner to be detained till the next session: *see* also 1 Chit. 304.

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

In R. v. Gilchrist, 2 Leach, 657, the prisoner was found guilty of forgery, but, upon motion in arrest of judgment, the court held that the indictment, being repugnant and defective, the prisoner should be discharged from it, but that as the objection went only to the form of the indictment, and not to the merits of the case, the prisoner should be remanded to prison until the end of the session to afford the prosecutor an opportunity, if he thought fit, of preferring another and better indictment against him: *see* also R. v. Pelfryman, 2 Leach, 563.

In Archbold, page 166, it is said: Upon the delivery of the verdict, if the defendant be thereby acquitted on the merits, he is forever free and discharged from that accusation, and is entitled to be immediately set at liberty, unless there be some other legal ground for his detention. If he be acquitted from some defect in the proceedings, so that the acquittal could not be pleaded in bar of another indict-

ment for the same offence, *he may be detained to be indicted afresh.* So in 1 Chit. 649, and R. v. Knewland, 2 Leach, 721.

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

In R. v. Bulmer, Montreal, Nov., 1881, though the indictment had been quashed on demurrer, the court refused to liberate the prisoner, and ordered his detention till the following term.

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

CERTAIN OMISSIONS AS TO JURORS NOT FATAL.

735. No omission to observe the directions contained in any Act as respects the qualification, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists, the drafting panels from the jury lists or the striking of special juries, shall be a ground for impeaching any verdict, or shall be allowed for error upon appeal to be brought upon any judgment rendered in any criminal case. R. S. C. c. 174, s. 247. (Amended in 1893.)

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

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

INSANITY.

736. Whenever it is given in evidence upon the trial of any person charged with any indictable offence that such person was insane at the time of the commission of such offence, and such person is acquitted, the jury shall be required to find, specially, whether such person was insane at the time of the commission of such offence, and to declare whether he is acquitted by it on account of such insanity; and if it finds that such person was insane at the time of committing such offence the court before which such trial is had shall order such person to be kept in strict custody in such place and in such manner as to the court seems fit, until the pleasure of the Lieutenant-Governor is known. R. S. C. c. 174, s. 252.

737. If at any time after the indictment is found, and before the verdict is given, it appears to the court that there is sufficient reason to doubt whether the accused is then, on account of insanity, capable of conducting his defence, the court may direct that an issue shall be tried whether the accused is or is not then on account of insanity unfit to take his trial.

2. If such issue is directed before the accused is given in charge to a jury for trial on the indictment such issue shall be tried by any twelve jurors. If such issue is directed after the accused has been given in charge to a jury for trial on the indictment such jury shall be sworn to try this issue in addition to that on which they are already sworn.

3. If the verdict on this issue is that the accused is not then unfit to take his trial the arraignment or the trial shall proceed as if no such issue had been directed. If the verdict is that he is unfit on account of insanity the court shall order the accused to be kept in custody till the pleasure of the Lieutenant-Governor of the province shall be known, and any plea pleaded shall be set aside and the jury shall be discharged.

4. No such proceeding shall prevent the accused being afterwards tried on such indictment. R. S. C. c. 174, s. 252.

738. If any person before the passing of this Act, whether before or after the first day of July, one thousand eight hundred and sixty-seven, was acquitted of any such offence on the ground of insanity at the time of the commission thereof, and has been detained in custody as a dangerous person by order of the court before which such person was tried, and still remains in custody, the Lieutenant-Governor may make a like order for the safe custody of such person during pleasure. R. S. C. c. 174, s. 254.

739. If any person charged with an offence is brought before any court to be discharged for want of prosecution, and such person appears to be insane, the court shall order a jury to be empanelled to try the sanity of such person, and if the jury so empanelled finds him insane the court shall order such person to be kept in strict custody, in such place and in such manner as to the court seems fit, until the pleasure of the Lieutenant-Governor is known. R. S. C. c. 174, s. 256.

740. In all cases of insanity so found the Lieutenant-Governor may make an order for the safe custody of the person so found to be insane, in such place and in such manner as to him seems fit. R. S. C. c. 174, ss. 253 & 257.

741. The Lieutenant-Governor, upon such evidence of the insanity of any person imprisoned in any prison other than a penitentiary for an offence, or imprisoned for safe custody charged with an offence, or imprisoned for not finding bail for good behaviour or to keep the peace, as the Lieutenant-Governor considers sufficient, may order the removal of such insane person to a place of safe-keeping; and such person shall remain there, or in such other place of safe-keeping, as the Lieutenant-Governor from time to time orders, until his complete or partial recovery is certified to the satisfaction of the Lieutenant-Governor, who may then order such insane person back to imprisonment, if then liable thereto, or otherwise to be discharged. R. S. C. c. 174, s. 258.

It is said in 1 Russ. 29: *see* R. v. Keary, 14 Cox, 148: "If a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner become mad he shall not be tried, as he cannot make his defence. If, after he is tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced, and if after judgment he becomes of non-sane memory execution shall be stayed; for, peradventure, says the humanity of the English law, had the prisoner been of sound memory he might have alleged something in stay of judgment or execution. And, by the common law, if it be doubtful whether a criminal who at his trial is, in appearance, a lunatic, be such in truth or not, the fact shall be investigated. And it appears that it may be tried by the jury who are charged to try the indictment, or by an inquest of office to be returned by the sheriff of the county wherein the court sits, or, being a collateral issue, the fact may be pleaded and replied to *ore tenus*, and a *venire* awarded returnable *instanter*, in the nature of an inquest of office. *See*, now, s-s. 2 of s. 737. And if it be found that the party only feigns himself mad, and he refuses to answer or plead, he would formerly have been dealt with as one who stood mute, but now a plea of not guilty may be entered."

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

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

It has been seen, *ante*, under s. 668, that no peremptory challenges are allowed on collateral issues.

The jury may judge of the sanity or insanity of the prisoner from his demeanour in their presence without any evidence: R. v. Goode, 7 A. & E. 536.

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

If a prisoner has not, at the time of his trial, from the defect of his faculties sufficient intelligence to understand the nature of the proceedings against him, the jury ought to find that he is not sane, and upon such finding he may be ordered to be kept in custody: R. v. Dyson, 7 C. & P. 305.

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

If at any stage of the trial it is thought that the prisoner has not sufficient intelligence to understand the nature of the proceedings the jury should pass upon it under the above s. 737: R. v. Berry, 13 Cox, 189.

PART LII.

APPEAL.

742. An appeal from the verdict or judgment of any court or judge having jurisdiction in criminal cases, or of a magistrate proceeding under section seven hundred and eighty-five, on the trial of any person for an indictable offence, shall lie upon the application of such person, if convicted, to the Court of Appeal in the cases hereinafter provided for, and in no others.

2. Whenever the judges of the Court of Appeal are unanimous in deciding an appeal brought before the said court their decision shall be final. If any of the judges dissent from the opinion of the majority an appeal shall lie from such decision to the Supreme Court of Canada as hereinafter provided.

Writ of Error Abolished—Cases Reserved.

743. *No proceeding in error shall be taken in any criminal case begun after the commencement of this Act:*

2. The court before which any accused person is tried may, either during or after the trial, reserve any question of law arising either on the trial or on any of the proceedings *preliminary, subsequent,* or *incidental thereto,* or arising out of the direction of the judge, for the opinion of the Court of Appeal in manner hereinafter provided.

3. *Either the prosecutor* or the accused may during the trial either orally or in writing apply to the court to reserve any such question as aforesaid, *and the court, if it refuses so to reserve it, shall nevertheless take a note of such objection.*

4. After a question is reserved the trial shall proceed as in other cases.

5. If the result is a conviction the court may in its discretion respite the execution of the sentence or postpone sentence till the question reserved has been decided, and shall in its discretion commit the person convicted to prison or admit him to bail with one or two sufficient sureties, in such sums as the court thinks fit, to surrender at such time as the court directs.

6. If the question is reserved, a case shall be stated for the opinion of the Court of Appeal.

Section 259 c. 174, R. S. C., is the repealed clause on cases reserved.

Even in cases of misdemeanours, and where the prisoner was on bail before his trial, the court is not bound to admit the prisoner to bail during the pendency of a reserved case: R. v. Bird, 5 Cox, 11; *see* as to intermediate effects of an appeal, s. 749, *post.*

APPEAL WHEN A RESERVED CASE REFUSED. (*New*).

744. If the court refuses to reserve the question the party applying may, with the leave in writing of the Attorney-General, move the Court of Appeal as hereinafter provided. The Attorney-General may in his discretion give or refuse such leave.

2. The Attorney-General, or any person to whom such leave as aforesaid is given, may on notice of motion to be given to the accused or prosecutor, as the case may be, move the Court of Appeal for leave to appeal. The Court of Appeal may upon the motion, and upon considering such evidence (if any) as they think fit to require, grant or refuse such leave.

3. If leave to appeal is granted a case shall be stated for the opinion of the Court of Appeal as if the question had been reserved.

4. If the sentence is alleged to be one which could not by law be passed, either party may without leave, upon giving notice of motion to the other side, move the Court of Appeal to pass a proper sentence.

5. If the court has arrested judgment, and refused to pass any sentence, the prosecutor may without leave make such a motion.

EVIDENCE FOR COURT OF APPEAL.

745. On any appeal or application for a new trial the court before which the trial was had shall, if it thinks necessary, or if the Court of Appeal so desires, send to the Court of Appeal a copy of the whole or of such part as may be material of the evidence or the notes taken by the judge or presiding justice at the trial. *The Court of Appeal may, if only the judge's notes are sent and it considers such notes defective, refer to such other evidence of what took place at the trial as it may think fit.* The Court of Appeal may in its discretion send back any case to the court by which it was stated to be amended or re-stated. R. S. C. c. 174, s, 264.

POWERS OF COURT OF APPEAL.

746. Upon the hearing of any appeal under the powers hereinbefore contained, the Court of Appeal may—

(*a*) confirm the ruling appealed from; or

(*b*) if of opinion that the ruling was erroneous, and that there has been a mis-trial in consequence, *direct a new trial;* or

(*c*) *if it considers the sentence erroneous, or the arrest of judgment erroneous, pass such a sentence as ought to have been passed or set aside any sentence passed by the court below, and remit the case to the court below with a direction to pass the proper sentence;* or

(*d*) if of opinion in a case in which the accused has been convicted that the ruling was erroneous, and that the accused ought to have been acquitted, direct that the accused shall be discharged, which order shall have all the effects of an acquittal; or

(*e*) *direct a new trial;* or

(*f*) make such other order as justice requires: *Provided that no conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was*

done at the trial or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the Court of Appeal is of opinion that any challenge for the defence was improperly disallowed a new trial shall be granted.

2. *If it appears to the Court of Appeal that such wrong or miscarriage affected some count only of the indictment the court may give separate directions as to each count and may pass sentence on any count unaffected by such wrong or miscarriage which stands good, or may remit the case to the court below with directions to pass such sentence as justice may require.*

3. The order or direction of the Court of Appeal shall be certified under the hand of the presiding chief justice or senior puisne judge to the proper officer of the court before which the case was tried, and such order or direction shall be carried into effect. R. S. C. c. 174, s. 263.

The words "Court of Appeal" and "Attorney-General," defined, s. 3.

Writs of error are abolished in all the cases *begun after the commencement of this Act.*

Only the grounds upon which the Court of Appeal are not unanimous are open to the appellant in a criminal case before the Supreme Court: *per* Ritchie, C.J., R. v. Cunningham, Cass. Dig. 107.

A case should not be reserved on frivolous grounds: R. v. Ferguson, Dears. 427; R. v. Tew, Dears. 429.

The passages of the above sections 742, *et seq.*, which are in italics, are those where it is thought that the law is either altered, extended, or settled on doubtful points.

As heretofore, no question of practice, or on points left to the discretion of the judge, and only questions of law, can be reserved by the judge at the trial, or brought before the Court of Appeal. The only exception to this rule is contained in s-s. 5 of s. 723.

Section 783, *post*, which allows a judge to reserve his final decision on questions raised at the trial of offences under the code, applies now to all the Dominion. It previously applied only to Ontario, but to all trials whatever. It seems to apply to all questions raised at the trial, not only to questions of law.

Question whether there is sufficient evidence to support charge cannot be reserved, being a question for the jury;

whether there is any evidence is a question of law for the judge: R. v. Lloyd, 19 O. R. 352.

The Imperial corresponding statute is 11 & 12 V. c. 78.

The statute gives no jurisdiction to the court of crown cases reserved to hear a case reserved on a judgment on a demurrer. There must have been a trial and a conviction to give jurisdiction to this court: R. v. Faderman, 1 Den. 565; R. v. Paxton, 2 L. C. L. J. 162.

If a prisoner pleads guilty to the charge alleged in the indictment no question of law can be reserved, as none can be said to have arisen on the trial: R. v. Clark, 10 Cox, 338. But that case is overruled by R. v. Brown, 16 Cox, 715, 24 Q. B. D. 357.

In R. v. Daoust, 9 L. C. J. 85, the defendant having been found guilty of felony, a motion for a new trial had been granted by Mr. Justice Mondelet. At the next term of the court the prosecutor moved to fix a day for this new trial before Mr. Justice Aylwin, who then reserved for the court of crown cases reserved the question whether a second trial could be had in a case of felony. The Court held that the question was properly reserved, and that the statute gave them jurisdiction to decide it: 10 L. C. J. 221. It may be doubted whether they had jurisdiction *before* the second trial and conviction, if a second conviction there had been.

A question raised in the court below by a motion in arrest of judgment is a question arising on the trial, and properly reserved: R. v. Martin, 1 Den. 398, 3 Cox, 447; R. v. Carr, 26 L. C. J. 61; R. v. Deery, 26 L. C. J. 129; R. v. Corcoran, 26 U. C. C. P. 134.

The statute gives jurisdiction to the court of crown cases reserved to take cognizance of defects apparent on the face of the record when questions upon them have been reserved at the trial: R. v. Webb, 1 Den. 338.

What a jury may say in recommending a prisoner to mercy is not a matter upon which a case should be

reserved. When the jury say guilty there is an end to the matter; that is the verdict, and a recommendation to mercy is no part of the verdict: R. v. Trebilcock, Dears. & B. 453.

The insufficiency of an indictment upon a motion to quash is not a question that can be reserved: R. v. Gibson, 16 O. R. 704.

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

The court expects cases reserved to be submitted in a complete form, and will ordinarily refuse to send back a case for amendment; R. v. Holloway, 1 Den. 370.

A case may be reserved after the trial, and even after the sessions of the court are over: ss. 743 and 753; R. v. Brown, 16 Cox, 715, 24 Q.B.D. 357; R. v. Smith, 38 U. C. Q. B. 218; R. v. Mellor, Dears. & B. 468; R. v. Whitchurch, 16 Cox, 743. If the judge who presided at the trial is unable to send up the case reserved any judge of the same court may do it: R. v. Featherstone, Dears. 369.

When the case reserved is upon the evidence the whole of the evidence should not be made part of the case, but merely the material facts established by the evidence: R. v. Gibson, 16 O. R. 704.

New trial granted upon a case reserved: R. v. Brice, 15 Q. L. R. 147.

The defendant must be present when a motion is made by his counsel to reserve a case: R. v. Murphy, 17 Q. L. R. 305.

If a counsel should think that any material point raised at the trial has been omitted in the case it would be proper for him to communicate with the judge who reserved the case, and suggest any amendment that in his judgment may be necessary: R. v. Smith, Temple & Mews' Crim. App. Cases, 214. Where a case reserved does not, in the opinion of the counsel, fairly raise all the points that were in issue, the proper course is to apply to the judge reserving to amend it: R. v. Smith, 1 Den. 510; *see* R. v. Winsor, 10 Cox, 276; R. v. Young, 14 Cox, 114.

The court will not send a case back for amendment on the mere application of counsel, but will do so if on the argument it appears that it is imperfectly stated: R. v. Hilton, Bell, 20; R. v. Bourdeau, M. L. R. 7 Q. B. 176. Where a case reserved has been re-stated by order of the court an application, supported by affidavit, to have it again re-stated will be refused. This court has no jurisdiction to interfere compulsorily with the judge's exercise of his discretion: R. v. Studd, 10 Cox, 258.

The court must deal with the case as it is stated, and upon the evidence returned by the judge: R. v. Brummitt, L. & C. 9; *see*, now, s. 745. The Court of Appeal may now order the stenographer's notes to be sent up.

By the express words of the statute the court of crown cases reserved has its jurisdiction limited to the question of law reserved and mentioned in the case sent up; it has no right to adjudicate on any other question: R. v. Tyree, L. R. 1 C. C. R. 177; R. v. Blakemore, 2 Den. 410; R. v. Smith, Temple and Mews' Cr. App. Cases 214; R. v. Shaw, L. & C. 579.

So, in R. v. Overton, Car. & M. 655, on a crown case reserved, it was held that the judges will not allow the

prisoner's counsel to argue objections that are apparent on the face of the indictment unless they were reserved by the judge, but will leave the prisoner to his writ of error.

The rule that a jury should not convict on the unsupported evidence of an accomplice is a rule of practice only, and not a rule of law, and questions of law only can be reserved: R. v. Stubbs, Dears. 555, Warb. Lead. Cas. 12; Contra, R. v. Smith, 38 U. C. Q. B. 218. But *see* later case of R. v. Andrews, 12 O. R. 184.

The court of crown cases reserved cannot amend the indictment: R. v. Garland, 11 Cox, 224. Where an amendment, without which the indictment was bad, had been improperly made at the trial, after verdict, this court ordered the record to be restored to its original state, and a verdict of not guilty to be entered: R. v. Larkin, Dears. 365; *see*, now, s. 723, s-s. 5.

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

On a motion for a new trial from a conviction for perjury: *Held*, that the trial (under s. 259 of the Procedure Act, c. 174, R. S. C.) is not terminated until sentence is rendered, and a "question which has arisen on the trial" (which arises on the trial) does not necessarily mean a question that was raised at the trial, but extends to one that took its rise at the trial, and therefore a point not raised by the defence may be reserved by the court: R. v. Bain, 23 L. C. J. 327.

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

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

Where the prisoner has been put on his trial on an indictment containing six counts charging him with shooting with intent to murder, and was found guilty on the first

count, which verdict was afterwards set aside on a reserved case for insufficiency of that first count: *held*, that he could not be tried again on the other counts, as they all referred to the same act of shooting; prisoner discharged on plea of *autrefois acquit:* R. v. Bulmer, 5 L. N. 92.

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

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

If illegal evidence has been allowed to go to the jury, though without objection from the prisoner, the verdict must be quashed if that evidence *might* have affected the verdict, though apart from it there is sufficient evidence to support the verdict. The law on this in criminal cases is what it was in civil cases before the Judicature Act. The case of R. v. Ball, R. & R. 132, reviewed; R. v. Gibson, 16 Cox, 181. But now by s. 746 (*f*), it is expressly enacted that the illegal admission or rejection of evidence is no ground to set aside a verdict unless the Court of Appeal finds that some substantial wrong has been occasioned thereby to the defendant.

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

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

The decision of the judge in directing certain jurors to stand aside is a question of law arising at the trial which he can reserve: R. v. Patteson, 36 U. C. Q. B. 129. But *see*

R. v. Smith, 38 U. C. Q. B. 218; *see* R. v. Mellor, Dears. & B. 468, cited *ante*, and Morin v. R., 18 S. C. R. 407, and cases there cited.

A police magistrate cannot reserve a case for the opinion of a superior court, under C. S. U. C. c. 112, as he is not within the terms of that Act: R. v. Richardson, 8 O. R. 651; *see* ss. 742 and 900.

Challenge to the array is a question of law arising on the trial which may be reserved. If Crown demurs to the challenge, and judgment on demurrer is given, it becomes a matter of record and cannot be reserved: R. v. Plante, 7 Man. L. R. 587.

NEW TRIAL. (*New*).

747. After the conviction of any person for *any* indictable offence the court before which the trial takes place may, either during the sitting or afterwards, give leave to the person convicted to apply to the Court of Appeal for a new trial on the ground that the verdict was against the weight of evidence. The Court of Appeal may, upon hearing such motion, direct a new trial if it thinks fit.

2. In the case of a trial before a Court of General or Quarter Sessions such leave may be given, during or at the end of the session, by the judge or other person who presided at the trial.

Under this clause a condition precedent to any application for a new trial in all offences whatever is the permission of the court before which the conviction took place, and, that permission being obtained, the Court of Appeal grants or rejects the application as it thinks proper: s. 745 applies to applications for new trials. No new trial is allowed to the crown. The only ground for the application mentioned in this section is that the verdict was against the weight of evidence. The application to the court before which the trial took place may be made during the sitting of the court or *afterwards*. The rule heretofore has been that the defendant or defendants must be present in court when the motion is made for a new trial, unless some special ground be laid for dispensing with the rule: R. v. Caudwell, 2 Den., *note a*, 372, 1 Chit. 658; R. v. Parkinson, 2 Den. 459; R. v. Fraser, 14 L. C. J. 245; R. v. Hollingberry, 4 B. & C. 329.

See R. v. Duncan, 7 Q. B. D. 198, Warb. Lead. Cas. 260, and cases there cited as to practice in England on new trials.

NEW TRIAL BY ORDER OF THE MINISTER OF JUSTICE (*New*).

748. If upon any application for the mercy of the Crown on behalf of any person convicted of an indictable offence, the Minister of Justice entertains a doubt whether such person ought to have been convicted, he may, instead of advising Her Majesty to remit or commute the sentence, after such inquiry as he thinks proper, by an order in writing direct a new trial at such time and *before such court* as he may think proper.

This is new. It virtually gives an appeal from the courts to the Minister of Justice. The sentence, if for imprisonment, is not suspended by the order of the Minister of Justice under this clause, nor is provision made to admit the person convicted to bail.

INTERMEDIATE EFFECTS OF APPEAL. (*New*).

749. The sentence of a court shall not be suspended by reason of any appeal, unless the court expressly so directs, except where the sentence is that the accused suffer death, or whipping. The production of a certificate from the officer of the court that a question has been reserved, or that leave has been given to apply for a new trial, or of a certificate from the Attorney-General that he has given leave to move the Court of Appeal, or of a certificate from the Minister of Justice that he has directed a new trial, shall be a sufficient warrant to suspend the execution of any sentence of death or whipping.

2. In all cases it shall be in the discretion of the Court of Appeal in directing a new trial to order the accused to be admitted to bail.

Sub-section 2, it seems, applies as well to new trials ordered under s. 746 as to new trials under s. 747.

APPEAL TO SUPREME COURT.

750. Any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under section seven hundred and forty-two, may appeal to the Supreme Court of Canada against the affirmance of such conviction; and the Supreme Court of Canada shall make such rule or order thereon, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect: Provided that no such appeal can be taken if the Court of Appeal is unanimous in affirming the conviction, nor unless notice of appeal in writing has been served on the Attorney-General within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a judge thereof.

2. Unless such appeal is brought on for hearing by the appellant at the session of the Supreme Court during which such affirmance takes place, or the

session next thereafter if the said court is not then in session, the appeal shall be held to have been abandoned, unless otherwise ordered by the Supreme Court or a judge thereof.

3. The judgment of the Supreme Court shall, in all cases, be final and conclusive. 50-51 V. c. 50, s. 1.

See R. v. Cunningham, Cass. Dig. 107, and Amer v. The Queen, 2 S. C. R. 592.

NO APPEALS TO PRIVY COUNCIL.

751. Notwithstanding any royal prerogative, or anything contained in *The Interpretation Act* or in *The Supreme and Exchequer Courts Act*, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority, by which in the United Kingdom appeals or petitions to Her Majesty in Council may be heard. 51 V. c. 43, s. 1.

The Privy Council has not had to pass yet on the constitutionality of this clause.

PART LIII.

SPECIAL PROVISIONS.

752. Whenever any person in custody *charged with an indictable offence* has taken proceedings before a judge or criminal court having jurisdiction in the premises by way of *certiorari*, *habeas corpus* or otherwise, to have the legality of his imprisonment inquired into, such judge or court may, *with* or without determining the question, make an order for the further detention of the person accused, and direct the judge or justice under whose warrant he is in custody, or any other judge or justice, to take any proceedings, hear such evidence, or do such further act as in the opinion of the court or judge may best further the ends of justice.

It is not clear what this enactment is intended for. It seems to be out of place where it stands in the Act.

DECISION MAY BE RESERVED.

753. Any judge or other person presiding at the sittings of a court at which any person is tried for an indictable offence *under this Act*, whether he is the judge of such court or is appointed by commission or otherwise to hold such sittings, may reserve the giving of his final decision on questions raised

at the trial; and his decision, whenever given, shall be considered as if given at the time of the trial. R. S. C. c. 174, s. 269.

This, by the repealed clause, applied only to Ontario. The words "under this Act" are new.

PRACTICE IN ONTARIO.

754. The practice and procedure in all criminal cases and matters in the High Court of Justice of Ontario *which are not provided for in this Act*, shall be the same as the practice and procedure in similar cases and matters *heretofore*. R. S. C. c. 174, s. 270.

It is not clear why a similar enactment for all the provinces has been left out, though Parliament undoubtedly had grave reasons for it.

COURTS IN ONTARIO.

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

2. The said courts shall be presided over by one of the justices of the said Supreme Court, or in their absence by one of such county court judges or by one of such counsel, or in the case of any such district by the judge of such district court. R. S. C. c. 174, s. 271.

756. It shall not be necessary for any court of General Sessions in the province of Ontario to deliver the gaol of all prisoners who are confined upon charges of theft, but the court may leave any such cases to be tried at the next court of oyer and terminer and general gaol delivery, if, by reason of the difficulty or importance of the case, or for any other cause, it appears to it proper so to do. R. S. C. c. 174, s. 272.

757. If any person is prosecuted in any division of the High Court of Justice for Ontario for any *indictable* offence, by information there filed, or by indictment there found or removed into such court, and appears therein in term time in person, or, in case of a corporation, by attorney, to answer to such information or indictment, such defendant, upon being charged therewith, shall not imparl to a following term, but shall plead or demur thereto within four days from the time of his appearance; and in default of his pleading or demurring within four days as aforesaid judgment may be entered against such defendant for want of a plea. R. S. C. c. 174, s. 273.

758. If such defendant appears to such information or indictment by attorney, he shall not imparl to a following term, but a rule, requiring him to

plead, may forthwith be given and served, and a plea to such information or indictment may be enforced, or judgment in default may be entered in the same manner as might have been done formerly in cases in which the defendant had appeared to such information or indictment by attorney in a previous term; but the court, or any judge thereof, upon sufficient cause shown for that purpose, may allow further time for such defendant to plead or demur to such information or indictment. R. S. C. c. 174, s. 274.

759. If any prosecution for *an indictable* offence, instituted by the Attorney-General for Ontario in the said court, is not brought to trial within twelve months next after the plea of not guilty has been pleaded thereto, the court in which such prosecution is depending, upon application made on behalf of any defendant in such prosecution of which application twenty days' previous notice shall be given to such Attorney-General, may make an order authorizing such defendant to bring on the trial of such prosecution; and thereupon such defendant may bring on such trial accordingly unless a *nolle prosequi* is entered to such prosecution. R. S. C. c. 174, s. 275.

The necessity of these last three sections is not clear. They applied heretofore only to misdemeanours.

SPECIAL PROVISIONS FOR NOVA SCOTIA.

760. In the province of Nova Scotia a calendar of the criminal cases shall be sent by the clerk of the Crown to the grand jury in each term, together with the depositions taken in each case and the names of the different witnesses, and the indictments shall not be made out, except in Halifax, until the grand jury so directs. R. S. C. c. 174, s. 276.

761. A judge of the Supreme Court of Nova Scotia may sentence convicted criminals on any day of the sittings at Halifax, as well as in term time. R. S. C. c. 174, s. 277.

PART LIV.

SPEEDY TRIALS OF INDICTABLE OFFENCES.

762. The provisions of this part do not apply to the North-West Territories or the district of Keewatin. 52 V. c. 47, s. 3.

763. In this part, unless the context otherwise requires,—

(*a*) the expression "judge" means and includes,—

(i) in the province of Ontario, any judge of a county court, junior judge or deputy judge authorized to act as chairman of the General Sessions of the Peace, and also the judges of the provisional districts of Algoma and Thunder Bay, and the judge of the district court of Muskoka and Parry Sound, authorized respectively to act as chairman of the General Sessions of the Peace;

(ii) in the province of Quebec, in any district wherein there is a judge of the sessions, such judge of sessions and in any district wherein there is no judge of sessions but wherein there is a district magistrate, such district magistrate, and in any district wherein there is neither a judge of sessions nor a district magistrate, the sheriff of such district;

(iii) in each of the provinces of Nova Scotia, New Brunswick and Prince Edward Island, any judge of a county court;

(iv) in the province of Manitoba the chief justice, or a puisne judge of the Court of Queen's Bench, or any judge of a county court;

(v) in the province of British Columbia the chief justice or a puisne judge of the Supreme Court, or any judge of a county court;

(*b*) the expression "county attorney" or "clerk of the peace" includes in the provinces of Nova Scotia, New Brunswick and Prince Edward Island, any clerk of a county court, and in the province of Manitoba, any Crown attorney, the prothonotary of the Court of Queen's Bench, and any deputy prothonotary thereof, any deputy clerk of the peace, and the deputy clerk of the Crown and pleas for any district in the said province. 52 V. c. 47, s. 2.

764. The judge sitting on any trial under this part, for all the purposes thereof and proceedings connected therewith or relating thereto, shall be a court of record, and in every province of Canada, except the province of Quebec, such court shall be called "The County Court Judge's Criminal Court" of the county or union of counties or judicial district in which the same is held.

2. The record in any such case shall be filed among the records of the court over which the judge presides, and as part of such records. 52 V. c. 47, s. 4.

765. Every person committed to gaol for trial on a charge of being guilty of any of the offences *which are mentioned in section five hundred and*

thirty-nine as being within the jurisdiction of the General or Quarter Sessions of the Peace, may, with his own consent (of which consent an entry shall then be made of record), and subject to the provisions herein, be tried in any province under the following provisions out of sessions and out of the regular term or sittings of the court, whether the court before which, but for such consent, the said person would be triable for the offence charged, or the grand jury thereof, is or is not then in session, and if such person is convicted he may be sentenced by the judge. 52 V. c. 47, s. 5.

766. Every sheriff shall, within twenty-four hours after any prisoner charged as aforesaid is committed to gaol for trial, notify the judge in writing that such prisoner is so confined, stating his name and the nature of the charge preferred against him, whereupon, with as little delay as possible, such judge shall cause the prisoner to be brought before him. 52 V. c. 47, s. 6.

767. The judge, upon having obtained the depositions on which the prisoner was so committed, shall state to him,

(*a*) that he is charged with the offence, describing it;

(*b*) that he has the option to be forthwith tried before such judge without the intervention of a jury, or to remain in custody or under bail, as the court decides, to be tried in the ordinary way by the court having criminal jurisdiction.

2. If the prisoner demands a trial by jury the judge shall remand him to gaol; but if he consents to be tried by the judge without a jury the county solicitor, clerk of the peace or other prosecuting officer shall prefer the charge against him for which he has been committed for trial, and if, upon being arraigned upon the charge, the prisoner pleads guilty, the prosecuting officer shall draw up a record as nearly as may be in one of the forms MM or NN in schedule one to this Act; such plea shall be entered on the record, and the judge shall pass the sentence of the law on such prisoner, which shall have the same force and effect as if passed by any court having jurisdiction to try the offence in the ordinary way. 52 V. c. 47, s. 6.

MM.—(*Section* 767).

FORM OF RECORD WHEN THE PRISONER PLEADS NOT GUILTY.

Canada,
Province of ,
County of .

Be it remembered that A. B. being a prisoner in the gaol of the said county, committed for trial on a charge of having on day of , in the year , stolen, etc., (*one cow, the property of* C. D., *or as the case may be, stating briefly the offence*) and having been brought before *me* (*describe the judge*) on the day of , in the year , and asked by me if he consented to be tried before me without

the intervention of a jury, consented to be so tried; and that upon the day of , in the year , the said A. B., being again brought before me for trial, and declaring himself ready, was arraigned upon the said charge and pleaded not guilty; and after hearing the evidence adduced, as well in support of the said charge as for the prisoner's defence (*or as the case may be*). I find him to be guilty of the offence with which he is charged as aforesaid, and I accordingly sentence him to (*here insert such sentence as the law allows and the judge thinks right*), (*or* I find him not guilty of the offence with which he is charged, and discharge him accordingly).

Witness my hand at , in the county of , this day of , in the year .

O. K.,
Judge.

NN.—(*Section* 767).

FORM OF RECORD WHEN THE PRISONER PLEADS GUILTY.

Canada,
Province of ,
County of .

Be it remembered that A. B. being a prisoner in the gaol of the said county, on a charge of having on the day of , in the year , stolen, etc., (*one cow, the property of C. D., or as the case may be, stating briefly the offence*), and being brought before me (*describe the judge*) on the day of , in the year , and asked by me if he consented to be tried before me without the intervention of a jury, consented to be so tried; and that the said A. B. being then arraigned upon the said charge, he pleaded guilty thereof, whereupon I sentenced the said A. B. to (*here insert such sentence as the law allows and the judge thinks right*).

Witness my hand this day of , in the year .

O. K.,
Judge.

768. If one of two or more prisoners charged with the same offence demands a trial by jury, and the other or others consent to be tried by the judge without a jury, the judge, in his discretion, may remand all the said prisoners to gaol to await trial by a jury. 52 V. c. 47, s. 8.

769. If under Part LV. (sec. 782), or Part LVI. (sec. 809), any person has been asked to elect whether he would be tried by the magistrate or justices of the peace, as the case may be, or before a jury, and he has elected to be tried before a jury, and if such election is stated in the warrant of committal for trial, the sheriff and judge shall not be required to take the proceedings directed by this part. 52 V. c. 47, s. 9.

2. But if such person, after his said election to be tried by a jury, has been committed for trial he may, at any time before the regular term or sittings of the court at which such trial by jury would take place, notify the sheriff that he desires to re-elect; whereupon it shall be the duty of the sheriff to proceed as directed by section seven hundred and sixty-six, and thereafter the person so committed shall be proceeded against as if his said election in the first instance had not been made. 53 V. c. 37, s. 30.

770. Proceedings under this part commenced before any judge may, where such judge is for any reason unable to act, be continued before any other judge competent to try prisoners under this part in the same judicial district, and such last mentioned judge shall have the same powers with respect to such proceedings as if such proceedings had been commenced before him, and may cause such portion of the proceedings to be repeated before him as he shall deem necessary. 53 V. c. 37, s. 30.

771. If, on the trial under Part LV. (sec. 782), or Part LVI. (sec. 809), of this Act of any person charged with any offence triable under the provisions of this part, the magistrate or justices of the peace decide not to try the same summarily, but commit such person for trial, such person may afterwards, with his own consent, be tried under the provisions of this part. 52 V. c. 47, s. 10.

772. If the prisoner upon being so arraigned and consenting as aforesaid pleads not guilty the judge shall appoint an early day, or the same day, for his trial, and the county attorney or clerk of the peace shall subpœna the witnesses named in the depositions, or such of them and such other witnesses as he thinks requisite to prove the charge, to attend at the time appointed for such trial, and the judge may proceed to try such prisoner, and if he be found guilty sentence shall be passed as hereinbefore mentioned; but if he be found not guilty the judge shall immediately discharge him from custody, so far as respects the charge in question. 52 V. c. 47, s. 11.

773. The county attorney or clerk of the peace or other prosecuting officer may, with the consent of the judge, prefer against the prisoner a charge or charges for any offence or offences for which he may be tried under the provisions of this part other than the charge or charges for which he has been committed to gaol for trial, although such charge or charges do not appear or are not mentioned in the depositions upon which the prisoner was so committed. 52 V. c. 47, s. 12.

774. The judge shall, in any case tried before him, have the same power as to acquitting or convicting, or convicting of any other offence than that charged, as a jury would have in case the prisoner were tried at a sitting of any court mentioned in this part, and may render any verdict which may be rendered by a jury upon a trial at a sitting of any such court. 52 V. c. 47, s. 13.

775. If a prisoner elects to be tried by the judge without the intervention of a jury the judge may, in his discretion, admit him to bail to appear for his trial, and extend the bail, from time to time, in case the court be adjourned or there is any other reason therefor; and such bail may be entered into and perfected before the clerk. 52 V. c. 47, s. 14.

776. If a prisoner elects to be tried by a jury the judge may, instead of remanding him to gaol, admit him to bail, to appear for trial at such time and place and before such court as is determined upon, and such bail may be entered into and perfected before the clerk. 52 V. c. 47, s. 15.

777. The judge may adjourn any trial from time to time until finally terminated. 52 V. c. 47, s. 16.

778. The judge shall have all powers of amendment which any court mentioned in this part would have if the trial was before such court. 52 V. c. 47, s. 17.

779. Any recognizance taken under section five hundred and ninety-eight of this Act, for the purpose of binding a prosecutor or a witness, shall, if the person committed for trial elects to be tried under the provisions of this part, be obligatory on each of the persons bound thereby, as to all things therein mentioned with reference to the trial by the judge under this part, as if such recognizance had been originally entered into for the doing of such things with reference to such trial: Provided, that at least forty-eight hours' notice in writing shall be given, either personally or by leaving the same at the place of residence of the persons bound by such recognizance as therein described, to appear before the judge at the place where such trial is to be had. 53 V. c. 37, s. 29.

780. Every witness, whether on behalf of the prisoner or against him, duly summoned or subpœnaed to attend and give evidence before such judge, sitting on any such trial, on the day appointed for the same, shall be bound to attend and remain in attendance throughout the trial; and if he fails so to attend he shall be held guilty of contempt of court, and may be proceeded against therefor accordingly. 52 V. c. 47, s. 18.

781. Upon proof to the satisfaction of the judge of the service of subpœna upon any witness who fails to attend before him, as required by such subpœna, and upon such judge being satisfied that the presence of such witness before him is indispensable to the ends of justice, he may, by his warrant, cause the said witness to be apprehended and forthwith brought before him to give evidence as required by such subpœna, and to answer for his disregard of the same; and such witness may be detained on such warrant before the said

judge, or in the common gaol, with a view to secure his presence as a witness; or, in the discretion of the judge, such witness may be released on recognizance with or without sureties, conditioned for his appearance to give evidence as therein mentioned, and to answer for his default in not attending upon the said subpœna, as for a contempt; and the judge may, in a summary manner, examine into and dispose of the charge of contempt against the said witness who, if found guilty thereof, may be fined or imprisoned, or both, such fine not to exceed one hundred dollars, and such imprisonment to be in the common gaol, with or without hard labour, and not to exceed the term of ninety days, and *he may also be ordered to pay the costs incident to the execution of such warrant and of his detention in custody.*

2. Such warrant may be in the form OO and the conviction for contempt in the form PP in schedule one to this Act, and the same shall be authority to the persons and officers therein required to act to do as therein they are respectively directed. 52 V. c. 47, s. 19.

The words in italics in s. 781 are new.

OO.—(*Section* 781.)

WARRANT TO APPREHEND WITNESS.

Canada,
Province of ,
County of ,

To all or any of the constables and other peace officers in the said county of .

Whereas it having been made to appear before me, that E. F., of , in the said county of , was likely to give material evidence on behalf of the prosecution (*or* defence, *as the case may be*) on the trial of a certain charge of (*as theft, or as the case may be*), against A. B., and that the said E. F. was duly subpœnaed (*or* bound under recognizance) to appear on the day of , in the year , at , in the said county at o'clock (forenoon *or* afternoon, *as the case may be*), before me, to testify what he knows concerning the said charge against the said A. B.

And whereas proof has this day been made before me, upon oath of such subpœna having been duly served upon the said E. F., (*or* of the said E. F. having been duly bound under recognizance to appear before me, *as the case may be*); and whereas the said E. F. has neglected to appear at the trial and place appointed, and no just excuse has been offered for such

neglect: These are therefore to command you to take the said E. F. and to bring him and have him forthwith before me, to testify what he knows concerning the said charge against the said A. B., and also to answer his contempt for such neglect.

Given under my hand this day of , in the year .

O. K.,
Judge.

PP.—(*Sections* 582, 781.)

CONVICTION FOR CONTEMPT.

Canada,
Province of ,
County of ,

Be it remembered that on the day of , in the year , in the county of , E. F. is convicted before me, for that he the said E. F. did not attend before me to give evidence on the trial of a certain charge against one A. B. of (*theft, or as the case may be*), although duly subpœnaed (*or* bound by recognizance to appear and give evidence in that behalf, *as the case may be*) but made default therein, and has not shown before me any sufficient excuse for such default, and I adjudge the said E. F., for the said offence, to be imprisoned in the common gaol of the county of , at , for the space of , there to be kept at hard labour (*and in case a fine is also intended to be imposed, then proceed*) and I also adjudge that the said E. F. do forthwith pay to and for the use of Her Majesty a fine of dollars, and in default of payment, that the said fine, with the cost of collection, be levied by distress and sale of the goods and chattels of the said E. F. (*or in case a fine alone is imposed, then the clause of imprisonment is to be omitted.*)

Given under my hand at , in the said county of , the day and year first above mentioned.

O. K.,
Judge.

PART LV.

SUMMARY TRIAL OF INDICTABLE OFFENCES.

782. In this part, unless the context otherwise requires, (*a*) the expression "magistrate" means and includes—

(i) in the provinces of Ontario, Quebec and Manitoba, any recorder, judge of a county court, being a justice of the peace, commissioner of police, judge of the sessions of the peace, police magistrate, district magistrate, or other functionary or tribunal, invested by the proper legislative authority, with power to do alone such acts as are usually required to be done by two or more justices of the peace, and acting within the local limits of his or of its jurisdiction;

(ii) in the provinces of Nova Scotia and New Brunswick, any recorder, judge of a county court, stipendiary magistrate or police magistrate, acting within the local limits of his jurisdiction, and any commissioner of police and any functionary, tribunal or person invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more justices of the peace;

(iii) in the provinces of Prince Edward Island and British Columbia and in the district of Keewatin, any two justices of the peace sitting together, and any functionary or tribunal having the powers of two justices of the peace;

(iv) in the North-West Territories, any judge of the Supreme Court of the said territories, any two justices of the peace sitting together, and any functionary or tribunal having the powers of two justices of the peace;

(*b*) the expression "the common gaol or other place of confinement," in the case of any offender whose age at the time of his conviction does not, in the opinion of the magistrate, exceed sixteen years, includes any reformatory prison provided for the reception of juvenile offenders in the province in which the conviction referred to takes place, and to which by the law of that province the offender may be sent; and

(*c*) the expression "property" includes everything included under the same expression or under the expression "valuable security," as defined by this Act, and in the case of any "valuable security," the value thereof shall be reckoned in the manner prescribed in this Act. R. S. C. c. 176, s. 2.

783. Whenever any person is charged before a magistrate;

(*a*) with having committed theft, or obtained money or property by false pretenses, or unlawfully received stolen property, and the value of the property alleged to have been stolen, obtained or received, does not, in the judgment of the magistrate, exceed ten dollars; or

(*b*) with having attempted to commit theft; or

(*c*) with having committed an aggravated assault by unlawfully and maliciously inflicting upon any other person, either with or without a weapon

or instrument, any grievous bodily harm, or by unlawfully and maliciously wounding any other person ; or

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

(*e*) with having assaulted, obstructed, molested or hindered *any peace officer or public officer* in the lawful performance of his duty, or with intent to prevent the performance thereof ; or

(*f*) with keeping or being an inmate, or habitual frequenter of any disorderly house, house of ill-fame or bawdy-house : or

(*g*) with using or knowingly allowing any part of any premises under his control to be used—

(i) for the purpose of recording or registering any bet or wager, or selling any pool ; or

(ii) keeping, exhibiting, or employing, or knowingly allowing to be kept, exhibited or employed, any device or apparatus for the purpose of recording or registering any bet or wager, or selling any pool ; or

(*h*) becoming the custodian or depositary of any money, property, or valuable thing staked, wagered or pledged ; or

(*i*) recording or registering any bet or wager, or selling any pool, upon the result of any political or municipal election, or of any race, or of any contest or trial of skill or endurance of man or beast,—

the magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way. R. S. C. c. 176, s. 3.

784. The jurisdiction of such magistrate is absolute in the case of any person charged with keeping or being an inmate or habitual frequenter of any disorderly house, house of ill-fame or bawdy-house, and does not depend on the consent of the person charged to be tried by such magistrate, nor shall such person be asked whether he consents to be so tried ; nor do the provisions of this part affect the absolute summary jurisdiction given to any justice or justices of the peace in any case by any other part of this Act. R. S. C. c. 176, s. 4.

The words "within the police limits of any city in Canada" were inserted in the repealed Act after the word *charged* in the second line.

2. The jurisdiction of the magistrate is absolute in the case of any person who, being a seafaring person and only transiently in Canada, and having no permanent domicile therein, is charged, either within the city of Quebec as limited for the purpose of the police ordinance, or within the city of Montreal as so limited, or in any other seaport city or town in Canada where there is such magistrate, with the commission therein of any of the offences hereinbefore mentioned, and also in the case of any other person charged with any such

offence on the complaint of any such seafaring person whose testimony is essential to the proof of the offence; and such jurisdiction does not depend on the consent of any such person to be tried by the magistrate, nor shall such person be asked whether he consents to be so tried. R. S. C. c. 176, s. 5.

3. The jurisdiction of a stipendary magistrate in the province of Prince Edward Island, and of a magistrate in the district of Keewatin, under this part, is absolute without the consent of the person charged. 52 V. c. 46, s. 1.

This sub-section extended to British Columbia by the repealed Act.

785. If any person is charged, in the province of Ontario before a police magistrate or before a stipendiary magistrate in any county, district or provisional county in such province, with having committed any offence for which he may be tried at a Court of General Sessions of the Peace, or if any person is committed to a gaol in the county, district or provisional county, under the warrant of any justice of the peace, for trial on a charge of being guilty of any such offence, such person may, with his own consent, be tried before such magistrate, and may, if found guilty, be sentenced by the magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions of the Peace. R. S. C. c. 176, s. 7.

786. Whenever the magistrate, before whom any person is charged as aforesaid, proposes to dispose of the case summarily under the provisions of this part, such magistrate, after ascertaining the nature and extent of the charge, but before the formal examination of the witnesses for the prosecution and before calling on the person charged for any statement which he wishes to make, shall state to such person the substance of the charge against him, and (if the charge is not one that can be tried summarily without the consent of the accused) shall then say to him these words, or words to the like effect: "Do you consent that the charge against you shall be tried by me, or do you desire that it shall be sent for trial by a jury at the (*naming the court at which it can probably soonest be tried*);" and if the person charged consents to the charge being summarily tried and determined as aforesaid, or if the power of the magistrate to try it does not depend on the consent of the accused, the magistrate shall reduce the charge to writing and read the same to such person, and shall then ask him whether he is guilty or not of such charge. If the person charged confesses the charge the magistrate shall then proceed to pass such sentence upon him as by law may be passed in respect to such offence, subject to the provisions of this Act; but if the person charged says that he is not guilty, the magistrate shall then examine the witnesses for the prosecution, and when the examination has been completed, the magistrate shall inquire of the person charged whether he has any defence to make to such charge, and if he states that he has a defence the magistrate shall hear such defence, and shall then proceed to dispose of the case summarily. R. S. C. c. 176, ss. 8 & 9.

787. In the case of an offence charged under paragraph (*a*) or (*b*) of section seven hundred and eighty-three, the magistrate, after hearing the whole case for the prosecution and for the defence, shall, if he finds the charge proved, convict the person charged and commit him to the common gaol or

other place of confinement, there to be imprisoned, with or without hard labour, for any term not exceeding six months. R. S. C. c. 176, s. 10.

788. In any case summarily tried under paragraph (*c*), (*d*), (*e*), (*f*), (*g*), (*h*) or (*i*) of section seven hundred and eighty-three, if the magistrate finds the charge proved, he may convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any term not exceeding six months, or may condemn him to pay a fine not exceeding, with the costs in the case, one hundred dollars, or to both fine and imprisonment not exceeding the said sum and term; and such fine may be levied by warrant of distress under the hand and seal of the magistrate, or the person convicted may be condemned, in addition to any other imprisonment on the same conviction, to be committed to the common gaol or other place of confinement for a further term not exceeding six months, unless such fine is sooner paid. R. S. C. c. 176, s. 11.

789. When any person is charged before a magistrate with theft or with having obtained property by false pretenses, or with having unlawfully received stolen property, and the value of the property stolen, obtained or received exceeds ten dollars, and the evidence in support of the prosecution is, in the opinion of the magistrate, sufficient to put the person on his trial for the offence charged, such magistrate, if the case appears to him to be one which may properly be disposed of in a summary way, and may be adequately punished by virtue of the powers conferred by this part, shall reduce the charge to writing, and shall read it to the said person, and, unless such person is one who can be tried summarily without his consent, shall then put to him the question mentioned in section seven hundred and eighty-six, and shall explain to him that he is not obliged to plead or answer before such magistrate, and that if he does not plead or answer before him, he will be committed for trial in the usual course. R. S. C. c. 176, s. 12.

790. If the person charged as mentioned in the next preceding section consents to be tried by the magistrate, the magistrate shall then ask him whether he is guilty or not guilty of the charge, and if such person says that he is guilty, the magistrate shall then cause a plea of guilty to be entered upon the proceedings, and sentence him to the same punishment as he would have been liable to if he had been convicted upon indictment in the ordinary way; and if he says that he is not guilty, the magistrate shall proceed as provided in section seven hundred and eighty-six. 52 V. c. 46, s. 2.

791. If, in any proceeding under this part, it appears to the magistrate that the offence is one which, owing to a previous conviction of the person charged, or from any other circumstance, ought to be made the subject of prosecution by indictment rather than to be disposed of summarily, such magistrate may, before the accused person has made his defence, decide not to adjudicate summarily upon the case; but a previous conviction shall not prevent the magistrate from trying the offender summarily, if he thinks fit so to do. R. S. C. c. 176, s. 14.

792. If, when his consent is necessary, the person charged elects to be tried before a jury, the magistrate shall proceed to hold a preliminary inquiry

as provided in Parts XLIV. and XLV., and if the person charged is committed for trial, shall state in the warrant of committal the fact of such election having been made. R. S. C. c. 176, s. 15.

793. In every case of summary proceedings under this part the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or solicitor. R. S. C. c. 176, s. 16.

794. Every court held by a magistrate for the purposes of this part shall be an open public court.

795. The magistrate before whom any person is charged under the provisions of this part may, by summons, require the attendance of any person as a witness upon the hearing of the case, at a time and place to be named in such summons, and such magistrate may bind, by recognizance, all persons whom he considers necessary to be examined, touching the matter of such charge, to attend at the time and place appointed by him and then and there to give evidence upon the hearing of such charge; and if any person so summoned, or required or bound as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, and if proof is made of such person having been duly summoned as hereinafter mentioned, or bound by recognizance as aforesaid, the magistrate before whom such person should have attended may issue a warrant to compel his appearance as a witness. R. S. C. c. 176, s. 18.

796. Every summons issued under the provisions of this part may be served by delivering a copy of the summons to the person summoned, or by delivering a copy of the summons to some inmate of such person's usual place of abode *apparently over sixteen years of age;* and every person so required by any writing under the hand of any magistrate to attend and give evidence as aforesaid shall be deemed to have been duly summoned. R. S. C. c. 176, s. 19.

797. Whenever the magistrate finds the offence not proved, he shall dismiss the charge, and make out and deliver to the person charged a certificate under his hand stating the fact of such dismissal. R. S. C. c. 176, s. 20.

798. Every conviction under this part shall have the same effect as a conviction upon indictment for the same offence. R. S. C. c. 176, s. 22.

799. Every person who obtains a certificate of dismissal or is convicted under the provisions of this part, shall be released from all further or other criminal proceedings for the same cause. R. S. C. c. 176, s. 23.

800. No conviction, sentence or proceeding under the provisions of this part shall be quashed for want of form; and no warrant of commitment upon a conviction shall be held void by reason of any defect therein, if it is therein alleged that the offender has been convicted, and there is a good and valid conviction to sustain the same. R. S. C. c. 176, s. 24.

801. The magistrate adjudicating under the provisions of this part shall transmit the conviction, or a duplicate of a certificate of dismissal, with the written charge, the depositions of witnesses for the prosecution and for the defence, and the statement of the accused, to the next court of General or Quarter Sessions of the Peace or to the court discharging the functions of a court of General or Quarter Sessions of the Peace, for the district, county or place, there to be kept by the proper officer among the records of the court. R. S. C. c. 176. s. 25.

802. A copy of such conviction, or of such certificate of dismissal, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein, in any legal proceedings. R. S. C. c. 176, s. 26.

803. The magistrate by whom any person has been convicted under the provisions of this part may order restitution of the property stolen, or taken *or obtained by false pretenses*, in any case in which the court before whom the person convicted would have been tried but for the provisions of this part, might by law order restitution. R. S. C. c. 176, s. 27.

See s. 838, *post.*

804. Whenever any person is charged before any justice or justices of the peace, with any offence mentioned in section seven hundred and eighty-three, and in the opinion of such justice or justices the case is proper to be disposed of summarily by a magistrate, as herein provided, the justice or justices before whom such person is so charged may, if he or they see fit, remand such person for further examination before the nearest magistrate in like manner in all respects as a justice or justices are authorized to remand a person accused for trial at any court, under Part XLV., section five hundred and eighty-six; but no justice or justices of the peace, in any province, shall so remand any person for further examination or trial before any such magistrate in any other province. Any person so remanded for examination before a magistrate in any city, may be examined and dealt with by any other magistrate in the same city. R. S. C. c. 176, ss. 28, 29 & 30.

805. If any person suffered to go at large, upon entering into such recognizance as the justice or justices are authorized, under Part XLV., section five hundred and eighty-seven, to take on the remand of a person accused, conditioned for his appearance before a magistrate, does not afterwards appear, pursuant to such recognizance, the magistrate before whom he should have appeared shall certify, under his hand on the back of the recognizance, to the clerk of the peace of the district, county or place, or other proper officer, as the case may be, the fact of such non-appearance, and such recognizance shall be proceeded upon in like manner as other recognizances; and such certificate shall be *prima facie* evidence of such non-appearance *without proof of the signature of the magistrate thereto.* R. S. C. c. 176, s. 31.

806. Every fine and penalty imposed under the authority of this part shall be paid as follows, that is to say:—

(*a*) In the province of Ontario, to the magistrate who imposed the same, or to the clerk of the court or clerk of the peace, as the case may be, to be paid over by him to the county treasurer for county purposes;

(*b*) In any new district in the province of Quebec, to the sheriff of such district, as treasurer of the building and jury fund for such district, to form part of such fund,—and if in any other district in the said province, to the prothonotary of such district to be applied by him, under the direction of the Lieutenant-Governor in Council, towards the keeping in repair of the court-house in such district, or to be added by him to the moneys and fees collected by him for the erection of a court-house and gaol in such district, so long as such fees are collected to defray the cost of such erection;

(*c*) In the provinces of Nova Scotia and New Brunswick, to the county treasurer for county purposes; and

(*d*) In the provinces of Prince Edward Island, Manitoba and British Columbia, to the treasurer of the province. R. S. C. c. 176, s. 32.

807. Every conviction or certificate may be in the form QQ, RR, or SS in schedule one hereto applicable to the case, or to the like effect; and whenever the nature of the case requires it, such forms may be altered by omitting the words stating the consent of the person to be tried before the magistrate, and by adding the requisite words, stating the fine imposed, if any, and the imprisonment, if any, to which the person convicted is to be subjected if the fine is not sooner paid. R. S. C. c. 176, s. 33.

FORMS UNDER PART LV.

QQ.—(*Section* 807.)

CONVICTION.

Canada,
Province of ,
County of . . .

Be it remembered that on the day of , in the year , at , A. B., being charged before me, the undersigned, , of the said (*city*) (and consenting to my trying the charge summarily), is convicted before me, for that he, the said A. B., (*etc., stating the offence, and the time and place when and where committed*), and I adjudge the said A. B., for his said offence, to be imprisoned in the , (and there kept to hard labour) for the term of .

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

J. S., [SEAL.]
J. P., (Name of county.)

RR.—(*Section* 807.)

CONVICTION UPON A PLEA OF GUILTY.

Canada,
Province of ,
County of .

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

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

J. S., [SEAL.]
J. P., (Name of county.)

SS.—*(Section* 807.*)*

CERTIFICATE OF DISMISSAL.

Canada,
Province of ,
County of .

I, the undersigned, , of the city *(or as the case may be)* of , certify that on the day of , in the year , at aforesaid, A. B., being charged before me (and consenting to my trying the charge summarily), for that he, the said A. B., *(etc., stating the offence charged, and the time and place when and where alleged to have been committed)*, I did, after having summarily tried the said charge, dismiss the same.

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

J. S., [SEAL.]
J. P., (Name of county.)

808. The provisions of this Act relating to preliminary inquiries before justices, except as mentioned in sections eight hundred and four and eight hundred and five and of Part LVIII., shall not apply to any proceedings under this part. Nothing in this part shall affect the provisions of Part LVI., and this part shall not extend to persons punishable under that part so far as regards offences for which such persons may be punished thereunder. R. S. C. c. 176, ss. 34 & 35.

PART LVI.

TRIAL OF JUVENILE OFFENDERS FOR INDICTABLE OFFENCES.

809. In this part, unless the context otherwise requires—

(*a*) The expression "two or more justices," or "the justices" includes,—

(i) in the provinces of Ontario and Manitoba any judge of the county court being a justice of the peace, police magistrate or stipendiary magistrate, or any two justices of the peace, acting within their respective jurisdictions;

(ii) in the province of Quebec any two or more justices of the peace, the sheriff of any district, except Montreal and Quebec, the deputy sheriff of Gaspe, and any recorder, judge of the Sessions of the Peace, police magistrate, district magistrate or stipendiary magistrate acting within the limits of their respective jurisdictions;

(iii) in the provinces of Nova Scotia, New Brunswick, Prince Edward Island, and British Columbia, and in the district of Keewatin, any functionary or tribunal invested by the proper legislative authority with power to do acts usually required to be done by two or more justices of the peace;

(iv) in the North-west Territories, any judge of the Supreme Court of the said territories, any two justices of the peace sitting together, and any functionary or tribunal having the powers of two justices of the peace;

(*b*) The expression "the common gaol or other place of confinement" includes any reformatory prison provided for the reception of juvenile offenders in the province in which the conviction referred to takes place, and to which, by the law of that province, the offender may be sent. R. S. C. c. 177, s. 2.

810. Every person charged with having committed, or having attempted to commit any offence which is theft, or punishable as theft, and whose age, at the period of the commission or attempted commission of such offence, does not, in the opinion of the justice before whom he is brought or appears, exceed the age of sixteen years, shall, upon conviction thereof in open court, upon his

own confession or upon proof, before any two or more justices, be committed to the common gaol or other place of confinement within the jurisdiction of such justices, there to be imprisoned, with or without hard labour, for any term not exceeding three months, or, in the discretion of such justices, shall forfeit and pay such sum, not exceeding twenty dollars, as such justices adjudge. R. S. C. c. 177, s. 3.

811. Whenever any person, whose age is alleged not to exceed sixteen years, is charged with any offence mentioned in the next preceding section, on the oath of a credible witness, before any justice of the peace, such justice may issue his summons or warrant, to summon or to apprehend the person so charged to appear before any two justices of the peace, at a time and place to be named in such summons or warrant. R. S. C. c. 177, s. 4.

812. Any justice of the peace, if he thinks fit, may remand for further examination or for trial, or suffer to go at large, upon his finding sufficient sureties, any such person charged before him with any such offence as aforesaid.

2. Every such surety shall be bound by recognizance conditioned for the appearance of such person before the same or some other justice or justices of the peace for further examination, or for trial before two or more justices of the peace as aforesaid, or for trial by indictment at the proper court of criminal jurisdiction, as the case may be.

3. Every such recognizance may be enlarged, from time to time, by any such justice or justices to such further time as he or they appoint; and every such recognizance not so enlarged shall be discharged without fee or reward, when the person has appeared according to the condition thereof. R. S. C. c. 177, ss. 5, 6 & 7.

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

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

2. And if such person, or a parent or guardian of such person, then objects, no further proceedings shall be had under the provisions of this part; but the justices may deal with the case according to the provision set out in Parts XLIV. and XLV., as if the accused were before them thereunder. R. S. C. c. 177, s. 8.

814. If the justices are of opinion, before the person charged has made his defence, that the charge is, from any circumstance, a fit subject for prosecution by indictment, or if the person charged, upon being called upon to answer the charge, objects to the case being summarily disposed of under the provisions of this part, the justices shall not deal with it summarily, but may proceed to hold a preliminary inquiry as provided in Parts XLIV. and XLV. (Ss. 553, 577).

2. In case the accused has elected to be tried by a jury, the justices shall state in the warrant of commitment the fact of such election having been made. R. S. C. c. 177, s. 9.

815. Any justice of the peace may, by summons, require the attendance of any person as a witness upon the hearing of any case before two justices, under the authority of this part, at a time and place to be named in such summons. R. S. C. c. 177, s. 10.

816. Any such justice may require and bind by recognizance every person whom he considers necessary to be examined, touching the matter of such charge, to attend at the time and place appointed by him and then and there to give evidence upon the hearing of such charge. R. S. C. c. 177, s. 11.

817. If any person so summoned or required or bound, as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, and if proof is given of such person having been duly summoned, as hereinafter mentioned, or bound by recognizance, as aforesaid, either of the justices before whom any such person should have attended may issue a warrant to compel his appearance as a witness. R. S. C. c. 177, s. 12.

818. Every summons issued under the authority of this part may be served by delivering a copy thereof to the person, or to some inmate, *apparently over sixteen years of age*, at such person's usual place of abode, and every person so required by any writing under the hand or hands of any justice or justices to attend and give evidence as aforesaid, shall be deemed to have been duly summoned. R. S. C. c. 177, s. 13.

819. If the justices, upon the hearing of any such case, deem the offence not proved, or that it is not expedient to inflict any punishment, they shall dismiss the person charged,—in the latter case on his finding sureties for his future good behaviour, and in the former case without sureties, and then make out and deliver to the person charged a certificate in the form TT in schedule one to this Act, or to the like effect, under the hands of such justices, stating the fact of such dismissal. R. S. C. c. 177, s. 14.

FORMS UNDER PART LVI.

TT.—(*Section* 819.)

CERTIFICATE OF DISMISSAL.

Canada, Province of , County of . } the peace for the , justices of the of , (*or if a recorder, etc.*, I, a , of the of , *as the case may be*), do hereby certify that on the day of ,

in the year , at , in the said of , A. B. was brought before us the said justices (*or* me, the said), charged with the following offence, that is to say (*here state briefly the particulars of the charge*), and that we, the said justices, (*or* I, the said), thereupon dismissed the said charge.

Given under our hands and seals (*or* my hand and seal) this day of , in the year , at aforesaid.

J. P. [SEAL.]
J. R. [SEAL.]
or S. J. [SEAL.]

---

820. The justices before whom any person is summarily convicted of any offence hereinbefore mentioned, may cause the conviction to be drawn up in the form UU in schedule one hereto, or in any other form to the same effect, and the conviction shall be good and effectual to all intents and purposes.

2. No such conviction shall be quashed for want of form, or be removed by *certiorari* or otherwise into any court of record; and no warrant of commitment shall be held void by reason of any defect therein, if it is therein alleged that the person has been convicted, and there is a good and valid conviction to sustain the same. R. S. C. c. 177, ss. 16 & 17.

UU.—(*Section* 820.)

CONVICTION.

Canada,
Province of ,
County of ,

Be it remembered that on the day of , in the year , at , in the county of , A. B. is convicted before us, J. P. and J. R., justices of the peace for the said county (*or* me, S. J., *recorder*, of the , of , *or as the case may be*) for that he, the said A. B., did (*specify the offence and the time and place when and where the same was committed, as the case may be, but without setting forth the evidence*), and we, the said J. P. and J. R. (*or* I, the said S. J.), adjudge the said A. B., for his said offence to be imprisoned in the , (*or* to be imprisoned in the , and there kept at hard labour), for the space of, (*or* we) (*or* I) adjudge the said A. B., for his said offence, to forfeit and pay (*here state the penalty*

actually imposed), and in default of immediate payment of the said sum, to be imprisoned in the , (*or* to be imprisoned in the , and kept at hard labour) for the term of , unless the said sum is sooner paid.

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

J. P. [SEAL.]
J. R. [SEAL.]
or S. J. [SEAL.]

---

821. Every person who obtains such certificate of dismissal, or is so convicted, shall be released from all further or other criminal proceedings for the same cause. R. S. C. c. 177, s. 15.

822. The justices before whom any person is convicted under the provisions of this part shall forthwith transmit the conviction and recognizances to the clerk of the peace or other proper officer, for the district, city, county or union of counties wherein the offence was committed, there to be kept by the proper officer among the records of the court of General or Quarter Sessions of the Peace, or of any other court discharging the functions of a court of General or Quarter Sessions of the Peace. R. S. C. c. 177, s. 18.

823. Every clerk of the peace, or other proper officer, shall transmit to the Minister of Agriculture a quarterly return of the names, offences and punishments mentioned in the convictions, with such other particulars as are, from time to time, required. R. S. C. c. 177, s. 19.

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

See s. 838, *post*.

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

3. The person ordered to pay such sum may be sued for the same as a debt in any court in which debts of the like amount are, by law, recoverable, with costs of suit, according to the practice of such court. R. S. C. c. 177, ss. 20, 21 & 22.

[*Parliament, by this enactment, assumes the right to give a right of action in the civil courts against minors.*

825. Whenever the justices adjudge any offender to forfeit and pay a pecuniary penalty under the authority of this part, and such penalty is not forthwith paid they may, if they deem it expedient, appoint some future day

for the payment thereof, and order the offender to be detained in safe custody until the day so appointed, unless such offender gives security to the satisfaction of the justices, for his appearance on such day; and the justice (*justices?*) may take such security by way of recognizance or otherwise in their discretion.

2. If at any time so appointed such penalty has not been paid, the same or any other justices of the peace may, by warrant under their hands and seals, commit the offender to the common gaol or other place of confinement within their jurisdiction, there to remain for any time not exceeding three months, reckoned from the day of such adjudication. R. S. C. c. 177, ss. 23 & 24.

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

2. The justices may, although no conviction takes place, order all or any of the payments aforesaid to be made, when they are of opinion that the persons, or any of them, have acted in good faith. R. S. C, c. 177, ss. 25 & 26.

827. Every fine imposed under the authority of this part shall be paid and applied as follows, that is to say:—

(*a*) In the Province of Ontario to the justices who impose the same or the clerk of the county court, or the clerk of the peace, or other proper officer, as the case may be, to be by him or them paid over to the county treasurer for county purposes;

(*b*) In any new district in the province of Quebec to the sheriff of such district as treasurer of the building and jury fund for such district to form part of such fund, and in any other district in the province of Quebec to the prothonotary of such district, to be applied by him, under the direction of the Lieutenant-Governor in Council, towards the keeping in repair of the court-house in such district or to be added by him to the moneys or fees collected by him for the erection of a court-house or gaol in such district, so long as such fees are collected to defray the cost of such erection;

(*c*) In the provinces of Nova Scotia and New Brunswick to the county treasurer, for county purposes; and

(*d*) In the provinces of Prince Edward Island, Manitoba and British Columbia to the treasurer of the province. R. S. C. c. 177, s. 27.

828. The amount of expenses of attending before the justices and the compensation for trouble and loss of time therein, and the allowances to the constables and other peace officers for the apprehension and detention of the offender, and the allowances to be paid to the prosecutor, witnesses and constables for attending at the trial or examination of the offender, shall be ascertained by and certified under the hands of such justices; but the amount of

the costs, charges and expenses attending any such prosecution, to be allowed and paid as aforesaid, shall not in any one case exceed the sum of eight dollars.

2. Every such order of payment to any prosecutor or other person, after the amount thereof has been certified by the proper justices of the peace as aforesaid, shall be forthwith made out and delivered by the said justices or one of them, or by the clerk of the peace or other proper officer, as the case may be, to such prosecutor or other person, upon such clerk or officer being paid his lawful fee for the same, and shall be made upon the officer to whom fines imposed under the authority of this part are required to be paid over in the district, city, county or union of counties in which the offence was committed, or was supposed to have been committed, who, upon sight of every such order, shall forthwith pay to the person named therein, or to any other person duly authorized to receive the same on his behalf, out of any moneys received by him under this part, the money in such order mentioned, and he shall be allowed the same in his accounts of such moneys. R. S. C. c. 177, ss. 28 & 29.

829. The provisions of this part shall not apply to any offence committed in the provinces of Prince Edward Island or British Columbia, or the district of Keewatin, punishable by imprisonment for two years and upwards; and in such provinces and district it shall not be necessary to transmit any recognizance to the clerk of the peace or other proper officer. R. S. C. c. 177, s. 30.

830. The provisions of this part shall not authorize two or more justices of the peace to sentence offenders to imprisonment in a reformatory in the province of Ontario. R. S. C. c. 177, s. 31.

831. Nothing in this part shall prevent the summary conviction of any person who may be tried thereunder before one or more justices of the peace, for any offence for which he is liable to be so convicted under any other part of this Act or under any other Act. R. S. C. c. 177, s. 8, part.

PART LVII.

COSTS AND PECUNIARY COMPENSATION—RESTITUTION OF PROPERTY.

832. Any court by which and any judge under Part LIV. or magistrate under LV. by whom judgment is pronounced or recorded, upon the conviction of any person for treason or any indictable offence, in addition to such sentence as may otherwise by law be passed, may condemn such person to the payment of the whole or any part of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he is convicted,

if to such court it seems fit so to do; and the payment of such costs and expenses, or any part thereof, may be ordered by the court to be made out of any moneys taken from such person on his apprehension (if such moneys are his own), or may be enforced at the instance of any person liable to pay or who has paid the same in such and the same manner (subject to the provisions of this Act) as the payment of any costs ordered to be paid by the judgment or order of any court of competent jurisdiction in any civil action or proceeding may for the time being be enforced: Provided, that in the meantime, and until the recovery of such costs and expenses from the person so convicted as aforesaid, or from his estate, the same shall be paid and provided for in the same manner as if this section had not been passed; and any money which is recovered in respect thereof from the person so convicted, or from his estate, shall be applicable to the reimbursement of any person or fund by whom or out of which such costs and expenses have been paid or defrayed: 33-34 V. (U. K.) c. 23, s. 3.

Part LIV. is comprised between ss. 762 and 781, *ante*, speedy trials of indictable offences; and Part LV. between ss. 782 and 808, summary trial of indictable offences.

This section is new. The only case where costs could previously be allowed in a criminal case was in assault by s. 248, R. S. C. c. 174: *see post*, s. 834.

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

COSTS AGAINST A PROSECUTOR IN A CASE OF LIBEL.

833. In the case of an indictment or information by a private prosecutor for the publication of a defamatory libel if judgment is given for the defendant, he shall be entitled to recover from the prosecutor the costs incurred by him by reason of such indictment or information either by warrant of distress issued out of the said court, or by action or suit as for an ordinary debt. R. S. C. c. 174, ss. 153 & 154.

See ante, under s. 302. The costs against a defendant are provided for by the preceding section.

COSTS ON CONVICTION FOR ASSAULT.

834. If a person convicted on an indictment for assault, whether with or without battery and wounding, is ordered to pay costs as provided in section eight hundred and thirty-two he shall be liable unless the said costs are sooner paid, to three months' imprisonment, in addition to the term of imprisonment, if any, to which he is sentenced for the offence, and the court may, by warrant in writing, order the amount of such costs to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and the surplus, if any, arising from such sale, to the owner; and if such sum is so levied, the offender shall be released from such imprisonment. R. S. C. c. 174, ss. 248 & 249 24-25 V. c. 100, ss. 74, 75 (Imp.).

TAXATION OF COSTS. (*New*).

835. Any costs ordered to be paid by a court pursuant to the foregoing provisions shall, in case there is no tariff of fees provided with respect to criminal proceedings, be taxed by the proper officer of the court according to the lowest scale of fees allowed in such court in a civil suit.

2. If such court has no civil jurisdiction the fees shall be those allowed in civil suits in *a superior court* of the province according to *the lowest scale*.

COMPENSATION FOR LOSS OF PROPERTY.

836. A court on the trial of any person on an indictment may, if it thinks fit, upon the application of *any* person aggrieved and *immediately after* the conviction of the offender, award any sum of money, not exceeding one thousand dollars, by way of satisfaction or compensation for any loss of property suffered *by the applicant* through or by means of the offence of which such person is so convicted; and the amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs ordered by the court to be paid under section eight hundred and thirty-two. 33-34 V. (U.K.) c. 23, s. 4.

"Property" defined, s. 3.

This section is new. It enables any person aggrieved to get a judgment from the court, without a jury, for any amount up to one thousand dollars against the party convicted, even where that court has no jurisdiction in civil matters.

"The discretionary power given by this section is far more extensive than the power conferred by 24 & 25 V. c. 96, s. 100 (s. 838, *post*), and if it is exercised in every case to which it may in strictness be applicable, will compel a criminal court at the close of many trials for felony to enter upon complicated inquiries involving the expenditure of a large amount of time and labour."

"It is probable, however, that criminal courts will decline to exercise the powers thus conferred upon them except in very simple cases, and will, in the majority of instances, leave the applicant to enforce his rights by the ordinary civil procedure."

"In the case of serious personal injuries, caused by a felonious act, no compensation could be awarded under this section in respect of the personal injuries. And even

where the personal injuries, caused by the felonious act, had incapacitated the prosecutor from earning his livelihood, it would seem that this would not be such a loss of property as would form the subject of compensation under this section": Archbold.

COMPENSATION TO PURCHASER OF STOLEN PROPERTY.

837. When any prisoner has been convicted, either summarily or otherwise, of any theft or other offence, including the stealing or unlawfully obtaining any property, and it appears to the court, by the evidence, that the prisoner sold such property or part of it to any person who had no knowledge that it was stolen or unlawfully obtained, and that money has been taken from the prisoner on his apprehension, the court may, on application of such purchaser and on restitution of the property to its owner, order that out of the money so taken from the prisoner (*if it is his*) a sum not exceeding the amount of the proceeds of the sale be delivered to such purchaser. R. S. C. c. 174, s. 251.

The words in italics are new. They are in conformity with the remarks of the judges in R. v. Roberts, 12 Cox, 574.

The Imperial Act is 30 & 31 V. c. 35, s. 9. The Imperial Act does not expressly provide for the case of goods obtained by false pretenses. The section provides for the case of a *sale* only of the stolen property: *see* R. v. Stancliffe, 11 Cox, 318; R. v. Roberts, 12 Cox, 574.

RESTITUTION OF STOLEN PROPERTY. (*As amended in 1893*).

838. If any person who is guilty of any indictable offence *in stealing, or knowingly receiving, any property* is indicted for such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, or is tried before a judge or justice for such offence under any of the foregoing provisions and convicted thereof, the property shall be restored to the owner or his representative.

2. In every such case the court or tribunal before which such person is tried for any such offence shall have power to award, from time to time, writs of restitution for the said property or to order the restitution thereof in a summary manner; *and the court or tribunal may also, if it sees fit, award restitution of the property taken from the prosecutor, or any witness for the prosecution, by such offence although the person indicted is not convicted thereof if the jury declares, as it may do, or if, in case the offender is tried without a jury, it is proved to the satisfaction of the court or tribunal by whom he is tried, that such property belongs to such prosecutor or witness, and that he was unlawfully deprived of it by such offence.*

3. If it appears before any award or order is made, that any valuable security has been *bona fide* paid or discharged by any person liable to the

payment thereof, or, being a negotiable instrument, has been *bona fide* taken or received by transfer or delivery, by any person, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, *by any indictable offence, been stolen, or if it appears that the property stolen has been transferred to an innocent purchaser for value who has acquired a lawful title thereto*, the court or tribunal shall not award or order the restitution of such security or property.

4. Nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker or other agent intrusted with the possession of goods or documents of title to goods, for any indictable offence under sections three hundred and twenty or three hundred and sixty-three of this Act. R. S. C. c. 174, s. 250.

Sections 803 and 824 *ante* also provide for restitution of stolen property in certain cases.

The words in italics in s-s 2 are not in the English Act, 24 & 25 V. c. 96, s. 100.

The repealed clause covered property obtained by false pretenses. The words in italics in s-s. 3 are new.

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

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

The court was bound by the repealed statute to order restitution of property obtained by false pretenses and the subject of the prosecution, in whose hands soever it was found; and so likewise of property received by a person

knowing it to have been stolen or obtained by false pretenses; but the order was strictly limited to property identified at the trial as being the subject of the charge; therefore it did not extend to property in the possession of innocent third persons which was not produced and identified at the trial as being the subject of the indictment: R. v. Goldsmith, 12 Cox, 594.

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

It was held, on this clause: R. v. Atkin, 18 L. C. J. 213; that the court will not give an order for the restitution of stolen goods where the ownership is the subject of a dispute in the civil courts: *see* R. v. Macklin, 5 Cox, 216.

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

See 1 Hale, 543; 4 Blacks. 363.

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

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

Before the conviction the defendant had purchased some of the goods *bona fide* of Blenkarn without notice of the fraud, and resold them to other persons. The plaintiffs

having brought an action for the conversion of the goods: *Held*, that the plaintiffs intended to deal with Blenkiron & Sons, and therefore there was no contract with Blenkarn; that the property of the goods never passed from the plaintiffs; and that they were accordingly entitled to recover in the action: Lindsay v. Cundy, 13 Cox, 583, 2 Q. B. D. 96, 3 App. Cas. 459.

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

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

Under this section the court can order the restitution of the proceeds of the goods as well as of the goods themselves, if such proceeds are in the hands of the criminal or of an agent who holds them for him: R. v. The Justices, 16 Cox, 143, 196.

A man was convicted of stealing cattle, which he had sold since in market overt and had been resold immediately also in market overt, the purchasers being in good faith. Restitution ordered to the person from whom they had been stolen: R. v. Horan, 6 Ir. R. C. L. 293; but *see* now s-s. 3 of s. 838 *ante*.

M. was indicted for stealing $95 in bank notes and acquitted. He applied to have $87 in notes, found on his person when arrested, returned to him which the prosecutor resisted. The statute of P. E. I., 6 Wm. IV. c. 22, s. 38, enacts that "when a prisoner is not convicted the court may, if it sees fit, order restitution of the property

where it clearly appears to have been stolen from the owner. When arrested prisoner had the money sewed up in his trousers, and among the notes was a $5 note, bank of N. B., $5 note, bank of Halifax, and a $5 note, bank of Montreal. Prisoner said he put the money there to hide it from the police. Prosecutor had sworn that he had carefully counted the money before the robbery, and that it included a $5 bank of N. B. note, and a $5 bank of Halifax note.

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

A leading case on this section in England is now Vilmont v. Bentley, 12 App. Cas. 471, Warb. Lead. Cas. 256, which, however, cannot be followed in Canada under s-s. 3 of s. 838, *ante*.