PART XLVII.

CORPORATIONS.

635. Every corporation against which a bill of indictment is found at any court having criminal jurisdiction shall appear by attorney in the court in which such indictment is found and plead or demur thereto. R. S. C. c. 174, s. 155.

See R. v. Birmingham, Warb. Lead. Cas. 33.

636. No writ of *certiorari* shall be necessary to remove any such indictment into any superior court with the view of compelling the defendant to plead thereto; nor shall it be necessary to issue any writ of *distringas*, or other process, to compel the defendant to appear and plead to such indictment. R. S. C. c. 174, s. 156.

637. The prosecutor, when any such indictment is found against a corporation, or the clerk of the court when such indictment is founded on a presentment of the grand jury, may cause a notice thereof to be served on the mayor or chief officer of such corporation, or upon the clerk or secretary thereof, stating the nature and purport of such indictment, and that, unless such corporation appears and pleads thereto in two days after the service of such notice, a plea of not guilty will be entered thereto for the defendant by the court, and that the trial thereof will be proceeded with in like manner as if the said corporation had appeared and pleaded thereto. R. S. C. c. 174, s. 157.

638. If such corporation does not appear in the court in which the indictment has been found, and plead or demur thereto within the time specified in the said notice, the judge presiding at such court may, on proof to him by affidavit of the due service of such notice, order the clerk or proper officer of the court to enter a plea of "not guilty" on behalf of such corporation, and such plea shall have the same force and effect as if such corporation had appeared by its attorney and pleaded such plea. R. S. C. c. 174, s. 158.

639. The court may—whether such corporation appears and pleads to the indictment, or whether a plea of "not guilty" is entered by order of the court—proceed with the trial of the indictment in the absence of the defendant in the same manner as if the corporation had appeared at the trial and defended the same; and in case of conviction, may award such judgment and take such other and subsequent proceedings to enforce the same as are applicable to convictions against corporations. R. S. C. c. 174, s. 159.

PART XLVIII.

PREFERRING INDICTMENT.

JURISDICTION. (*New*).

640. Every court of criminal jurisdiction in Canada is, subject to the provisions of Part XLII. (s. 538), competent to try all offences *wherever* committed, *if the accused is found* or apprehended or is in custody within the jurisdiction of such court, or if he has been committed for trial to such court or ordered to be tried before such court, *or before any other court the jurisdiction of which has by lawful authority been transferred to such first mentioned court under any Act for the time being in force:* Provided that nothing in this Act authorizes any court in one province of Canada to try any person for any offence committed entirely in another province, except in the following case:

2. Every proprietor, publisher, editor, or other person charged with the publication in a newspaper of any defamatory libel shall be dealt with, indicted, tried and punished in the province in which he resides, or in which such newspaper is printed. 51 V. c. 44, s. 2.

This section extends to all cases, the provision heretofore to be found in various statutes that the accused may be tried in any district where he is apprehended or in custody: *see* R. v. Lynch, 20 L. C. J. 187; R. v. Smith, 1 F. & F. 36; R. v. James, 7 C. & P. 553; R. v. Smythies, 1 Den. 498, and *note* (*c*) to 1 Russ. 274. S-s. 2 is given as an exception to the proviso in s-s. 1. But it is clearly not an exception to the enactment of that proviso that any offence committed entirely in one Province shall not be triable in another Province.

See ante, under s. 542, the Imperial statutory provisions as to the trial in the colonies of offences committed abroad or within the jurisdiction of the Admiralty.

The words "wherever committed" in s. 640 must receive a limited construction, and be read as if the words "in Canada" were added thereto: Macleod v. The Attorney-General, 17 Cox, 341, (1891), A.C. 455. Parliament cannot have intended to legislate on offences committed abroad by any one, even by foreigners, as this enactment taken

literally would infer. The English draft code was more happily worded. It said "every court competent to try offences triable in England or Ireland shall be competent to try all such offences wherever committed if the accused is found, etc. What this s. 640 means is, what was meant by the English draft, namely, that all courts otherwise competent to try an offence shall be competent to try it irrespectively of the place where it was committed, the place of trial being determined by the costs and expenses, the convenience of the court, the witnesses, and the person accused, the county where the offence was committed, being, of course, as a general rule, the best place for the purpose: 1 Stephens' Hist. 278. The Code is silent as to what are the offences committed on the high seas or abroad, on land, either wholly or partly, that can be tried in Canada: *see* remarks under s. 542, *ante*. The Imperial draft code had two special articles on the subject, but they have not been reproduced.

MODES OF PROSECUTION. (*New*).

641. Any one who is bound over to prosecute any person, whether committed for trial or not, may prefer a bill of indictment for the charge on which the accused has been committed, or in respect of which the prosecutor is so bound over, or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice. The accused may at any time before he is given in charge to the jury apply to the court to quash any count in the indictment on the ground that it is not founded on such facts or evidence, and the court shall quash such count if satisfied that it is not so founded. And if at any time during the trial it appears to the court that any count is not so founded, and that injustice has been or is likely to be done to the accused in consequence of such count remaining in the indictment, the court may then quash such count and discharge the jury from finding any verdict upon it.

2. The Attorney-General or any one by his direction or any one with the written consent of a judge of any court of criminal jurisdiction or of the Attorney-General, may prefer a bill of indictment for any offence before the grand jury of any court specified in such consent; and any person may prefer any bill of indictment before any court of criminal jurisdiction by order of such court.

3. It shall not be necessary to state such consent or order in the indictment. An objection to an indictment for want of such consent or order must be taken by motion to quash the indictment before the accused person is given in charge.

4. Save as aforesaid no bill of indictment shall after the commencement of this Act be preferred in any province in Canada.

The words "Attorney-General" include the solicitor-general: s. 3.

This enactment extends to all offences whatever the provisions of s. 140, c. 174, R. S C., which applied only to certain specified offences. The grand jury are not now at liberty to find a bill upon their own knowledge only; and the right to go directly before them and prefer a bill against any one is taken away. No one, as a general rule, is now liable to be indicted without a preliminary inquiry being first held before a magistrate. The only exceptions are those contained in s-s. 2 of the above s. 641. Criminal informations will lie as heretofore, though there may be some difficulty to determine in what cases, owing to the silence of the Code on the subject, the distinction between felonies and misdemeanours being abolished, and the remedy by information being given in England only in cases of misdemeanours.

By s. 595, *ante*, if the magistrate dismisses the charge and refuses to commit or bail the person accused, he is bound, if required to do so, to take the prosecutor's recognizance to prosecute the charge: R. v. Lord Mayor, 16 Cox, 77; *see Ex parte Wason*, 38 L. J. Q. B. 302.

This clause 641 forms in England the Acts known as the "Vexatious Indictments Acts" 22 & 23 V. c. 17; 30 & 31 V. c. 35; 44 & 45 V. c. 60 and 48 & 49 V. c. 69, and the enactment applies there only to certain specified offences.

The order of a judge in a court of civil jurisdiction ordering any one to be prosecuted for perjury under s. 4 of c. 154, R. S. C. (unrepealed, *see*, *ante*, p. 98) is not covered by s-s. 2 of s. 641, as it was by s. 140 of the Procedure Act.

As to jurisdiction of a state over offences committed abroad by its own subjects *see* cases under s. 542, *ante*, and Macleod v. Attorney General, 17 Cox, 341, [1891] A.C. 455. The offence committed abroad in that last case

was committed by a British subject, but that fact does not seem to have been specially alluded to, or else it was assumed that a colony has not, in such cases, like the Imperial Parliament, jurisdiction over offences committed abroad.

It is not necessary by s-s. 3 that the performance of any of the conditions mentioned in this section should be averred in the indictment or proved before the petit jury: Knowlden v. R. (in error) 5 B. & S. 532, 9 Cox, 483; Boaler v. R. 16 Cox, 488, 21 Q. B. D. 284. When the indictment is preferred by the direction in writing of a judge of competent jurisdiction, it is for the judge to whom the application is made for such direction to decide what materials ought to be before him, and it is not necessary to summon the party accused or to bring him before the judge; the court will not interfere with the exercise of the discretion of the judge under this clause: R. v. Bray, 8 B. & S. 255, 9 Cox, 215.

The provisions of the above statute must be complied with in respect to every count of an indictment to which they are applicable, and any count in which they have not been complied with must be quashed, but the motion to quash need not necessarily be made before plea pleaded: R. v. Fuidge, L. & C. 390, 9 Cox, 480; R. v. Bradlaugh, 15 Cox, 156. So if an indictment contains one count for obtaining money by false pretenses on the 26th of September, 1873, and another count for obtaining money by false pretenses on the 29th of September, 1873, though the false pretenses charged be the same in both cases, the second count must be quashed, if the defendant appears to have been committed only for the offence of the 26th September, and if the second offence is not disclosed by the depositions.

Where three persons were committed for conspiracy, and afterwards the Solicitor-General, acting under this clause, directed a bill to be preferred against a fourth person, who had not been committed, and all four were indicted together

for the same conspiracy, such a course was held unobjectionable: Knowlden v. R. (in error), 5 B. & S. 532, 9 Cox, 483.

Where it is made clear, either on the face of an indictment or by affidavit, that it has been found without jurisdiction, the court will quash it on motion of the defendant, even after he has pleaded: R. v. Heane, 4 B. & S. 947, 9 Cox, 483.

A prosecutor who has required the magistrates to take his recognizances to prosecute under s. 595 when the magistrates have refused to commit or to bail for trial the person charged, must either go on with the prosecution or have his recognizances forfeited, as it would defeat the object of the statute if he was allowed to move to have his recognizances discharged: R. v. Hargreaves, 2 F. & F. 790.

Held, that where one of the preliminary formalities mentioned in this section is required, the direction by a Queen's counsel then acting as crown prosecutor, for and in the name of the Attorney-General, is not sufficient. The Attorney-General or Solicitor-General alone can give the direction: Abrahams v. R., 6 S. C. R. 10; R. v. Ford, 14 Q. L. R. 231.

A person heretofore prosecuting under s. 140 of the Procedure Act had no right to be represented by any other counsel than the representative of the Attorney-General: R. v. St. Amour, 5 R. L. 469. As to the interpretation of the said section: *see*, further, R. v. Bradlaugh, 15 Cox, 156; also R. v. Bell, 12 Cox, 37; R. v. Yates, 15 Cox, 272, and Yates v. R. 15 Cox, 686.

CORONER'S INQUISITION. (*New*).

642. After the commencement of this Act no one shall be tried upon any coroner's inquisition.

By s. 568, the coroner cannot now commit any one for trial. He must send any one charged by his inquest before a magistrate.

OATH BEFORE GRAND JURY.

643. It shall not be necessary for any person to take an oath in open court in order to qualify him to give evidence before any grand jury. R. S. C. c. 174, s. 173.

644. The foreman of the grand jury or any member of the grand jury who may, for the time being, act on behalf of the foreman in the examination of witnesses, may administer an oath to every person who appears before such grand jury to give evidence in support of any bill of indictment; and every such person may be sworn and examined upon oath by such grand jury touching the matters in question. R. S. C. c. 174, s. 174.

645. The name of every witness examined, or intended to be examined, shall be endorsed on the bill of indictment; and the foreman of the grand jury, or any member of the grand jury so acting for him, shall write his initials against the name of each witness sworn by him and examined touching such bill of indictment. R. S. C. c. 174, s. 175.

646. The name of every witness intended to be examined on any bill of indictment shall be submitted to the grand jury by the officer prosecuting on behalf of the Crown, and no others shall be examined by or before such grand jury unless upon the written order of the presiding judge. R. S. C. c. 174, s. 176.

647. Nothing in this Act shall affect any fees by law payable to any officer of any court for swearing witnesses, but such fees shall be payable as if the witnesses had been sworn in open court. R. S. C. c. 174, s. 177.

Sections 643, 644 & 645 are re-enactments of the Imperial Act, 19 & 20 V. c. 54. S. 646 would, perhaps, be held not to apply to private prosecutions, *sed quære?*

The omission by the foreman to write his initials against the name of each witness sworn *and* examined would give to the prisoner the right, before plea, to ask that the indictment be sent back to the grand jury with a direction to the foreman to so initial the names of the witnesses examined. In a case in Illinois, under a similar enactment, it was held that the statute requiring the foreman of the grand jury to note on the indictment the names of the witnesses upon whose evidence the same is found is mandatory, and that a disregard of this requirement would, no doubt, be sufficient ground to authorize the court, upon a proper motion, to quash the indictment: Andrews v. The People, 117 Ill., 195.

See Thompson on Juries, 724.

Under s. 629, *ante*, a motion to quash the indictment upon such a ground must be made before plea, and upon such a motion the court would send the indictment back to the grand jury to remedy the defect. If the grand jury has been discharged the indictment, it seems, must be quashed.

With the grand jury's consent the witnesses before them are examined by the crown prosecutor or clerk of the crown, or by the private prosecutor or his solicitor. But the grand jury must be alone during their deliberations: 1 Chit. 315; 3 Burn, 36; charge to grand jury, Drummond, J., 4 R. L. 364; Stephen's Cr. Proc. Art. 190; and 1 Hist. Cr. L. 273, 274.

Not more than twenty-three grand jurors should be sworn in. But any number from twelve to twenty-three constitute a legal grand jury. At least twelve of them must agree to find a true bill. If twelve do not agree, they must return "not found," or "not a true bill," or "*ignoramus*"; this last form, however, is not now often used: 4 Stephen's Bl. 375 (10th edit.); 1 Chit. 322; 2 Burr. 1089; 3 Burn, 37; R. v. Marsh, 6 A. & E. 236; Dickinson's Quarter Sess. 183; Stephen's Cr. Proc. Art. 186; Low's case, 4 Me. 437; 1 Whart. Cr. L. pars. 463, 497. In addressing the grand jury, in Montreal, Queen's Bench, June 1st, 1893, Wurtele, J., instructed them that to find an accusation founded or *to declare it unfounded* twelve at least must concur. The italicized words contain a palpable error.

The court will not inquire whether the witnesses were properly sworn before the grand jury: R. v. Russell, C. & M. 247, but *see* R. v. Dickinson, *post*.

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

On the trial of Alexander Gillis for murder, his counsel called the foreman of the grand jury which found the bill

against him to prove that a witness's evidence before the grand jury was different from that given by the witness on the trial. The counsel for the crown objected that a grand juror could not be allowed to give evidence of what took place in the grand jury room: *Held*, that a grand juror's obligation to keep secret what transpired before the grand jury only applied to what took place among the grand jurors themselves, and did not prevent his being called to prove what a witness had said: R. v. Gillis, 6 C. L. T. 208.

On this point, *see* Taylor, Ev. par. 863. Also, Stephen Ev., Art. 114, where it is said: "It is also doubtful whether a grand juror may give evidence as to what any witness said when examined before the grand jury." *See* s. 145, *ante*, as to perjury committed before a grand jury.

A grand jury cannot on a suspicion that a witness called before them has been tampered with by the prisoner receive in evidence his written examination given at the preliminary investigation for the purpose of finding a bill: R. v. Denby, 1 Leach, 514.

Depositions not taken in presence of the accused cannot be submitted to the grand jury: R. v. Carbray, 13 Q. L. R. 100.

A grand jury have no right to ignore a bill on account of insanity, either when the offence was committed or at the time when the bill is preferred: R. v. Hodges, 8 C. & P. 195.

In R. v. Dickinson, R. & R. 401, it being discovered after conviction that the witnesses had been examined before the grand jury without being sworn, the judge thought the objection came too late, and sentenced the prisoner. Subsequently, without deciding on the validity of the objection, the judge thought that, as a matter of discretion, it was better to direct application to be made for a pardon.

As to whether a bill once thrown out by the grand jury can be submitted *de novo* during the same term of the

court, *see* R. v. Humphreys, Car. & M. 601; R. v. Newton, 2 M. & Rob. 509. By observing either one or the other of the preliminary formalities required by s. 641 a new bill founded on the same facts may, it would seem, be preferred during the same term.

Witnesses may be examined before the petit jury whose names are not on the back of the indictment: Archbold, 86.

BENCH WARRANT. (*Amended*).

648. When any one against whom an indictment has been duly preferred and has been found, and who is then at large, does not appear to plead to such indictment, whether he is under recognizances to appear or not—

(*a*) *the court before which the accused ought to have been tried may issue a warrant for his apprehension, which may be executed in any part of Canada;*

(*b*) the officer of the court at which the said indictment is found or (if the place or trial has been changed) the officer of the court before which the trial is to take place, shall, at any time after the time at which the accused ought to have appeared and pleaded, grant to the prosecutor, upon application made on his behalf and upon payment of twenty cents, a certificate of such indictment having been found. The certificate may be in the form GG in schedule one hereto, or to the like effect. Upon production of such certificate to any justice for the county or place in which the indictment was found, or in which the accused is or resides or is suspected to be or reside, such justice shall issue his warrant to apprehend him, and to cause him to be brought before such justice, or before any other justice for the same county or place, to be dealt with according to law. The warrant may be in the form HH in schedule one hereto, or to the like effect.

2. If it is proved upon oath before such justice that any one apprehended and brought before him on such warrant is the person charged and named in such indictment, such justice shall, without further inquiry and examination, either commit him to prison by a warrant which may be in the form II in schedule one hereto, or to the like effect, or admit him to bail as in other cases provided; *but if it appears that the accused has without reasonable excuse broken his recognizance to appear he shall not in any case be bailable as of right.*

3. If it is proved before the justice upon oath that any such accused person is at the time of such application and production of the said certificate as aforesaid confined in any prison for any other offence than that charged in the said indictment, such justice shall issue his warrant directed to the warden or gaoler of the prison in which such person is then confined as aforesaid, commanding him to detain him in his custody until by lawful authority he is removed therefrom. Such warrant may be in the form JJ. in schedule one hereto, or to the like effect. R. S. C. c. 174, ss. 33, 34 & 35. 11 & 12 V. c. 42, s. 3, Imp.: Archbold, 89.

GG.—(*Section* 648.)

CERTIFICATE OF INDICTMENT BEING FOUND.

Canada,
Province of ,
County of .

I hereby certify that at a Court of (Oyer and Terminer, *or* General Gaol Delivery, *or* General Sessions of the Peace) holden in and for the county of , at , in the said (county), on , a bill of indictment was found by the grand jury against A. B., therein described as A. B. late of (*labourer*), for that he (*&c., stating shortly the offence*), and that the said A. B. has not appeared or pleaded to the said indictment.

Dated this day , in the year

Z. X.
(*Title of officer.*)

HH.—(*Section* 648.)

WARRANT TO APPREHEND A PERSON INDICTED.

Canada,
Province of ,
County of .

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

Whereas it has been duly certified by J. D., clerk of the (*name the court*) (*or* E. G., deputy clerk of the Crown *or* clerk of the peace, *or as the case may be*), in and for the county of , that (*etc., stating the certificate*). These are therefore to command you in Her Majesty's name forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice or justices of the peace in and for the said county to be dealt with according to law.

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

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

II.—(*Section* 648.)

WARRANT OF COMMITMENT OF A PERSON INDICTED.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of , and the keeper of the common gaol, at , in the said county of .

Whereas by a warrant under the hand and seal of , (*a*) justice of the peace in and for the said county of , dated , after reciting that it had been certified by J. D., (*etc., as in the certificate*), the said justice of the peace commanded, all or any of the constables or peace officers of the said county, in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*him*) the said justice of the peace or before some other justice or justices in and for the said county, to be dealt with according to law; and whereas the said A. B. has been apprehended under and by virtue of the said warrant, and being now brought before (*me*) it is hereupon duly proved to (*me*) upon oath that the said A. B. is the same person who is named and charged as aforesaid in the said indictment: These are therefore to command you, the said constables and peace officers, or any of you, in Her Majesty's name, forthwith to take and convey the said A. B. to the said common gaol at , in the said county of , and there to deliver him to the keeper thereof, together with this precept; and (*I*) hereby command you the said keeper to receive the said A. B. into your custody in the said gaol, and him there safely to keep until he shall thence be delivered by due course of law.

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

J. S., [SEAL.]

J. P., (Name of county.)

JJ.—(*Section* 648.)

WARRANT TO DETAIN PERSON INDICTED WHO IS ALREADY IN CUSTODY FOR ANOTHER OFFENCE.

Canada,
Province of ,
County of .

To the keeper of the common gaol at , in the said county of .

Whereas it has been duly certified by J. D., clerk of the (*name the court*) (*or* deputy clerk of the Crown *or* clerk of the peace of and for the county of , *or as the case may be*) that (*etc., stating the certificate*); And whereas (*I am*) informed that the said A. B. is in your custody in the said common gaol at aforesaid, charged with some offence, or other matter; and it being now duly proved upon oath before (*me*) that the said A. B., so indicted as aforesaid, and the said A. B., in your custody, as aforesaid, are one and the same person: These are therefore to command you, in Her Majesty's name, to detain the said A. B. in your custody in the common gaol aforesaid, until by a writ of *habeas corpus* he shall be removed therefrom, for the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of your custody by due course of law.

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

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

PART XLIX.

REMOVAL OF PRISONERS—CHANGE OF VENUE.

649. The Governor in Council or the Lieutenant-Governor in Council of any province may, if, from the insecurity or unfitness of any gaol of any county or district for the safe custody of prisoners, or for any other cause, he deems it expedient so to do, order any person charged *with an indictable offence* confined in such gaol or for whose arrest a warrant has been issued, to be removed to any other place for safe keeping or to *any* gaol, which place or gaol shall be named in such order, there to be detained until discharged in due course of law, or removed for the purpose of trial to the gaol of the county or district in which the trial is to take place; and a copy of such order, certified by the clerk of the Queen's Privy Council for Canada, or the clerk of the Executive Council, or by any person acting as such clerk of the Privy Council or Executive Council, shall be sufficient authority to the sheriffs and gaolers of the counties or districts respectively named in such order, to deliver over and to receive the body of any person named in such order. R. S. C. c. 174, s. 97.

2. The Governor in Council or a Lieutenant-Governor in Council may, in any such order, direct the sheriff in whose custody the person to be removed then is, to convey the said person to the place or gaol in which he is to be confined, and in case of removal to another county or district shall direct the sheriff or gaoler of such county or district to receive the said person, and to detain him until he is discharged in due course of law, or is removed for the purpose of trial to any other county or district. R. S. C. c. 174, s. 98.

3. The Governor in Council or a Lieutenant-Governor in Council may make an order as hereinbefore provided in respect of any person under sentence of imprisonment or under sentence of death,—and in the latter case, the sheriff to whose gaol the prisoner is removed shall obey any direction given by the said order or by any subsequent order in council, for the return of such prisoner to the custody of the sheriff by whom the sentence is to be executed. R. S. C. c. 174, s. 100.

650. If after such removal a true bill for any indictable offence is returned by any grand jury of the county or district from which any such person is removed, against any such person, the court into which such true bill is returned, may make an order for the removal of such person, from the gaol in which he is then confined, to the gaol of the county or district in which such court is sitting, for the purpose of his being tried in such county or district. R. S. C. c. 174, s. 99.

Change of Venue.

651. Whenever it appears to the satisfaction of the court or judge hereinafter mentioned, that it is expedient to the ends of justice that the trial of any person charged with an indictable offence should be held in some dis-

trict, county or place other than that in which the offence is supposed to have been committed, or would otherwise be triable, the court before which such person is or is liable to be indicted may, at any term or sitting thereof, and any judge who might hold or sit in such court may, at any other time, either before or after the presentation of a bill of indictment, order that the trial shall be proceeded with in some other district, county or place within the same province, named by the court or judge in such order; but such order shall be made upon such conditions as to the payment of any additional expense thereby caused to the accused, as the court or judge thinks proper to prescribe.

2. Forthwith upon the order of removal being made by the court or judge, the indictment, if any has been found against the prisoner, and all inquisitions, informations, depositions, recognizances and other documents relating to the prosecution against him, shall be transmitted by the officer having the custody thereof to the proper officer of the court at the place where the trial is to be had, and all proceedings in the case shall be had, or, if previously commenced, shall be continued in such district, county or place, as if the case had arisen or the offence had been committed therein.

3. The order of the court, or of the judge, made under this section, shall be a sufficient warrant, justification and authority, to all sheriffs, gaolers and peace officers, for the removal, disposal and reception of the prisoner, in conformity with the terms of such order; and the sheriff may appoint and empower any constable to convey the prisoner to the gaol in the district, county or place in which the trial is ordered to be had.

4. Every recognizance entered into for the prosecution of any person, and every recognizance, as well of any witness to give evidence, as of any person for any offence, shall, in case any such order, as provided by this section, is made, be obligatory on each of the persons bound by such recognizance as to all things therein mentioned with reference to the said trial, at the place where such trial is so ordered to be had, in like manner as if such recognizance had been originally entered into for the doing of such things at such last mentioned place: Provided that 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 court, at the place where such trial is ordered to be had. R. S. C. c. 174, s. 102.

See s. 600, s-s. 2.

By this section, 651, the court or judge has a discretionary power of a wide extent: "*Whenever it appears to the satisfaction of the court or judge*," it says, and when the court or judge declares that it so appears, the matter *quoad hoc* is at an end, the venue is changed, and the trial must take place in the district, county or place designated in the order.

The words of the statute require that the court or judge be satisfied that the change of venue *is expedient to the ends of justice*. Mr. Justice Sanborn, in *Ex parte* Brydges, 18

L. C. J. 141, said that "the common law discourages change of venue, and it is only to be granted with caution and upon strong grounds."

The following cases decided in England may be usefully noticed here:

Where there was a prospect of a fair trial the court refused to change the venue, though the witnesses resided in another county: R. v. Dunn, 11 Jur. 287.

The court will not permit the venue in an indictment to be changed for any other cause than the inability to obtain a fair trial in the original jurisdiction: R. v. Patent Eureka and Sanitary Manure Company, 13 L. T. 365.

The court has no power to change the venue in a criminal case, nor will they order a suggestion to be entered on the roll to change the place of trial in an information for libel, on the ground of inconvenience and difficulty in securing the attendance of the defendant's witnesses: R. v. Cavendish, 2 Cox, 176.

Change of venue asked for upon the ground on an indictment for conspiracy to destroy foxes, that the gentlemen who were likely to serve on the jury were much addicted to fox-hunting refused: R. v. King, 2 Chit. Rep. 217.

It is no ground to change the venue that the defendant's witnesses are all resident in another county and that he has no funds to bring them for his trial: R. v. Casey, 13 Cox, 614.

The court will remove an indictment for a misdemeanour from one county to another, if there is reasonable cause to apprehend or suspect that justice will not be impartially administered in the former county: R. v. Hunt, 3 B. & Ald. 444; 2 Chit. 130.

The court has a discretionary power of ordering a suggestion to be entered on the record of an indictment for felony, removed thither by *certiorari*, for the purpose of

awarding the jury process into a foreign county; but this power will not be exercised unless it is absolutely necessary for the purpose of securing an impartial trial: R. v. Holden, 5 B. &. Ad. 347.

In the case of R. v. Harris, *et al.*, 3 Burr. 1330, the private prosecutors, in their affidavit on an application made by them for a change of the venue, went no further than to swear generally "that they *verily believed* that there could not be a fair and impartial trial had by a jury of the City of Gloucester," without giving any particular reasons or grounds for entertaining such a belief. The case to be tried was an information against the defendants, as aldermen of Gloucester, for a misdemeanour in refusing to admit several persons to their freedom of the city, who demanded their admission, and were entitled to it, and in consequence to vote at the then approaching election of members of Parliament for that city, and whom the defendants did admit after the election was over; but would not admit them till after the election, and thereby deprived them of their right of voting at it. The prosecutors had moved for this rule on a supposition "that the citizens of the city could not but be under an influence or prejudice in this matter." The application was refused.

"There must be a clear and solid foundation for it," said Lord Mansfield; "now, in the present case, this general swearing to apprehension and belief only is not a sufficient ground for entering such a suggestion, especially as it is sworn on the other side that there is a list returned up, consisting of above six hundred persons duly qualified to serve. Surely a person may espouse the interest of one or another candidate at an election, without thinking himself obliged to justify, or being even inclined to defend, the improper behaviour of the friends or agents of such candidate."

"The place of trial," said Mr. Justice Denison, "ought not to be altered from that which is settled and established

by the common law, unless there shall appear a clear and plain reason for it, which cannot be said to be the present case."

"Here is no fact suggested," said Mr. Justice Foster, "to warrant the conclusion that there cannot be a fair and impartial trial had by a jury of the City of Gloucester. It is a conclusion without premises. The reason given, or rather the *supposition*, would hold as well in all cases of riots at elections. This is no question relating to the interest of the voters; it is only whether the defendants, the persons particularly charged with this misdemeanour, have personally acted corruptly or not."

"There was no rule better established," said Mr. Justice Wilmot, "than that all causes shall be tried in the county, and by the neighbourhood of the place where the fact is committed; and, therefore, that rule ought never to be infringed, unless it plainly appears that a fair and impartial trial cannot be had in that county; . . It does not follow that because a man voted on one side or on the other he would therefore perjure himself to favour that party when sworn upon a jury. God forbid! The freemen of this corporation are not at all interested in the personal conduct of these men upon this occasion; the same reasoning would just as well include all cases of election riots."

It may be remarked on this case: (1) That the application for a change of the venue was made by the prosecution, and there is no doubt that much stronger reason must then be given than when the application is made by the defendant; (2) That the case dates from 1762, and that in some of the more recent cases on this point, the court seems to have granted such an application, *on the part of the defendant*, with less reluctance. This is easily explained; it must have been an unheard of thing, at first, to change the venue, at common law, at the time where the jurors themselves were the witnesses, and the only witnesses; where they were selected for each case because they were supposed to

know the facts. Where no other witnesses, no evidence whatever was offered to them, it may well be presumed that a change in the venue was not allowable under any circumstances. The rule must then invariably, inflexibly, have been that the venue should always be laid in the county where the offence was committed. The strictness of the rule can have been relaxed only by degrees, and even when, for a long period, the strongest reason in support of it had ceased to exist, by the changes which have given us the present system of jury trial, it is not surprising to find the judges still adhering to it as much as possible. But, insensibly, a change is perceptible in the decisions, and now, under our statute, there is no doubt that every time, for any reason whatever, *it is expedient to the ends of justice* that a change in the venue, upon any criminal charge, should take place, it should be granted whether applied for by the prosecution or by the defence.

Another decision, in England, on the question may be noticed here:

The court removed an indictment from the Central Criminal Court, and changed the venue from London to Westminster, where it was a prosecution instituted by the Corporation of London for a conspiracy in procuring false votes to be given at an election to the office of bridge-master: R. v. Simpson, 5 Jur. 462.

A case in the Province of Quebec gave rise to a full discussion on this section: *Ex parte* Brydges, 18 L. C. J. 141.

In this case, a coroner's jury in the district of Quebec returned a verdict of manslaughter against the defendant, a resident of Montreal. The coroner issued his warrant, upon which the defendant was arrested; he gave bail, and then, in Montreal, before Mr. Justice Badgley, a judge of the Court of Queen's Bench, made application in chambers for a change in the venue; the only affidavit, in support of the application, was the defendant's, who swore that he could not have a fair trial in the district of Quebec. The

crown was served with a notice of the application, and resisted it; Mr. Justice Badgley, however, granted it, and ordered that the trial should take place in Montreal, deciding (1) that, under the statute, a judge of the Court of Queen's Bench, in chambers in Montreal, may order the change of the venue from Quebec to Montreal, of the trial of a person charged with the commission of an offence in the Quebec district, and (2) that this order may be given immediately after the arrest of the prisoner.

On this last point there is no room for doubt. By the statute, as soon as a person is *charged* with an offence, the application can be made, and there is no doubt, that in Brydges' case such an application could even have been made before the issuing of the warrant of arrest against him. The finding by the coroner's inquisition of manslaughter against him was the *charge*. From the moment this finding was delivered by the jury Brydges *stood charged* with manslaughter; *see* now s. 568, *ante*. In fact, this finding was equivalent to a true bill by a grand jury, and upon it he had, if remaining intact, to stand his trial, whether or not a bill was later submitted to the grand jury, whether the grand jury found "a true bill," or a "no bill" in the case. *See* R. v. Maynard, R. & R. 240; R. v. Cole, 2 Leach, 1095; and the authorities cited in R. v. Tremblay, 18 L. C. J. 158.

Upon the other point decided, in this case, by Mr. Justice Badgley, as to the jurisdiction he had to grant the order required, there seemed at first to be more doubt. But the question was set at rest by the judgment afterwards given in the case by Ramsay and Sanborn, JJ., who entirely concurred with Mr. Justice Badgley in his ruling on the question, as follows:

Ramsay, J.—"Before entering on the merits of these rules it becomes necessary to deal with a question of jurisdiction which has been raised on the part of the crown. It is urged that this case is not properly before us, and

that if it is, that the law under which it is brought before the court, sitting in this district, is of so inconvenient and dangerous a character that it should be altered. With the inconvenience of the law we have nothing to do; neither ought we to express any opinion as to whether the grounds on which the learned judge who gave the order to change the venue were slight or not, provided he had jurisdiction. The whole question rests on the interpretation of s. 11 of the Criminal Procedure Act of 1869. That section is in these words: (His Lordship read the section.)

"We have only to ask whether, at the time this order was given, Judge Badgley was a judge who might hold or sit in the Court of Queen's Bench. If so, he had jurisdiction.

"But we are told that the statute evidently intended that the judge giving the order should be actually sitting in the district in which the offence is alleged to have taken place. There is no trace of any such intention in the statute and there is no rule of interpretation of statutes so well established as this, that where the words of a statute are clear and sufficient they must be taken as they stand. If courts take upon themselves, under the pretext of interpreting the law, to diminish or extend the clearly expressed scope of a statute, they are usurping the powers of the legislature, and assuming a responsibility which in no way devolves on them. In the particular case before us it does not appear clear to my mind that it was the intention of the legislature to limit the power to change the venue to a judge sitting in the district where the offence was said to be committed. In the first place, our statute goes far beyond the old law, which, I believe, is still unchanged in England. Not only is the power given here to a judge in chambers to change the venue, but he may do so before the bill of indictment is either laid or found. The object was to protect a man from being even put to trial by a prejudiced grand jury, and this could only be effectually

done by giving the power to any judge who could hold or sit in the court to change the venue, for it will be observed that in 1869, when the Act was passed, there were many districts in this Province in which there was no resident judge, and in Ontario the judges of the superior courts all live in Toronto, and, so far as I know, in each of the other Provinces, they live in the capital town. Unless, then, there was to be a particular provision for the Province of Quebec the law had to be drawn as we find it. Besides this the Court of Queen's Bench is not for the district but for the whole Province. The object of dividing the Province into districts is for convenience in bringing suits, but the jurisdiction of the court is general. This has never been doubted, and it has been the practice both in England and this country to bail in the place where the prisoner is arrested. In the case of *Blossom*, where the taking of bail was vigorously resisted by the crown, this court, sitting at Quebec, bailed the prisoner who was in jail here. This is going a great deal farther, but the power of the court to bail was not, and, I think, could not, be questioned. We are told that great inconvenience might arise if this statute be not restrained. This is really no valid objection to the law. There are no facultative acts which may not be abused one way or another. A discretionary power involves the possibility of its indiscreet exercise, but that is not ground for us to annul the law creating it. In this case the inconveniences referred to are not specially apparent —the prisoner arrested in Montreal was bailed there, and made his application to have the venue changed to the district where he resided and where he actually was. The order made by Mr. Justice Badgley could hardly then be used as a precedent for an abusive use of the statute. It must be understood that in saying this I do not refer to the sufficiency or insufficiency of the affidavit on which the order was given, which is not in any way before us, but solely to the circumstance of the accused being actually before the judge here. As the point is a new one, and as

questions of jurisdiction are always delicate, we would willingly have reserved it for the decision of all the judges; but the Act allowing us to reserve cases is unfortunately as much too narrow as the statute before us appears to Mr. Ritchie to be too wide in its phraseology. We can only reserve after conviction, and irregular reservations for the opinion of the judges have no practically good results. We must, therefore, give the judgment to the best of our ability, and I must say for my own part that I cannot see any difficulty in the matter. The words of the statute are perfectly unambiguous, and there is no reason to say that they lead to any absurd conclusion."

Sanborn, J.—"First, as to the jurisdiction. It is objected that the venue was improperly changed, and that this inquisition ought to be before the court at Quebec. If we are not 'legally' possessed of the inquisition of course we cannot entertain these motions to quash. This has been fully and exhaustively treated by the President of the court. It is merely for us to inquire: Had Mr. Justice Badgley the power to order the trial to take place here instead of in the district of Quebec where the accident occurred? The 11th section of the Criminal Procedure Act undoubtedly gives that power. He was a judge, entitled to sit at the court *where the party was sent for trial.* The jurisdiction of any of the judges of the Queen's Bench is not local for any district, but extends to all parts of the Province."

The words "he was a judge, entitled to sit at the court *where the party was sent for trial,*" in Mr. Justice Sanborn's remarks appear not supported by the statute. It is the court at which the party charged with a crime was at first liable to be indicted, or any judge who might hold or sit in *that court,* who have jurisdiction in the matter, *not the court where the party is sent for trial nor a judge who can hold and sit in such last mentioned/ court.* Of course, in Brydges' case this distinction could not be made, as Mr. Justice

Badgley, who gave the order to change the venue, could sit in the court at Quebec as well as in Montreal, and in Montreal as well as in Quebec. But suppose that such an application is made to a judge who can hold or sit in a court of quarter sessions, at which the party charged is *or is* liable to be indicted; and there are not many cases where a party accused is *not liable* to be indicted before the court of quarter sessions; the statute gives jurisdiction only to the court of quarter sessions of and for the locality where the trial should take place, in the ordinary course of law, or to a judge thereof, and not to a court or judge of another locality; and the judge of the quarter sessions for Montreal, for instance, could not, in a case from the district of Quebec, order the trial to take place in Montreal, though he would be a judge entitled to sit at the court *where the party was sent for trial.*

See in *Re* Sproule, 12 S. C. R. 140, questions as to change of venue, and R. v. Martin, 16 Q. L. R. 281.

Change of venue allowed upon prisoner's solicitor's affidavit that from conversations he had had with the jurors, he was convinced of a strong prejudice against the prisoner: R. v. McEneany, 14 Cox, 87; *see* R. v. Walter, 14 Cox, 579.

Held, that 32 & 33 V. c. 20, s. 11, does not authorize any order for the change of the place of trial of a prisoner in any case where such change would not have been granted under the former practice, the statute only affecting procedure: R. v. McLeod, 5 P. R. (Ont.) 181.

The power so granted is purely discretionary, but, where application is made on the part of the accused, it will be a sufficient ground that persons might be called on the jury whose opinions might be tainted with prejudice, and whom the prisoner could not challenge: R. v. Russell, Ramsay's App. Cas. 199. *See Ex parte* Corwin, 24 L. C. J. 104, 2 L. N. 364.

As to the carrying out of the sentence where venue has been changed, *see post*, s. 733, s-s. 4.

PART L.

ARRAIGNMENT. (*Amended*).

652. If any person against whom any indictment is found is at the time confined for some other cause in the prison belonging to the jurisdiction of the court by which he is to be tried, the court may by order in writing, without a writ of *habeas corpus*, direct the warden or gaoler of the prison or *sheriff or other person having the custody of the prisoner* to bring up the body of such person *as often as may be required for the purposes of the trial*, and such warden, gaoler, *sheriff or other person* shall obey such order. R. S. C. c. 174, s. 101. 30-31 V. c. 35 (Imp.).

"Prison" defined, s. 3.

RIGHT TO INSPECT DEPOSITIONS, ETC.

653. Every accused person shall be entitled at the time of his trial to inspect, without fee or reward, all depositions, or copies thereof, taken against him and returned into the court before which such trial is had, *and to have the indictment on which he is to be tried read over to him if he so requires.* R. S. C. c. 174, s. 180.

This is the 6 & 7 Wm. IV. c. 114, s. 4 of the Imperial Statutes. *See* s. 597, *ante*.

COPY OF INDICTMENT.

654. Every person indicted for any offence shall, before being arraigned on the indictment, be entitled to a copy thereof on paying the clerk *five* cents per folio *of one hundred words* for the same, if the court is of opinion that the same can be made without delay to the trial, but not otherwise. R. S. C. c. 174, s. 181.

The cost was *ten* cents by the repealed statute. At common law, the prisoner was not entitled to a copy of the indictment in treason and felonies.

COPY OF DEPOSITIONS.

655. Every person indicted shall be entitled to a copy of the depositions returned into court on payment of *five* cents per folio *of one hundred words* for the same, provided, if the same are not demanded before the opening of the assizes, term, sittings or sessions, the court is of opinion that the same can be made without delay to the trial, but not otherwise; but the court may, if it sees fit, postpone the trial on account of such copy of the depositions not having been previously had by the person charged. R. S. C. c. 174, s. 182. 11-12 V. c. 42, s. 27 (Imp.).

The cost was ten cents by the repealed statute. *See* s. 597, *ante*.

PLEAS IN ABATEMENT ABOLISHED. (*New*).

656. No plea in abatement shall be allowed after the commencement of this Act. Any objection to the constitution of the grand jury may be taken by motion to the court, and the indictment shall be quashed if the court is of opinion both that such objection is well founded and that the accused has suffered or may suffer prejudice thereby, but not otherwise. R. S. C. c. 174, s. 142 part.

The repealed clause applied only to certain pleas in abatement. An objection that the grand jury was composed of more than twenty-three members should now be taken by motion: see Bishop, 1 Cr. P. 884. It is only objections to the *constitution* of the grand jury that this section provides for. The Code makes no provision on the constitution of the grand jury, with the exception of s. 662, *post*; in R. v. Mitchel, 3 Cox 93, an objection that a grand juror was disqualified was taken by a plea in abatement. There is no such thing known to the criminal law as a challenge to the grand jury: R. v. Mercier, Q. R. 1 Q. B. 541.

It seems that an objection that the witnesses have not been properly sworn before giving their evidence before the grand jury is a question of law that can be reserved for the Court of Appeal: R. v. Tew, Dears, 429.

The prosecutor has the right to move to quash the finding of the grand jury: R. v. Fieldhouse, 1 Russ. 1030.

Though an objection to the constitution of the grand jury may be well founded, yet the indictment is not to be quashed if the court is of opinion that the accused has not suffered or will not suffer prejudice thereby by the objection. *See* R. v. Belyea, James (N.S.) 220.

PLEA—REFUSAL TO PLEAD. (*Amended*).

657. When the accused is called upon to plead he may plead either guilty or not guilty, or such special plea as is hereinbefore provided for.

2. If the accused *wilfully* refuses to plead, or will not answer directly, the court may order the proper officer to enter a plea of not guilty. R. S. C. c. 174, ss. 144, 145.

The words "stands mute of malice" in the repealed clause are replaced by "wilfully refuses to plead."

This clause is taken from 7 & 8 Geo. IV. c. 28, ss. 1 & 2 of the Imperial statutes.

Formerly, to stand mute was to confess, and, if the defendant stood mute of malice, he was immediately sentenced. In the case of R. v. Mercier, 1 Leach, 188, the prisoner being arraigned, stood mute. The court ordered the sheriff to return a jury *instanter*, to try whether the prisoner stood mute obstinately, or by the visitation of God. A jury being accordingly returned, the following oath was administered to them: "You shall diligently inquire and true presentment make for and on behalf of Our Sovereign Lord the King, whether Francis Mercier, the now prisoner at the bar, being now here indicted for the wilful murder of David Samuel Mondrey, stands mute fraudulently, wilfully and obstinately, or by the providence and act of God, according to your evidence and knowledge." The jury examined the witnesses in open court, and returned as their verdict that the prisoner stood mute of malice and not by the visitation of God. Whereupon the court immediately passed sentence of death upon the prisoner who was accordingly executed on the Monday following.

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

A person deaf and dumb was to be tried for a felony; the judge ordered a jury to be empannelled to try whether he was mute by the visitation of God; the jury found that he was so; they were then sworn to try whether he was able to plead which they found in the affirmative, and the defendant by a sign pleaded not guilty; the judge then

ordered the jury to be empannelled to try whether the defendant was now sane or not, and, on this question, directed them to say whether the defendant had sufficient intellect to understand the course of the proceedings to make a proper defence, to challenge the jurors and comprehend the details of the evidence, and that, if they thought he had not, they should find him of non-sane mind: R. v. Pritchard, 7 C. & P. 303.

It seems that where a prisoner who is called on to plead remains mute the court cannot hear evidence to prove that he does so through malice, and then enter a plea of not guilty under this section; but a jury must be empannelled to try the question of malice, and it is upon their finding that the court is authorized to enter the plea: R. v. Israel, 2 Cox, 268.

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

A collateral issue of this kind is always tried *instanter* by a jury empannelled for that purpose. In fact there is, properly speaking, no issue upon it; it is an inquest of office. No peremptory challenges are allowed: R. v. Radcliffe, Fost. 36, 40. The jury may be chosen amongst the jurors in attendance for the term of court, but must be returned by the sheriff, on the spot, as a special panel: Dickinson's Quarter Sessions, 481. If the jury return a verdict of "mute by the visitation of God," as where the prisoner is deaf or dumb, or both, a plea of not guilty is to be entered, and the trial is to proceed in the usual way, but in so critical a case great diligence and circumspection ought to be exercised by the court; all the proceedings against the prisoner must be examined with a critical eye, and every possible assistance consistent with the rules of

law given to him by the court: R. v. Steel, 1 Leach 451. In the case of R. v. Jones, *note*, 1 Leach 452, the jury returned that the prisoner was "mute by the visitation of God." It appearing that the prisoner, who was deaf and dumb, could receive and communicate information by certain signs, a person skilled in those signs was sworn to act as interpreter and the trial then proceeded.

By s. 737, *post*, it is provided for the case where an accused is insane: *see* R. v. Berry, 13 Cox, 189. Formerly, after the prisoner had pleaded "not guilty," he was asked by the clerk: "*How wilt thou be tried?*" To have his trial he had to answer, if a commoner, "*By God and the country:*" if a peer, "*By God and my peers.*" If he refused to answer, the indictment was taken *pro confesso*, and he stood convicted: 4 Blacks. 341.

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

SPECIAL PROVISIONS IN TREASON.

658. When any one is indicted for treason, or for being accessory after the fact to treason, the following documents shall be delivered to him after the indictment has been found, and at least ten days before his arraignment; that is to say:

(*a*) a copy of the indictment;

(*b*) a list of the witnesses to be produced on the trial to prove the indictment; and

(*c*) a copy of the panel of the jurors who are to try him returned by the Sheriff.

2. The list of the witnesses and the copy of the panel of the jurors must mention the names, occupations, and places of abode of the said witnesses and jurors.

3. The documents aforesaid must all be given to the accused at the same time and in the presence of two witnesses.

4. This section shall not apply to cases of treason by killing Her Majesty, or to cases where the overt act alleged is any attempt to injure her person in any manner whatever, or to the offence of being accessory after the fact to any such treason. 7 Anne, c. 21, s. 11. 6 Geo. IV. c. 50. 39-40 Geo. III. c. 96. 5 & 6 V. c. 11 (Imp.).

See R. v. Frost, 2 Moo. 140; R. v. Burke, 10 Cox, 519.

PART LI.

TRIAL.

659. Every person tried for any indictable offence shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel learned in the law. R. S. C. c. 174 s. 178. 6-7 Wm. IV. c. 114 (Imp.).

See remarks under the two next sections.

PRESENCE OF THE ACCUSED AT TRIAL.

660. Every accused person shall be entitled to be present in court during the whole of his trial unless he misconducts himself by so interrupting the proceedings as to render their continuance in his presence impracticable.

2. *The court may permit the accused to be out of court during the whole or any part of any trial on such terms as it thinks proper.*

Sub-section 2 is new as to offences heretofore known as felonies.

The defendant should in all cases, as a general rule, appear in person to plead and to receive his sentence. In cases where the punishment may be for more than five years, (*see* s. 668) the court will probably not allow the defendant to be out of court, except for grave reasons, and under particular circumstances. A defendant should submit to the jurisdiction of the court and appear in person before his plea can be received: R. v. Maxwell, 10 L. C. R. 45.

The following cases on the practice may serve as guides in the future notwithstanding the change introduced by s-s. 2 of s. 660.

A prisoner charged with felony, whether he has been on bail or not, must be at the bar, viz., in the dock during his trial, and cannot take his trial at any other part of the court, even with the consent of the prosecutor: R. v. St. George, 9 C. & P. 483. A merchant was indicted for an offence against the Act of parliament prohibiting slave-trading (felony). His counsel applied to the court to allow him to sit by him, not on the ground of his position in

society, but because he was a foreigner, and several of the documents in the case were in a foreign language, and it would, therefore, be convenient for his counsel to have him by his side, that he might consult him during his trial: *Held*, that the application was one which ought not to be granted: R. v. Zulueta, 1 C. & K. 215, 1 Cox, 20. A similar application by a captain in the army was also refused in R. v. Douglas, Car. & M. 193. But in misdemeanours a defendant who is on bail and surrenders to take his trial need not stand at the bar to be tried: R. v. Lovett, 9 C. & P. 462.

COUNSEL'S ADDRESSES TO THE JURY. (*Amended*).

661. If an accused person, or any one of several accused persons being tried together, is defended by counsel, such counsel shall, at the end of the case for the prosecution, declare whether he intends to adduce evidence or not on behalf of the accused person for whom he appears; and if he does not thereupon announce his intention to adduce evidence *the counsel for the prosecution may address the jury by way of summing up.*

2. Upon every trial for an indictable offence, whether the accused person is defended by counsel or not, he or his counsel shall be allowed, if he thinks fit, to open his case, and after the conclusion of such opening to examine such witnesses as he thinks fit, and when all the evidence is concluded to sum up the evidence. *If no witnesses are examined for the defence the counsel for the accused shall have the privilege of addressing the jury last, otherwise such right shall belong to the counsel for the prosecution:* Provided, that the right of reply shall be always allowed to the Attorney-General or Solicitor-General or to *any* counsel acting on behalf *of either of them.* R. S. C. c. 174, s. 179. 28 V. c. 18, s. 2 (Imp.).

The words in italics in s-s. 2 seem in contradiction with the last part of s-s. 1. The corresponding section in the Imp. draft Code is differently worded. However, as it is, this s. 661 probably bears a construction that brings no substantial change in the law. The reply is now given to *any* counsel acting on behalf of the *Attorney-General or Solicitor-General* instead of to any *Queen's* counsel *acting on behalf of the Crown.* The addresses of counsel are, therefore, to take place as follows:—*First case: When no evidence for the defence:* Counsel for the Crown opening the case: Crown's evidence. *Defendant or his counsel declares that he has no evidence to adduce*; counsel for the Crown

sums up: defendant or his counsel addresses jury; reply of counsel for the Crown, but only by Attorney or Solicitor-General, or counsel, acting on behalf of either of them. *Second case: where the defence adduces evidence.* Crown prosecutor opens the case: evidence of the Crown; defendant or his counsel addresses the jury: defendant's evidence; defendant or his counsel sums up; reply of prosecution in all cases. In the first case, the counsel for the prosecution seldom in practice exercises both the rights of summing up and replying, and should not do so except for special reasons: R. v. Holchester, 10 Cox, 226; if the counsel, however, is not the Attorney-General or Solicitor-General, or a counsel acting on behalf of either of them, he has to sum up the evidence, after it is over and before the defendant or his counsel addresses the jury, if he thinks proper to do so, as he is not allowed to reply; if he is the Attorney-General or Solicitor-General, or a counsel acting on behalf of either of them, he, in practice, does not sum up, as he is entitled to reply whether the defendant adduces evidence or not, though in England this right is very seldom exercised where no evidence, or evidence as to character only, is offered. In the second case, in practice, the defence addresses the jury only after its evidence is over; two addresses would generally have no other result but to lengthen the trial, and fatigue judge, counsel and jury: *see* R. v. Kain, 15 Cox, 388, and Archbold, 178.

Opening of counsel for prosecution.—A prosecutor conducting his case in person, and who is to be examined as a witness in support of the indictment, has no right to address the jury as counsel: R. v. Brice, 2 B. & Ald. 606; R. v. Stoddart, Dickinson's Quarter Sessions, 152; R. v. Gurney, 11 Cox, 414, where a note by the reporter, supported by authorities, says that such is the law whether the prosecutor is to be a witness or not.

Sergeant Talfourd, in Dickinson's Quarter Sessions, 495, on the duties of the counsel for the prosecution, says:

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

On the duties of counsel, in opening the case for the prosecution, it is said in Archbold, 178: "In doing so he ought to state *all* that it is proposed to prove, as well declarations of the prisoners as facts, so that the jury may see if there be a discrepancy between the opening state-

ments of counsel and the evidence afterwards adduced in support of them: *per* Parke, B., R. v. Hartel, 7 C. & P. 773; R. v. Davis, 7 C. & P. 785; unless such declarations should amount to a *confession*, where it would be improper for counsel to open them to the jury; R. v. Swatkins, 4 C. & P. 548. The reason for this rule is that the circumstances under which the confession was made may render it inadmissible in evidence. The general effect only of any confession said to have been made by a prisoner ought, therefore, to be mentioned in the opening address of the prosecutor's counsel."

Mr. Justice Blackburn, in R. v. Berens, 4 F. & F. 842, Warb. Lead. Cas. 237, said that the position of prosecuting counsel in a criminal case is not that of an ordinary counsel in a civil case, but that he is acting in a *quasi* judicial capacity, and ought to regard himself as part of the court: that while he was there to conduct his case, he was to do it at his discretion, but with a feeling of responsibility, not as if trying to obtain a verdict, but to assist the judge in fairly putting the case before the jury, and nothing more.

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

Summing up by counsel for the prosecution, where the defence brings no evidence.—It has already been remarked that in practice, if the counsel for the prosecution has the right of reply and intends to avail himself of it, it would be waste of time for him to sum up; but if the counsel has not the right of reply he will perhaps find it useful to review the evidence as it has been adduced, and give some explanations to the jury. But it has been held in R. v. Puddick, 4 F. & F. 497, that the counsel for the prosecution

ought not, in summing up the evidence, to make observations on the prisoner's not calling witnesses, unless, at all events, it has appeared that he might be fairly expected to be in a position to do so, and that neither ought counsel to press it upon the jury that if they acquit the prisoner they may be considered to convict the prosecutor or prosecutrix of perjury. Nor is it the duty of counsel for the prosecution to sum up in every case in which the prisoner's counsel does not call witnesses. The statute gives him the right to do so, but that right ought only to be exercised in exceptional cases, such as where erroneous statements have been made and ought to be corrected, or when the evidence differs from the instructions. The counsel for the prosecution is to state his case before he calls the witnesses; then, when the evidence has been given, either to say simply, "I say nothing," or "I have already told you what would be the substance of the evidence, and you see the statement which I made is correct;" or in exceptional cases, as if something different is proved from what he expected, to address to the jury any suitable explanation which may be required: R. v. Berens, 4 F. & F. 842, reporter's *note;* R. v. Holchester, 10 Cox, 226; R. v. Webb, 4 F. & F. 862. By the Canada Evidence Act of 1893, 56 V. c. 31, s. 4, it is enacted that the failure of the accused or of his wife or husband to testify shall not be made the subject of comment by the judge or by counsel for the prosecution in addressing the jury.

The defence.—The defendant cannot have the assistance of counsel in examining and cross-examining witnesses, and reserve to himself the right of addressing the jury: R. v. White, 8 Camp. 98; R. v. Parkins, 1 C. & P. 548. But *see post* as to statements by him to the jury. But if the defendant conducts his own case counsel will be allowed to address the court for him on points of law arising in the case: *Idem.* Not more than two counsel are entitled to address the court for a prisoner during the trial upon a point of law: R. v. Bernard, 1 F. & F. 240.

The counsel for the defendant may comment on the case for the prosecution. He may adduce evidence to any extent, and even introduce new facts, provided he can establish them by witnesses. He cannot, however, assume as proved that which is not proved. Nor will he be allowed to state anything which he is not in a situation to prove, or to state the prisoner's story as the prisoner himself might have done: R. v. Beard, 8 C. & P. 142; R. v. Butcher, 2 M. & Rob. 228.

At a meeting of all the judges, in 1881, in England it was resolved: "That in the opinion of the judges it is contrary to the administration and practice of the criminal law as hitherto allowed, that counsel for prisoner should state to the jury as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence": Archbold, 180.

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

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

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

Summing up by the defence.—The counsel for the prisoner or the prisoner himself is entitled at the close of the examination of his witnesses to sum up the evidence: R. v. Wainwright, 13 Cox, 171. In practice, it is the only time when the counsel for the prisoner addresses the jury, and what has just been said on the defence generally applies to the address to the jury, whether made before or after the examination of witnesses.

The rule formerly was that if the prisoner's counsel has addressed the jury the prisoner himself will not be allowed

to address the jury also: R. v. Boucher, 8 C. & P. 141; R. v. Burrows, 2 M. & Rob. 124; R. v. Rider, 8 C. & P. 539. But the following cases show that there seems now in England to be no well settled rule on the subject. Here, in Canada, now that by the Evidence Act of 1893, 56 V. c. 31, s. 4, the prisoner is a competent witness, he probably will not be allowed to make a statement to the jury. As he is at liberty to give his story upon oath, he should not be allowed to protect himself from cross-examination by making the same statement not upon oath.

A person on his trial defended by counsel is not entitled to have his explanation of the case to the jury made through the mouth of his counsel, but may, at the conclusion of his counsel's address, himself address the jury and make such statements, subject to this, that what he says will be treated as additional facts laid before the court, and entitling the prosecution to the reply: R. v. Shimmin, 15 Cox, 122; *see* reporter's *note*, and R. v. Doherty, 16 Cox, 306, Warb. Lead. Cas. 242.

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

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

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

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

In R. v. Borrowes, cited in Shirley's Leading Cases, 140, the court held that a prisoner defended by counsel is not entitled to address the jury as a matter of right.

The Reply.—If the defendant brings no evidence the counsel for the prosecution is not allowed to reply, except if he be the Attorney-General or Solicitor-General, or counsel acting on behalf of either of them.

On this privilege to reply it is said in 1 Taylor Ev., par. 362: "But as this is a privilege, or rather a prerogative which stands opposed to the ordinary practice of the courts, the true friend of justice will do well to watch with jealousy the parties who are entitled to exercise it. Mr. Horne, so long back as the year 1777, very properly observed that the Attorney-General would be grieviously embarrassed to produce a single argument of reason or justice on behalf of his claim, and, as the rule which precludes the counsel for the prosecution from addressing the jury in reply when the defendant has called no witnesses has been very long thought to afford the best security against unfairness in ordinary trials, this fact raises a natural suspicion that a contrary rule may have been adopted, and may still be followed in State prosecutions, for a different and less legitimate purpose. It is to be hoped that ere long this question will receive the consideration which its importance demands, and that the Legislature, by an enlightened interference, will introduce one uniform practice in the trial of political and ordinary offenders."

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

In R. v. Bignold, 4 D. & R. 70, Lord Tenderden revived an important rule, originally promulgated by Lord Kenyon, and by which a reply is allowed to the counsel for the prosecution if the counsel for the defendant, in his address to the jury, states any fact or any document which is not

already in evidence, although he afterwards declines to prove the fact or put in the writing: 5 Burn, 857; *see* R. v. Trevelli, 15 Cox, 289; R. v. Stephens, 11 Cox, 669; R. v. Burns, 16 Cox, 195, Warb. Lead. Cas. 240.

Evidence in reply.—Whenever the defendant gives evidence to prove new matter by way of defence, which the Crown could not foresee, the counsel for the prosecution is entitled to give evidence in reply to contradict it, but then he does not address the jury in reply before going into that evidence. The general rule is that the evidence in reply must bear directly or indirectly upon the subject-matter of the defence, and ought not to consist of new matter unconnected with the defence, and not tending to controvert or dispute it. This is the general rule, made for the purpose of preventing confusion, embarrassment and waste of time; but it rests entirely in the discretion of the judge whether it ought to be strictly enforced or remitted as he may think best for the discovery of truth and the administration of justice: 2 Phillips' Ev. 408; R. v. Briggs, 2 M. & Rob. 199; R. v. Frost, 9 C. & P. 159. Where the counsel for the Crown has, *per incuriam*, omitted to put in a piece of evidence before commencing his reply, and the course of justice might be interfered with if the evidence were not given, the court may permit the evidence to be given: R. v. White 2 Cox, 192. If evidence of his good character is given on behalf of a prisoner, evidence of his bad character may be given in reply: R. v. Rowton, L. & C. 520, overruling R. v. Burt, 5 Cox, 284; *see* R. v. Brown, Warb. Lead. Cas. 236; R. v. Triganzie, 15 O. R. 294.

Defendant's reply on evidence adduced in answer to his own.—When evidence is adduced for the prosecution in reply to the defendant's proof the defendant's counsel has a right to address the jury on it, confining himself to its bearings and relations, before the general replying address of the prosecution: Dickinson's Quart. Sess. 565.

Witnesses may be recalled: R. v. Lamere, 8 L. C. J. 281; R. v. Jennings, 20 L. C. J. 291; 2 Taylor, Ev. par. 1331.

Charge by the judge to the jury.—It is the duty of the president of the court, the case on both sides being closed, to sum up the evidence. His address ought to be free from all technical phraseology, the substance of the charge plainly stated, the attention of the jury directed to the precise issue to be tried, and the evidence applied to that issue. It may be necessary, in some cases, to read over the whole evidence, and, when requested by the jury, this will, of course, be done; but in general it is better merely to state its substance: 5 Burn, 357; 1 Chit. 632; *see Re* Dillet, 16 Cox, 241, for a conviction set aside by the Privy Council on account of the unfairness of the charge.

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

The case is Commonwealth v. Magee, Philadelphia, December, 1878, decided by Pierce, J., as follows, on a motion for a new trial and in arrest of judgment on the ground of misdirection in the charge to the jury:

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

"There was nothing in the manner or matter of the witnesses to call in question their veracity, or in the slightest degree to impugn their evidence; the counsel for the

defence did not in any manner question the truth of their evidence, but confined his address to the jury to an attack upon the law and the motives of the prosecutors. Were the jury, under these circumstances, at liberty to disregard their oaths and acquit the defendant? They had been solemnly sworn to try the case according to the evidence, and a regard to their oaths would lead them but to one conclusion, the guilt of the defendant. The counsel for the Commonwealth states the charge to have been: 'The judge declared that he had no hesitation in saying that, under the evidence, it was the duty of the jury to render a verdict of guilty under the bill of indictment.' But no matter which form of expression was used, it was the evidence to which I had just called their attention that indicated their duty, and in view of which the remark was made. I perceive no error in this. It was not a direction to the jury to convict the defendant. It was simply pointing them to their duty. Jurors are bound to observe their oaths of office, whether it will work a conviction or acquittal of a defendant, and they are not at liberty to disregard uncontradicted and unquestioned testimony at their will and pleasure. Where, however, the testimony is contradicted by testimony on the other side, or a witness is impeached in his general character, or by the improbability of his story, or his demeanour, it would be an unquestionable error in a judge to assume that the facts testified to by him had been proved."

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

See charge to the jury in R. v. Dougall, 18 L. C. J. 90.

In R. v. Wadge (July 27th, 1878), for murder, Denman, J., remarked that "he had to take exception to the request

made to the jury by the counsel for the defence, that, 'if they had any doubt about the case, they should give the prisoner the benefit of it.' That was an expression frequently employed by counsel in defending prisoners, but it was a fallacious and an artful one, and intended to deceive juries. The jury had no right to grant any benefit or boon to any one, but only to be just and do their duty."

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

When the judge has summed up the evidence he leaves it to the jury to consider of their verdict. If they cannot agree by consulting in their box they withdraw to a convenient place, appointed for the purpose, an officer being sworn to keep them, as follows, in all capital cases, (and in other cases, when so ordered by the court, s. 673): "You shall well and truly keep this jury, you shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask them if they are agreed on their verdict. So help you God:" 1 Chit. 632; 5 Burn, 357.

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

The jury coming back to the box the prisoner is brought to the bar. The clerk then calls the jurors over by their names, and asks them whether they agree on their verdict; if they reply in the affirmative, he then demands who shall say for them to which they answer, their foreman. He then addresses them as follows: "Gentlemen, are you

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

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

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

Russ. 749; Archbold, 166; Bacon's Abr. Verb. "verdict;" 5 Burn, 358; 1 Chit. 647; R. v. Maloney, 9 Cox, 6; 2 Hale, 309.

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

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

QUALIFICATION OF JURORS.

662. Every person qualified and summoned as a grand or petit juror, according to the laws in force for the time being in any province of Canada, shall be duly qualified to serve as such juror in criminal cases in that province. R. S. C. c. 174, s. 160.

The following words were in the repealed clause: "whether such laws were in force or were or are enacted by the Legislature of the Province before or after such province became a part of Canada, but subject always to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such Act.

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

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

JURIES DE MEDIETATE LINGUÆ ABOLISHED AS TO ALIENS.

663. No alien shall be entitled to be tried by a jury *de medietate linguæ* but shall be tried as if he was a natural born subject. R. S. C. c. 174, s. 161.

Ever since the 28 Ed. III. c. 13, aliens, under our criminal law, have been entitled to be tried by a jury composed of one half of citizens and one half of aliens or foreigners, if so many of these could be had. It seems to have been thought necessary, in R. v. Vonhoff, 10 L. C. J. 292, that these six aliens should be natives of the country to which the defendant alleged himself to belong, but the

better opinion seemed to be that six aliens were required, without regard to nationality. S. 2 of 28 Ed. III. c. 13, says "the other half of aliens."

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

In England also, now, an alien is not entitled to a jury *de medietate linguæ*: 33 & 34 V. c. 14 (Imp.).

MIXED JURIES IN PROVINCE OF QUEBEC.

664. In those districts in the province of Quebec in which the sheriff is required by law to return a panel of petit jurors composed one half of persons speaking the English language, and one half of persons speaking the French language, he shall in his return specify separately those jurors whom he returns as speaking the English language, and those whom he returns as speaking the French language respectively; and the names of the jurors so summoned shall be called alternately from such lists. R. S. C. c. 174, s. 166.

The right to a *medietate linguæ* jury exists in misdemeanours as in felonies: R. v. Maguire, 13 Q. L. R. 99.

Sub-section 2 of s. 7, 27 & 28 V. c. 41 (1864), clearly gives that right to *any* prosecuted party. And though the Quebec Legislature, by 46 V. c. 16, s. 62 (1883), has repealed the said Act, this particular clause, giving the right to a mixed jury, must be considered as still in force, the Quebec Legislature not having had the right to repeal it. Otherwise, there is no statute in the Province giving the right to a mixed jury in any case whatever, s. 664, *ante*, merely taking it for granted that the right exists. If the Quebec Legislature had the power to repeal that clause the Dominion Parliament had not the right to enact for Manitoba s. 167 of the Procedure Act, now s. 665, *post*.

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

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

In R. v. Dougall, 18 L. C. J. 85, it was held by Mr. Justice Ramsay: 1st. That where defendant has asked for a jury composed one half of the language of the defence six jurors speaking that language *may* first be put into the box, before calling any juror of the other language; 2nd. That the right of the Crown to tell jurors "to stand aside," exists for misdemeanours as well as for felonies; 3rd. That when to obtain six jurors speaking the language of the defence all speaking that language have been called, the Crown is still at liberty to challenge to stand aside, and is not held to show cause until the whole panel is exhausted. Mr. Justice Ramsay said that the calling the jurors' names alternately from the English and French lists, mentioned in s. 40, now s. 664, *ante*, is only directory, and applies only to the calling of the jury in ordinary cases, where no order has been given for a jury composed of one half English and one half French. The case was reserved, by the learned judge, for the consideration of the full court, but only on the one point thirdly above mentioned, given in the summary of the report of the decision of the court, at page 242, 18 L. C. J., as follows; "Where to obtain six jurors speaking the language of the defence (English), the list of jurors speaking that language was called, and several were ordered by the Crown to stand aside; and the six English-speaking jurors being sworn the clerk re-commenced to call the panel alternately from the list of jurors speaking the English and French languages, and one of those (English) previously ordered to "stand aside" was again called: *Held*, that the previous "stand aside" stood good

until the panel was exhausted by all the names on both lists being called."

MIXED JURIES IN MANITOBA.

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

2. Whenever, from the number of challenges or any other cause, there is in any such case a deficiency of persons skilled in the language of the defence the court shall fix another day for the trial of such case, and the sheriff shall supply the deficiency by summoning, for the day so fixed, such additional number of jurors skilled in the language of the defence as the court orders, and as are found inscribed next in succession on the list of petit jurors. R. S. C. c. 174, s. 167.

See remarks under preceding section.

CHALLENGING THE ARRAY. (*New*).

666. Either the accused or the prosecutor may challenge the array on the ground of partiality, fraud, or wilful misconduct on the part of the sheriff or his deputies by whom the panel was returned, *but on no other ground*. The objection shall be made in writing, and shall state that the person returning the panel was partial, or was fraudulent, or wilfully misconducted himself, as the case may be. Such objection may be in the form KK in schedule one hereto, or to the like effect.

2. If partiality, fraud or wilful misconduct, as the case may be, is denied the court shall appoint any two indifferent persons to try whether the alleged ground of challenge is true or not. If the triers find that the alleged ground of challenge is true in fact, or if the party who has not challenged the array admits that the ground of challenge is true in fact, the court shall direct a new panel to be returned.

This is taken in part from 39 & 40 V. c. 78, s. 17 (Imp.) (for Ireland).

KK.—(*Section* 666.)

CHALLENGE TO ARRAY.

Canada,
Province of
County of

The Queen
v.
C. D.

The said A. B., who prosecutes for our Lady the Queen (*or* the said C. D., *as the case may be*) challenges the array of the panel on the ground that it was returned by X. Y., sheriff of the county of (*or* E. F., deputy of X. Y., sheriff of the county of , *as the case may be*), and that the said X. Y. (*or* E. F., *as the case may be*) was guilty of partiality (*or* fraud, *or* wilful misconduct) on returning said panel.

Relationship between the sheriff and the prosecutor or the defendant are no more by themselves grounds for challenging the array, and R. v. Rouleau, 16 Q. L. R. 322 cannot now be followed. The form above given is very general, but the court may order the party challenging to give particulars: *see* Archbold, 171.

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

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

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

If the court holds that the alleged fact is a good cause for a principal challenge, and the alleged fact is denied, or if the court holds that the alleged fact is good as a challenge to the favour, and either the fact or the partiality sought to be inferred from it, or both, are denied, two triers must be appointed by the court to try the facts in dispute.

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

Held, in an indictment against R. M., that it was ground of principal challenge to the array that the prisoner's husband had an action pending against the sheriff for an assault committed on the prisoner: R. v. Rose Milne, 4 P & B. (N. B.) 394. This case cannot now be followed.

CALLING THE PANEL. (*New*).

667. If the array is not challenged, or if the triers find against the challenge, the officer of the court shall proceed to call the names of the jurors in the following manner: The name of each juror on the panel returned, with his number on the panel and the place of his abode, shall be written on a distinct piece of card, such cards being all as nearly as may be of an equal size. The cards shall be delivered to the officer of the court by the sheriff or other officer returning the panel, and shall, under the direction and care of the officer of the court, be put together in a box to be provided for that purpose, and shall be shaken together.

2. The officer of the court shall in open court draw out the said cards, one after another, and shall call out the name and number upon each such card as it is drawn, until such a number of persons have answered to their names as in the opinion of the court will probably be sufficient to provide a full jury after allowing for challenges of jurors and directions to stand by.

3. The officer of the court shall then proceed to swear the jury, each juror being called to swear in the order in which his name is so drawn, until, after subtracting all challenges allowed and jurors directed to stand by, twelve jurors are sworn. If the number so answering is not sufficient to provide a full jury such officer shall proceed to draw further names from the box, and call the same in manner aforesaid, until, after challenges allowed and directions to stand by, twelve jurors are sworn.

4. If by challenges and directions to stand by the panel is exhausted without leaving a sufficient number to form a jury those who have been directed to stand by shall be again called in the order in which they were drawn, and shall be sworn, unless challenged by the accused, or unless the prosecutor challenges them and shows cause why they should not be sworn: Provided that if before

any such juror is sworn other jurymen in the panel become available the prosecutor may require the names of such jurymen to be put into and drawn from the box in the manner hereinbefore prescribed, and such jurors shall be sworn, challenged, or ordered to stand by, as the case may be, before the jurors originally ordered to stand by are again called.

5. The twelve men who in manner aforesaid are ultimately sworn shall be the jury to try the issues on the indictment, and the names of the men so drawn and sworn shall be kept apart by themselves until such jury give in their verdict or until they are discharged; and then the names shall be returned to the box, there to be kept with the other names remaining at that time undrawn, and so *toties quoties* as long as any issue remains to be tried.

6. Provided that when the prosecutor and accused do not object thereto the court may try any issue with the same jury that has previously tried or been drawn to try any other issue, without their names being returned to the box and redrawn, or if the parties or either of them object to some one or more of the jurors forming such jury, or the court excuses any one or more of them, then the court may order such persons to withdraw, and may direct the requisite number of names to make up a complete jury to be drawn, and the persons whose names are so drawn shall be sworn.

7. Provided also, that an omission to follow the directions in this section shall not affect the validity of the proceedings.

This section is taken from the 39 & 40 V. c. 78, s. 19 (Imp.), for Ireland.

CHALLENGES, ETC.

668. Every one indicted for treason or any offence punishable with death is entitled to challenge twenty jurors peremptorily.

2. Every one indicted for any offence, other than treason or an offence punishable with death, for which he may be sentenced to imprisonment for more than five years, is entitled to challenge twelve jurors peremptorily.

3. Every one indicted for any other offence is entitled to challenge four jurors peremptorily.

4. Every prosecutor and every accused person is entitled to any number of challenges on any of the following grounds; that is to say:

(*a*) that any juror's name does not appear in the panel: Provided that no misnomer or misdescription shall be a ground of challenge if it appears to the court that the description given in the panel sufficiently designates the persons referred to; or

(*b*) that any juror is not indifferent between the Queen and the accused; or

(*c*) that any juror has been convicted of any offence for which he was sentenced to death or to any term of imprisonment with hard labour or exceeding twelve months; or

(*d*) that any juror is an alien.

5. No other ground of challenge than those above-mentioned shall be allowed.

6. If any such challenge is made the court may in its discretion require the party challenging to put his challenge in writing. The challenge may be in

the form LL in schedule one hereto, or to the like effect. The other party may deny that the ground of challenge is true.

7. If the ground of challenge is that the jurors' names do not appear in the panel, the issue shall be tried by the court on the *voir dire* by the inspection of the panel, and such other evidence as the court thinks fit to receive.

8. If the ground of challenge be other than as last aforesaid the two jurors *last* sworn, or if no jurors have then been sworn then two persons present whom the court may appoint for that purpose shall be sworn to try whether the juror objected to stands indifferent between the Queen and the accused, or has been convicted, or is an alien, as aforesaid, as the case may be. If the court or the triers find against the challenge the juror shall be sworn. If they find for the challenge he shall not be sworn. If after what the court considers a reasonable time, the triers are unable to agree the court may discharge them from giving a verdict, and may direct other persons to be sworn in their place.

9. The Crown shall have power to challenge four jurors peremptorily, and may direct any number of jurors not peremptorily challenged by the accused to stand by until all the jurors have been called who are available for the purpose of trying that indictment.

10. The accused may be called upon to declare whether he challenges any *jurors* peremptorily or otherwise, before the prosecutor is called upon to declare whether he requires such juror to stand by, or challenges him either for cause or peremptorily. R. S. C. c. 174, ss. 163 & 164. (*Amended*).

LL.—(*Section* 668.)

CHALLENGE TO POLL.

Canada, Province of, County of .

The Queen *v.* C.D., The said A.B., who prosecutes, &c (*or* the said C.D., *as the case may be*) challenges G.H., on the ground that his name does not appear in the panel (*or* "that he is not indifferent between the Queen and the said C.D.," *or* "that he was convicted and sentenced to ('death' *or* '*penal servitude*,' *or* 'imprisonment with hard labour,' *or* 'exceeding twelve months,'" *or* "that he is disqualified as an alien."

"Jurors" in second line of s-s. 10 ought to be "juror."

The word "last" in s-s. 8 constitutes a change in the law as given in Bacon's Abr. Juries E. 12: 3 Blacks. 363; 2 Hale, 275; and Archbold, 176, that the two first jurors sworn are to try all the subsequent challenges. The rule

that when the challenge is made to the first juror and disallowed by the two triers chosen by the court, then this first juror is joined to the two triers till another juror is sworn is not reproduced. *See* s. 675.

A challenge to the polls is an exception to some one or more individual juror or jurors. It may be made orally. *See* s-s. 6, *ante*. After issue joined between the crown and the prisoner, when the jury is called and before they are sworn, is the only time when the right of challenge can be exercised: R. v. Key, 2 Den. 347; R. v. Shuttleworth, 2 Den. 341 1; Stephen's Hist. 302. In R. v. Giorgetti, 4 F. & F. 546, it was held that the challenge must be made before the book is given into the hands of the juror, and before the officer has recited the oath, and it comes too late afterwards though made before the juror has kissed the book. In R. v. Frost, 9 C. & P. 136, it was held that the challenge of a juror, either by the Crown or by the prisoner, must be before the oath is commenced. The moment the oath has begun it is too late. The oath is begun by the juror taking the book, having been directed by the officer of the court to do so. But if the juror takes the book without authority neither party wishing to challenge is to be prejudiced thereby. But a juror may be challenged even after being sworn if the prosecutor consents: Bacon's Abr. Verb. Juries, 11; 1 Chit. 545; R. v. Mellor, Dears. & B. 494, *per* Wightman, J.

By s-s. 10 of s. 668, the prisoner may be compelled to exhaust all his challenges before the Crown is called upon to show cause for its challenges or order to stand aside: 1 Stephen's Hist. 303.

It is obvious that each juror must be sworn separately in all cases, *see* s-s. 3, s. 667, *ante*.

The accused is to be informed before the swearing of the jurors that if he will challenge them or any of them he must challenge them as they come to the book to be sworn and before they are sworn; the following is the

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

The accused must make all his challenges in person, even in cases where he has counsel: 1 Chit. 546; 2 Hawk. 570. The practice is not uniform on that point.

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

A challenge to the polls is either peremptory or for cause; a peremptory challenge is such as is allowed to be made to a juror without assigning any cause; the number of these challenges allowed in each particular case is settled by s. 668, *ante*.

Peremptory challenges are not allowed upon any collateral issue: R. v. Ratcliffe, Fost. 40; Barkstead's case, Kel. 16; Johnson's case, Fost. 46; R. v. Paxton, 10 L. C. J. 213.

Hale, 2 P. C. 267*d*, says that no peremptory challenges are allowed to the defendant "if he had pleaded any foreign plea in bar or in abatement, which went not to the trial of the felony, but of some collateral matter only." And it is added, in Bacon's Abr. Verb. Juries, 9, that "this peremptory challenge seems by the better opinion to be only allowable when the prisoner pleads the general issue." This would seem to take away the right of peremptorily challenging on the trial of pleas of "*autrefois acquit*," or "*autrefois convict*." But it is not so; the issue on a plea of this kind is not a collateral issue. And it is said in 2 Hale, *loc. cit.*, that if a man plead not guilty, or *plead any*

other matter of fact triable by the same jury, and plead over to the felony, he has his peremptory challenges. By collateral issues must be understood, for instance, where a criminal *convict* pleads any matter allowed by law in bar of execution, as pregnancy, pardon, an act of grace, or, as in Ratcliffe's case, above cited, when a person brought to the bar to receive his sentence says that he is not the same person that was convicted, the issues in these cases being always tried by a jury *instanter*.

Where several persons are tried by the same jury each of such persons has a right to his full number of peremptory challenges in all cases where the right of peremptory challenge exists; and if twenty men were indicted for the same offence by one indictment yet every prisoner should be allowed his full number of peremptory challenges. Th ey may join in their challenges, if they wish to be tried together, and then they can only challenge amongst them to the number allowed to one: s. 671, *post*. But if they refuse to do so the Crown has the right of trying each, or any number of them less than the whole, separately from the others, in order to prevent the delay which might arise from the whole panel being exhausted by the challenges : 1 Chit. 535.

So, in Charnock's case, 3 Salk. 80 (in many books erroneously called Charwick,) three being indicted together, Holt, C.J., told them "that each of them had liberty to challenge thirty-five of those who were returned upon the panel to try them, without showing any cause; but that if they intended to take this liberty, then they must be tried separately and singly, as not joining in the challenges; but, if they intended to join in the challenges, then they could challenge but thirty-five in the whole, and might be tried jointly upon the same indictment;" accordingly, they all three joined in their challenges and were tried together and found guilty.

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

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

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

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

The most important causes of a *principal* challenge to the polls are: 1. *Propter defectum*, on account of some personal objection, as alienage, minority, old age, insanity, present state of drunkenness, deafness, or a want of the property qualifications required by law. 2. *Propter affectum*, on the ground of some presumed or actual partiality in the juror who is objected to; as if he be of affinity to either party, or in his employment, or is interested in the event, or if he has eaten or drunk at the expense of one of the parties, if the juror has expressed his wishes as to the

result of the trial, or his opinion of the guilt or innocence of the defendant, also if he was one of the grand jurors who found the indictment upon which the prisoner is then arraigned, or any other indictment against him on the same facts. 3. *Propter delictum*, on the ground of infamy as where the juror has been convicted of treason, felony, perjury, conspiracy, or any other infamous offence; *see* s. 668, *ante*.

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

In the case of a *principal* challenge to the polls the court, without triers, examines either the juror challenged, or any witness or evidence then offered, to ascertain the truth of the fact alleged as a ground of challenge, if this fact is not admitted by the adverse party; and if the ground is made out to the satisfaction of the court, the challenge is at once allowed, and the juror set aside.

In these cases, the necessary conclusion in law of the fact alleged against the juror is that he is not indifferent, and this, as a matter of law, must be decided by the court.

But in the case of a challenge for favour the matter of challenge is left to the discretion of triers. In this case the grounds of such challenge are not such that the law necessarily infers partiality therefrom, as, for instance,

relationship; but are reasonable grounds to suspect that the juror will act under some undue influence or prejudice.

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

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

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

No challenge of triers is admissible: 1 Chit. 549.

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

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

If this challenge is made to the first juror, and before any one has been sworn, then the court will direct two indifferent persons, not returned of the jury, to act as triers; if they find against the challenge the juror will be sworn, *and be joined with the triers in determining the next challenges.* Such has been the rule heretofore, though, as noted above, it is not enacted in s. 668.

But as soon as two jurors have been found indifferent and have been sworn then the office of the first two triers ceases, and every subsequent challenge is referred to the decision of the two first jurors sworn: 3 Blacks. 363; (now the two last, s. 668). If the challenge is made when there is yet only one juror sworn, one trier is chosen by each party, and added to the juryman sworn, and the three, together, try the challenges till a second juror is sworn: 1 Chit. 549; Bacon's Abr. Verb. Juries, E. 12; 2 Hale, 274; s. 675.

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

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

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

See R. v. Mellor, Dears. & B. 468; Morin v. R., 16 Q. L. R. 366, 18 S. C. R. 407; Brisebois v. The Queen, 15 S. C. R. 421; Bowsse v. Cannington, cited in Doe v. Oliver, 2 Sm. Lead. Cas. 780; Mansell v. R., Dears. & B. 375; R. v. Geach, 9 C. & P. 499; 1 Chit. 547; 4 Blacks. 353. In Morin v. R. *ubi supra*, the result in the Supreme Court was that the court had no jurisdiction to determine the question raised. All that was said upon the merits of that question is *obiter*.

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

The prisoner should challenge before the juror takes the book in his hand, but the judge, in his discretion, may allow the challenge afterwards before the oath is fully administered: R. v. Kerr, 3 L. N. 299.

CHALLENGE BY THE CROWN IN LIBEL CASES.

669. Special provision as to the right of the Crown to cause any juror to stand aside in a libel case. *See ante*, under s. 302, p. 305.

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

But it is restricted to cases of libel: R. v. Brice, 15 Q. L. R. 147.

CHALLENGES IN CASE OF MIXED JURORS.

670. Whenever a person accused of an offence for which he would be entitled to twenty or twelve peremptory challenges as hereinbefore provided elects to be tried by a jury composed one-half of persons skilled in the language of the defence under sections six hundred and sixty-four or six hundred and sixty-five, the number of peremptory challenges to which he is entitled shall be divided, so that he shall only have the right to challenge one half of such number from among the English speaking jurors, and one half from among the French speaking jurors. R. S. C. c. 174, ss. 166 & 167.

This applies to Quebec and Manitoba: ss. 664, 665, *ante*. When the accused has only four peremptory challenges this s. 670 does not apply. The crown exercises its challenges without regard to the language of the jurors.

JOINT TRIALS.

671. If several accused persons are jointly indicted and it is proposed to try them together, they or any of them may either join in their challenges, in which case the persons who so join shall have only as many challenges as a single person would be entitled to, or each may make his challenges in the same manner as if he were intended to be tried alone.

That has always been the law; *see* remarks, *ante*, under s. 668.

ORDERING TALES.

672. Whenever after the proceedings hereinbefore provided the panel has been exhausted, and a complete jury cannot be had by reason thereof, then, *upon request made on behalf of the Crown*, the court may order the sheriff or other proper officer forthwith to summon such number of persons whether qualified jurors or not as the court deems necessary and directs in order to make a full jury; and such jurors may, if necessary, be summoned by word of mouth.

2. The names of the persons so summoned shall be added to the general panel, *for the purposes of the trial*, and the same proceedings shall be taken as to calling and challenging such persons and as to directing them to stand by as are hereinbefore provided for with respect to the persons named in the original panel. R. S. C. c. 174, s. 168.

This is a re-enactment.

JURORS NOT TO SEPARATE. (*New*).

673. The trial shall proceed continuously, subject to the power of the court to adjourn it. Upon every such adjournment the court may in all cases, if it thinks fit, direct that during the adjournment the jury shall be kept together, and proper provision made for preventing the jury from holding communication with any one on the subject of the trial. Such direction shall be given in all cases in which the accused may upon conviction be sentenced to death. In other cases, if no such direction is given, the jury shall be permitted to separate.

2. *No formal adjournment of the court shall hereafter be required, and no entry thereof in the Crown book shall be necessary.* R. S. C. c. 174, s. 169.

JURORS MAY HAVE FIRE, ETC. (*New*).

674. Jurors, after having been sworn, shall be allowed at any time before giving their verdict the use of fire and light when out of court, and shall also be allowed reasonable refreshment. 53 V. c. 57, s. 21.

SAVING CLAUSE.

675. Nothing in this Act shall alter, abridge or affect any power or authority which any court or judge has when this Act takes effect, or any practice or form in regard to trials by jury, jury process, juries or jurors, except in cases where such power or authority is expressly altered by or is inconsistent with the provisions of this Act. R. S. C. c. 174, s. 170.

Section 673 alters the law; s. 674 was first enacted in 1890.

On a trial for felony the jury could not be allowed to separate during the progress of the trial, and where such separation took place it was a mis-trial, and the court then directed that the party convicted be tried again as if no trial had been had in such case: R. v. Derrick, 23 L. C. J. 239.

It seems to have always been admitted that in misdemeanours the jury might be allowed to separate during the trial: R. v. Woolf, 1 Chit. Rep. 401; R. v. Kinnear, 2 B. & Ald. 462.

There is no doubt that, generally speaking, the judge ought not to allow the jury to separate in cases where the

punishment may be for over five years' imprisonment. In fact, some judges never allow the jury to separate and if it can be done without too much inconvenience, this is, perhaps, the best practice. When, however, such separation is permitted, the judge ought to caution the jury against holding conversation with any person respecting the case, or suffering it in their presence, or reading newspaper reports or comments regarding it, or the like: *see* 1 Bishop, Cr. Proc. 996. They are not allowed to separate after they have retired to consider their verdict: s. 727.

The doctrine that "a jury sworn and charged in case of life or member cannot be discharged by the court, but they ought to give a verdict," is exploded, and it may now be considered as established law that a jury sworn and charged with a prisoner, even in a capital case, may be discharged by the judge at the trial without giving a verdict, if a necessity—that is a high degree of need—for such discharge is made evident to his mind. If after deliberating together the jury say that they have not agreed, and that they are not likely to agree, the judge may discharge them. It lies absolutely in his discretion how long they should be kept together, and his determination on the subject cannot be reviewed in any way: R. v. Charlesworth, 2 F. & F. 326, 1 B. & S. 460; Winsor v. R. (in error), 7 B. & S. 490, 10 Cox, 276; s. 728 *post*.

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

If a juryman is taken ill, so as to be incapable of attending through the trial, the jury may be discharged, and the trial and examination of witnesses begun over

again another juror being added to the eleven; but in that case the prisoner should be offered his challenges over again as to the eleven, and the eleven should be sworn *de novo*: R. v. Edwards, R. & R. 224; *see* also R. v. Scalbert, 2 Leach, 620; R. v. Beere, 2 M. & Rob. 472; R. v. Gould, 3 Burn, 98.

In R. v. Murphy, 2 Q. L. R. 383, after the prisoner had been given in charge to the jury, the case was adjourned for one day on account of his counsel's illness.

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

Although each juryman may apply to the subject before him that general knowledge which any man may be supposed to have, yet if he be personally acquainted with any material particular fact he is not permitted to mention the circumstance privately to his fellows, but he must submit to be publicly sworn and examined, though there is no necessity for his leaving the box, or declining to interfere in the verdict: R. v. Rosser, 7 C. & P. 648; 2 Taylor, Ev. par. 1244; 3 Burn 96; *see* R. v. Petrie, 20 O. R. 317.

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

The rule is that the right to discharge the jury without giving a verdict ought not to be exercised except in some

case of physical necessity, or where it is hopeless that the jury will agree, or where there have been some practices to defeat the ends of justice. If after the prisoner is given in charge, though before any evidence is given, it is discovered that a material witness for the prosecution is not acquainted with the nature of an oath, it is not a sufficient ground for discharging the jury so that the witness might be instructed before the next assizes upon that point, and a verdict of acquittal must be entered if the prosecution has no other sufficient evidence: R. v. Wade, 1 Moo. 86. R. v. White, 1 Leach, 430, seems a contrary decision, but is now overruled by the above last cited case. Where, during the trial of a felony, it was discovered that the prisoner had a relation on the jury, Erskine, J., after consulting Tindal, C.J., held that he had no power to discharge the jury but that the trial must proceed: R. v. Wardle, Car. & M. 647.

If it appear during a trial that the prisoner, though he has pleaded not guilty, is mad, the judge may discharge the jury of him, that he may be tried after the recovery of his understanding: 1 Hale, 34: *see post*, sections 737, *et seq.*, and remarks thereunder.

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

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

A jury had been sworn on the previous day to try the prisoner on an indictment for murder. In the course of the

trial one of the jurors was discharged because he came from a house where there was small-pox. The case being resumed before a new jury the prisoner contended that, having been once put in jeopardy of his life, no new trial could be had. The court overruled the objection: R. v. Considine, 8 L. N. 307.

A juror may be a witness. He is then sworn without leaving the jury box: 2 Taylor, Ev., par. 1244. *See* R. v. Rosser, 7 C. & C. 648. Under s. 675 it seems that the whole of s. 7 of the 27 & 28 V. c. 41 (1864), is still in force in the Province of Quebec, (*see* remarks under s. 664, *ante*), except s-s. 8 & 9 thereof, which are repealed by 49 V. c. 4 (D.).

PROCEEDINGS WHEN PREVIOUS CONVICTION CHARGED.

676. The proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows, that is to say: the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he pleads not guilty, or if the court orders a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if the jury finds him guilty, or if on arraignment he pleads guilty, he shall then, and not before, be asked whether he was so previously convicted as alleged in the indictment; and if he answers that he was so previously convicted the court may proceed to sentence him accordingly, but if he denies that he was so previously convicted, or stands mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall, for all purposes, be deemed to extend to such last mentioned inquiry: Provided, that if upon the trial of any person for any such subsequent offence, such person gives evidence of his good character, the prosecutor may, in answer thereto, give evidence of the conviction of such person for the previous offence or offences before such verdict of guilty is returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence. R. S. C. c. 174, s. 207.

See s. 628, *ante*, and remarks thereunder: R. v. Woodfield, 16 Cox, 314.

WITNESSES' ATTENDANCE.

677. Every witness duly subpœnaed to attend and give evidence at any criminal trial before any court of criminal jurisdiction shall be bound to attend and remain in attendance throughout the trial. R. S. C. c. 174, s. 210.

COMPELLING ATTENDANCE OF WITNESSES.

678. Upon proof to the satisfaction of the judge of the service of the subpœna upon any witness who fails to attend or remain in attendance, or upon its appearing that any witness at the preliminary examination has entered into a recognizance to appear at the trial, and has failed so to appear, and that the presence of such witness is material to the ends of justice, the judge may, by his warrant, cause such witness to be apprehended and forthwith brought before him to give evidence and to answer for his disregard of the subpœna; and such witness may be detained on such warrant before the judge or in the common gaol with a view to secure his presence as a witness, or, in the discretion of the judge, he may be released on a recognizance, with or without sureties, conditioned for his appearance to give evidence and to answer for his default in not attending or not remaining in attendance; and the judge may, in a summary manner, examine into and dispose of the charge against such witness, who, if he is found guilty thereof, shall be liable to a fine not exceeding one hundred dollars, or to imprisonment, with or without hard labour, for a term not exceeding ninety days or to both. R. S. C. c. 174, s. 211.

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

WITNESS OUT OF THE JURISDICTION.

679. If any witness in any criminal case cognizable by indictment in any court of criminal jurisdiction at any term, sessions or sittings of any court in any part of Canada, resides in any part thereof, not within the ordinary jurisdiction of the court before which such criminal case is cognizable, such court may issue a writ of subpœna, directed to such witness, in like manner as if such witness was resident within the jurisdiction of the court; and if such witness does not obey such writ of subpœna the court issuing the same may proceed against such witness for contempt or otherwise, or bind over such witness to appear at such days and times as are necessary, and upon default being made in such appearance may cause the recognizances of such witness to be estreated, and the amount thereof to be sued for and recovered by process of law, in like manner as if such witness was resident within the jurisdiction of the court. R. S. C. c. 174, s. 212.

WITNESS FROM GAOL OR PENITENTIARY.

680. When the attendance of any person confined in any prison in Canada, or upon the limits of any gaol, is required in any court of criminal jurisdiction in any case cognizable therein by indictment, the court before whom such prisoner is required to attend may, or any judge of such court, or of any superior court or county court may, before or during any such term or sittings at which the attendance of such person is required, make an order upon the warden or gaoler of the prison, or upon the sheriff or other person having the custody of such prisoner, to deliver such prisoner to the person named in such order to receive him; and such person shall, at the time prescribed in such order, convey such prisoner to the place at which such person is required to attend, there to receive and obey such further order as to the said court seems meet. R. S. C. c. 174, s. 213.

At common law writs of subpœna have no force beyond the jurisdictional limits of the court from which they issue, but, by the above clause, 679, any court of criminal jurisdiction in Canada may summon a witness from any other part of Canada, for instance, a criminal court in Quebec can summon a witness in Nova Scotia, or *vice versa*, and if the subpœna is not obeyed the court may proceed against the witness in like manner as if such witness were resident within the jurisdiction of the court. In England, 46 Geo. III. c. 92 contains a provision of the same nature. In criminal cases the witness is bound to attend even if he has not been tendered his expenses: 3 Russ. 575; Roscoe, Ev. 104.

Section 680 renders unnecessary, in criminal matters, the writ of *habeas corpus ad testificandum*. It seems to go very far, and might lead to serious consequences; it, for instance, authorizes a judge of the court of quarter sessions, or of the county court in any part of the Dominion, to order the removal of a prisoner from any other part of the Dominion. Moreover, this removal is not, as in England, to be made under the same care and custody as if the prisoner was brought under a writ of *habeas corpus*, and by the officer under whose custody the witness is, but by any other person named by the judge in his order, thereby, against all notions on the subject, releasing for a while a prisoner from the custody of his gaoler, who, of course, ceases, *pro tempore*, to be responsible for his safe keeping. The Imperial Act on the subject is the 16 & 17 V. c. 30, s. 9. Though our statute does not expressly require it, an affidavit stating the place and cause of confinement of the witness, and further that his evidence is material, and that the party cannot, in his absence, safely proceed to trial, should be given in support of the application. And if the prisoner be confined at a great distance from the place of trial, the judge will, perhaps, require that the affidavit should point out in what manner his testimony is material: 2 Taylor, Ev. par. 1149.

The word "prison" includes any penitentiary, s. 3.

EVIDENCE OF PERSON ILL MAY BE TAKEN UNDER COMMISSION.

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

2. Such commissioner shall take such statement and shall subscribe the same and add thereto the names of the persons, if any, present at the taking thereof, and if the deposition relates to any indictable offence for which any accused person is already committed or bailed to appear for trial shall transmit the same, with the said addition, to the proper officer of the court at which such accused person is to be tried; and in every other case he shall transmit the same to the clerk of the peace of the county, division or city in which he has taken the same, or to such other officer as has charge of the records and proceedings of a superior court of criminal jurisdiction in such county, division or city, and such clerk of the peace or other officer shall preserve the same and file it of record, and upon order of the court or of a judge transmit the same to the proper officer of the court where the same shall be required to be used as evidence. R. S. C. c. 174, s. 220.

See s. 686, *post.*

PRESENCE OF PRISONER.

682. Whenever a prisoner in actual custody is served with, or receives, notice of an intention to take the statement mentioned in the last preceding section the judge who has appointed the commissioner may, by an order in writing, direct the officer or other person having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement; and such officer or other person shall convey the prisoner accordingly, and the expenses of such conveyance shall be paid out of the funds applicable to the other expenses of the prison from which the prisoner has been conveyed. R. S. C. c. 174, s. 221.

See s. 686, *post.*

COMMISSION OUT OF CANADA.

683. Whenever it is made to appear, at the instance of the Crown, or of the prisoner or defendant, to the satisfaction of the judge of any superior court, or the judge of a county court having criminal jurisdiction, that any person who resides out of Canada is able to give material information relating to any indictable offence for which *a prosecution is pending*, or relating to any person accused of such offence, such judge may, by order under his hand, appoint a commissioner or commissioners to take the evidence, upon oath, of such person.

2. Until otherwise provided by rules of court, the practice and procedure in connection with the appointment of commissioners under this section, the taking of depositions by such commissioners, and the certifying and return

thereof, and the use of such depositions as evidence at the trial, shall be, as nearly as practicable, the same as those which prevail in the respective courts in connection with the like matters in civil causes. 53 V. s. 37, s. 23.

Order for examination of witness out of jurisdiction under 53 V. c. 37, s. 23 should not provide that evidence so taken should be read before the grand jury: R. v. Chetwynd, 23 N. S. Rep. 332.

WHEN EVIDENCE MUST BE CORROBORATED.

684. No person accused of an offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused:

(*a*) Treason, Part IV., section sixty-five;

(*b*) Perjury, Part X., section one hundred and forty-six;

(*c*) Offences under *Part XIII* sections one hundred and eighty-one to one hundred and ninety inclusive;

(*d*) Procuring feigned marriage, Part XXII., section two hundred and seventy-seven;

(*e*) Forgery, Part XXXI., section four hundred and twenty-three.

Section 218, c. 174 R. S. C., as to evidence in cases of forgery, required corroboration only of an interested witness: *see* R. v. Rhodes, 22 O. R. 480.

EVIDENCE OF CHILD IN CERTAIN CASES.

685. Where, upon the hearing or trial of any charge for carnally knowing or attempting to carnally know a girl under fourteen or of any charge under section two hundred and fifty-nine for indecent assault, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received though not given upon oath if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

2. But no person shall be liable to be convicted of the offence, unless the testimony admitted by virtue of this section, and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused.

3. Any witness whose evidence is admitted under this section is liable to indictment and punishment for perjury in all respects as if he or she had been sworn. 53 V. c. 37, s. 13. 48-49 V. c. 69, s. 4 (Imp.).

See s. 25 of the Canada Evidence Act, 1893, 56 V. c. 31.

This provision applies to the trial of offences under ss. 259, 269, & 270, *ante*.

See R. v. Wealand, 16 Cox, 402, 20 Q. B. D. 827; R. v. Paul, 17 Cox, 111, 25 Q. B. D. 202; R. v. Pruntey, 16 Cox, 344. The evidence so given would be evidence to support any verdict allowed in virtue of s. 713, *post*, on an indictment for any of the offences provided for in ss. 259, 269 & 270. Held, in that sense, by Court of Queen's Bench, Montreal, May 26th, 1893, in R. v. Grantyers.

DEPOSITIONS TO BE READ IN EVIDENCE.

686. If the evidence of a sick person has been taken under commission as provided in section six hundred and eighty-one, and upon the trial of any offender for any offence to which the same relates, the person who made the statement is proved to be dead, or if it is proved that there is no reasonable probability that such person will ever be able to attend at the trial to give evidence, such statement may, upon the production of the judge's order appointing such commissioner, be read in evidence, either for or against the accused, without further proof thereof,—if the same purports to be signed by the commissioner by or before whom it purports to have been taken, and if it is proved to the satisfaction of the court that reasonable notice of the intention to take such statement was served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person or his counsel or solicitor had, or might have had, if he had chosen to be present, full opportunity of cross-examining the person who made the same. R. S. C. c. 174, s. 220.

See s. 681, *ante*.

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

DEPOSITIONS TO BE READ IN EVIDENCE.

687. If upon the trial of any accused person it is proved upon the oath or affirmation of any credible witness that any person whose deposition has been taken by a justice in the preliminary or other investigation of any charge is dead, or so ill as not to be able to travel, or is absent from Canada, and if it is also proved that such deposition was taken in the presence of the person accused, and that he, his counsel or solicitor, had a full opportunity of cross-examining the witness, then if the deposition purports to be signed by the justice by or before whom the same purports to have been taken it shall be read as evidence in the prosecution without further proof thereof, unless it is proved that such deposition was not in fact signed by the justice purporting to have signed the same. R. S. C. c. 174, s. 222. 11-12 V. c. 43, s. 17, (Imp.).

See R. v. Pruntey, 16 Cox, 344; R. v. Bullard, 12 Cox, 353; R. v. Bull, 12 Cox, 31; R. v. Clements, 2 Den. 251; R. v. Stephenson, L. & C. 165, Warb. Lead. Cas. 233; R. v. De Vidil, 9 Cox, 4; *Ex parte* Huguet, 12 Cox, 551.

Doubts have arisen in England whether, under this last cited clause of the Imperial Act, the prosecution must have been identically for the same offence as charged against the prisoner by the depositions against him as taken by the magistrate, and it has even been held that a deposition taken on a charge of assault could not afterwards be received on an indictment for wounding: R. v. Ledbetter, 3 C. & K. 108. Though in the subsequent case of R. v. Beeston, Dears. 405, it was held by the court of criminal appeal that a deposition taken on a charge, either of assault and robbery, of doing grievous bodily harm, or of feloniously wounding with intent to do grievous bodily harm, can, after the death of the witness, be read upon a trial for murder or manslaughter, where the two charges relate to the same transaction, yet it seems by the report of the case that if the charges on the two occasions had been substantially different the deposition would not have been admissible: *see* R. v. Lee, 4 F. & F. 63; R. v. Radbourne, 1 Leach, 457; R. v. Smith, R. & R. 339; R. v. Dilmore, 6 Cox, 52. But in Canada, by s. 688, *post*, all doubts on the question are removed, and a deposition taken on "*any*" charge against a person may be read as evidence in the prosecution of such person for "*any other offence*," when the deposition is otherwise admissible.

Prisoner's deposition.—The depositions on oath of a witness legally taken are admissible evidence against him if he is subsequently tried on a criminal charge. The only exception is in the case of answers to questions which he objected to, when his evidence was taken, as tending to criminate him but which he has been improperly compelled to answer: R. v. Coote, L. R. 4 P. C. 599, 12 Cox, 557; R. v. Garbett, 1 Den. 236. Where a witness claims protection on

the ground that an answer may criminate him, and he is compelled to answer, the answer is inadmissible whether he claim the protection in the first instance or after having given some answers tending to criminate himself: R. v. Garbett, *ubi supra.* But it seems that the part of the deposition given before such witness has so claimed the protection of the court is admissible: R. v. Coote, *ubi supra.* And the witness need not have been cautioned or put upon his guard as to the tendency of the question in order to render his answer admissible. *See*, now, s. 5 of the Canada Evidence Act, 1893, 56 V. c. 31. S. 591, *ante*, is applicable to accused persons only and not to witnesses; and s. 592 enacts specially that "nothing herein contained shall prevent any prosecutor from giving in evidence any admission or confession, or other statement made at any time by the person accused or charged, which by law would be admissible as evidence against him." *See* 3 Russ. 418, and R. v. Coote, *ubi supra.* Also, R. v. Wellings, 14 Cox, 105, and R. v. Beriau, Ramsay's App. Cas. 185.

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

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

Depositions not taken in presence of the accused cannot be submitted to the grand jury under s. 687: R. v. Carbray, 13 Q. L. R. 100.

The deposition, regularly taken by the committing magistrate, of a witness was allowed to be read at the trial, for the reason that a medical man proved that the witness was old, and that he thought, under her state of nervousness, that she would faint at the idea of coming into court, though he was of opinion that she could go to London to see a doctor without difficulty or danger: *held*, that her

deposition ought not to have been received: R. v. Farrell, 12 Cox, 605; R. v. Thompson, 13 Cox, 181.

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

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

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

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

Upon a prosecution for uttering forged notes the deposition of one S., taken before the Police Magistrate on the preliminary investigation, was read upon the following proof that S. was absent from Canada. R. swore that S. had, a few months before, left his (R.'s) house where she (S.) had, for a time, lodged; that he had since twice heard from her in the U. S. but not for six months. The chief constable of Hamilton, where the prisoner was tried, proved ineffectual attempts to find S., by means of personal inquiries in some places, and correspondence with the police of other cities. S. had for some time lived with the prisoner as his wife:

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

DEPOSITIONS MAY BE USED FOR OTHER OFFENCES.

688. Depositions taken in the preliminary or other investigation of any charge against any person may be read as evidence in the prosecution of such person for any other offence, upon the like proof and in the same manner, in all respects, as they may, according to law, be read in the prosecution of the offence with which such person was charged when such depositions were taken. R. S. C. c. 174, s. 224.

The deposition on oath of a witness is evidence against him on his trial if he is subsequently charged with a crime: R. v. Coote, 12 Cox, 557, L. R. 4 P. C. 599: *see* R. v. Buckley, *ante*, under s. 687, and remarks under that section.

EVIDENCE OF PRISONER'S STATEMENT.

689. The statement made by the accused person before the justice may, if necessary, upon the trial of such person, be given in evidence against him without further proof thereof, unless it is proved that the justice purporting to have signed the same did not in fact sign the same. R. S. C. c. 174, s. 223. 11-12 V. c 48, s. 18 (Imp.).

As to confessions under inducements, *see* R. v. Fennell, Warb. Lead. Cas. 250, and cases there cited.

See R. v. Soucie, 1 P. & B. (N.B.) 611. S. 689 must be read in connection with s. 591 *ante*.

ADMISSIONS ON TRIAL. (*New*).

690. Any accused person on his trial for any indictable offence, or his counsel or solicitor, may admit any fact alleged against the accused so as to dispense with proof thereof.

"At present if the accused is proved before his trial to have made an admission it is evidence against him, but though he offers to make the same admission in court it is thought that in cases of felony the judge is obliged to refuse to let him do so."—Imp. Comm. Rep.

EVIDENCE ON TRIAL FOR PERJURY.

691. A certificate containing the substance and effect only, omitting the formal part, of the indictment and trial for any offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court whereat the indictment was tried, or among which such indictment has been filed, or by the deputy of such clerk or other officer, shall, upon the trial of an indictment for perjury or subornation of perjury, be sufficient evidence of the trial of such indictment without proof of the signature or official character of the person appearing to have signed the same. R. S. C. c. 174, s. 225. 14-15 V. c. 100, s. 22 (Imp.).

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

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

EVIDENCE ON TRIAL UNDER SECTIONS 460, ET SEQ.

692. When, upon the trial of any person, it becomes necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of Her Majesty's mint, or other person employed in producing the lawful coin in Her Majesty's dominions or elsewhere, whether the coin counterfeited is current coin, or the coin of any foreign prince, state or country, not current in Canada, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness. R. S. C. c. 174, s. 229.

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

EVIDENCE UNDER SECTION 480.

693. On the trial of any person charged with the offences mentioned in section four hundred and eighty, any letter, circular, writing or paper offering or purporting to offer for sale, loan, gift or distribution, or giving or purporting to give information, directly or indirectly, where, how, of whom or by what means any counterfeit token of value may be obtained or had, or concerning any similar scheme or device to defraud the public, shall be *prima facie* evidence of the fraudulent character of such scheme or device. 51 V. c. 40, s. 4.

PROOF OF PREVIOUS CONVICTION.

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

proof of the identity of the person of the offender, be sufficient evidence of such conviction without proof of the signature or official character of the person appearing to have signed the same. R. S. C. c. 174, s. 230.

See ss. 628 & 676 *ante*, to which this s. 694 is intended to apply: *see* 34 & 35 V. c. 112, s. 18 (Imp.). The enactment does not extend to proof of a previous acquittal.

PREVIOUS CONVICTION OF WITNESS.

695. A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction; and a certificate, as provided in the next preceding section, shall, upon proof of the identity of the witness as such convict, be sufficient evidence of his conviction, without proof of the signature or the official character of the person appearing to have signed the certificate. R. S. C. c. 174, s. 231.

This enactment is taken from the 28 V. c. 18, s. 6, of the Imperial statutes, *An Act for Amending the Law of Evidence and Practice on Criminal Trials.*

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

It is now decided, contrary to an opinion formerly entertained by several of the judges, that the mere declaration of a witness on oath that he believes that the answer will tend to criminate him will not suffice to protect him from answering, when the other circumstances of the case are such as to induce the judge to believe that the answer

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

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

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

Where, however, the question is not directly material to the issue, but is only put for the purpose of testing the character and consequent credit of the witness, there is much more room for doubt. Several of the older *dicta* and authorities tend to show that in such case the witness is not bound to answer; but the privilege, if it still exists, is certainly much discountenanced in the practice of modern times. Even Lord Ellenborough, who is reported to have held on one occasion that a witness was not bound to state

whether he had not been sentenced to imprisonment in a house of correction, and on another, that the question could not so much as be put to him, seems in a later case to have disregarded the rules thus enunciated by himself; for, on a witness declining to say whether or not he had been confined for theft in gaol, his Lordship harshly observed: "If you do not answer the question I will send you there."

No doubt cases may arise where the judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a remote date might, in general, be rightly suppressed; for the interests of justice can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked. But the rule of protection should not be further extended; for if the inquiry relates to transactions comparatively recent, bearing directly upon the moral principles of the witness, and his present character for veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding the answer may disgrace him. It has, indeed, been termed a harsh alternative to compel a witness either to commit perjury or to destroy his own reputation; but, on the other hand, it is obviously most important that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause: 2 Taylor Ev. pars. 1313, 1314, 1315; 3 Russ. 543, 547.

By the words "*or refuses to answer*" in the said section (and these words are also in the Imperial statute), it would,

at first sight, seem that the witness questioned as to a previous conviction is not bound to answer; but it is obvious that this is not so; and the above quotation from Taylor goes to show clearly that the question, if insisted upon by the court, must be answered. Indeed, in a great many cases, the party putting the question could not be expected to be ready, on the spot, to prove the conviction of the witness otherwise than by himself.

By the Canada Evidence Act, 1893, 56 V. c. 31, s. 5, no one is now excused from answering any question upon the ground that the answer may tend to criminate him.

PROOF OF ATTESTED INSTRUMENTS.

696. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise as if there had been no attesting witness thereto. R. S. C. c. 174, s. 232.

This is, *verbatim*, s. 7 of 28 V. c. 18 of the Imperial statutes. Formerly the rule was that if an instrument, on being produced, appeared to be signed by subscribing witnesses, one of them, at least, should be called to prove its execution. The above clause abrogates this rule. It applies only to instruments to the validity of which attestation is not requisite.

EVIDENCE AT TRIAL FOR CHILD MURDER.

697. The trial of any woman charged with the murder of any issue of her body, male or female, which being born alive would, by law, be bastard, shall proceed and be governed by such and the like rules of evidence and presumption as are by law used and allowed to take place in respect to other trials for murder. R. S. C. c. 174, s. 227.

If the mother of an illegitimate child endeavoured privately to conceal his birth and death she was presumed to have murdered it, unless she could prove that the child was born dead. Taylor, on Ev., note 7, p. 128, justly says that this rule was barbarous and unreasonable.

COMPARISON OF WRITINGS.

698. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the

same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. R. S. C. c. 174, s. 233.

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

PARTY DISCREDITING HIS OWN WITNESS.

699. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement. R. S. C. c. 174, s. 234.

This is s. 3 of the 28 & 29 V. c. 18 of the Imperial statutes, *An Act for Amending the Law of Evidence and Practice on Criminal Trials.*

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

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

The first part of the clause seems to have always been the law. It was decided in Ewer v. Ambrose, 3 B. & C. 746, that if a witness called to prove a fact prove the contrary his credit could not be impeached by general evidence, but, in R. v. Ball, 8 C. & P. 745, that the party is at liberty to make out his case by other and contradictory evidence. The portion of the clause allowing a party to

prove that his witness made at any time a different account of the same transaction seems to be new law according to the said case of R. v. Ball, *ubi supra*. *See* R. v. Little, 15 Cox, 319.

FORMER WRITTEN STATEMENTS BY WITNESS.

700. Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, without such writing being shown to him; but if it is intended to contradict the witness by the writing his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; and the judge, at any time during the trial, may require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he thinks fit: Provided that a deposition of the witness, purporting to have been taken before a justice on the investigation of the charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer, shall be presumed *prima facie* to have been signed by the witness. R. S. C. c. 174, s. 235.

The words "upon any trial" mean "upon any trial *in any criminal case*." This enactment is reproduced from s. 5 of 28 V. c. 18 of the Imperial statutes, *An Act for Amending the Law of Evidence and Practice on Criminal Trials*: upon which *see* 2 Taylor Ev. pars. 1301, 1302, 1303; 3 Russ. 550. The general rule was that, when a contradictory statement alleged to have been made by the witness was contained in a letter or other writing, the cross-examining party should produce the document as his evidence, and have it read, in order to base any questions to the witness upon it. The above clause abrogates this rule, under which was excluded one of the best tests by which the memory and integrity of a witness can be tried: 2 Taylor Ev. par. 1301. Before the abrogation of the rule the witness could not be asked whether he did or did not state a particular fact before the magistrate, without first allowing him to read, or have read to him, his deposition: R. v. Edwards, 8 C. & P. 26. And it was irregular to question a witness as to the contents of a former declaration, affidavit, letter or any writing made or written by him, or taken in writing as his declaration or deposition, without first having the said writing read: The Queen's case, 2 Brod. & B. 288.

The prosecution cannot use or refer to the depositions without putting them in: R. v. Muller, 10 Cox, 43.

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

PROOF OF CONTRADICTORY STATEMENT BY WITNESS.

701. If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness and he shall be asked whether or not he did make such statement. R. S. C. c. 174, s. 236.

This enactment is taken from s. 4 of the 28 V. c. 18 of the Imperial statutes.

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

of any declaration by such witness, or of acts done by him, to procure persons corruptly to give evidence in support of the prosecution, unless he has previously cross-examined such witness as to such declarations or acts.

EVIDENCE—COMMON GAMING-HOUSE.

702. When any cards, dice, balls, counters, tables or other instruments of gaming used in playing any unlawful game are found in any house, room or place suspected to be used as a common gaming-house, and entered under a warrant or order issued under this Act, or about the person of any of those who are found therein, it shall be *prima facie* evidence, on the trial of a prosecution under section one hundred and ninety-eight, that such house, room or place is used as a common gaming-house, and that the persons found in the room or place where such tables or instruments of gaming are found were playing therein although no play was actually going on in the presence of the chief constable, deputy chief constable or other officer entering the same under a warrant or order issued under this Act, or in the presence of those persons by whom he is accompanied as aforesaid. R. S. C. c. 158, s. 4. 8-9 V. c. 109, s. 2 (Imp.).

This provision applies to prosecutions under s. 198, p. 134, *ante*. As to search warrant *see* s. 575, p. 643. *See* next section.

Sections 9 & 10 R. S. C. c. 158, on the same subject are unrepealed.

703. It shall be *prima facie* evidence in any prosecution for keeping a common gaming-house under section one hundred and ninety-eight of this Act that a house, room or place is used as a common gaming-house, and that the persons found therein were unlawfully playing therein—

(*a*) if any constable or officer authorized to enter any house room or place, is wilfully prevented from, or obstructed or delayed in, entering the same or any part thereof; or

(*b*) if any such house, room or place is found fitted or provided with any means or contrivance for unlawful gaming, or with any means or contrivance for concealing, removing or destroying any instruments of gaming. R. S. C. c. 158, s. 8. 17-18 V. c. 38, s. 2 (Imp.).

EVIDENCE OF GAMING IN STOCKS.

704. Whenever, on the trial of a person charged with making an agreement for the sale or purchase of shares, goods, wares or merchandise in the manner set forth in section two hundred and one, it is established that the person so charged has made or signed any such contract or agreement of sale or purchase, or has acted, aided or abetted in the making or signing thereof, the burden of proof of the *bona fide* intention to acquire or to sell such goods, wares or merchandise, or to deliver or to receive delivery thereof, as the case may be, shall rest upon the person so charged. 51 V. c. 42, s. 2.

See s. 201, *ante*.

EVIDENCE IN CERTAIN CASES OF LIBEL.

705. In any criminal proceeding commenced or prosecuted for publishing any extract from, or abstract of any paper containing defamatory matter and which has been published by or under the authority of the Senate, House of Commons or any Legislative Council, Legislative Assembly or House of Assembly, such paper may be given in evidence, and it may be shown that such extract or abstract was published in good faith and without ill-will to the person defamed, and if such is the opinion of the jury, a verdict of not guilty shall be entered for the defendant. *Amendment of 1893.*

EVIDENCE OF POLYGAMY.

706. In the case of any indictment under section two hundred and seventy-eight (*b*), (*c*) and (*d*), no averment or proof of the method in which the sexual relationship charged was entered into, agreed to, or consented to, shall be necessary in any such indictment, or upon the trial of the person thereby charged; nor shall it be necessary upon such trial to prove carnal connection had or intended to be had between the persons implicated. 53 V. c. 37, s. 11.

See s. 278, *ante.*

EVIDENCE OF STEALING MINERALS.

707. In any prosecution, proceeding or trial for stealing ores or minerals the possession, contrary to the provisions of any law in that behalf, of any smelted gold or silver, or any gold-bearing quartz, or any unsmelted or otherwise unmanufactured gold or silver, by any operative, workman or labourer actively engaged in or on any mine, shall be *primâ facie* evidence that the same has been stolen by him. R. S. C. c. 164, s. 30.

See s. 571 as to search warrant. As to stealing of ores of metals, etc., *see* s. 348.

EVIDENCE UNDER SECTION 338.

708. In any prosecution, proceeding or trial for any offence under section three hundred and thirty-eight a timber mark, duly registered under the provisions of the *Act respecting the Marking of Timber*, on any timber, mast, spar, saw-log or other description of lumber, shall be *primâ facie* evidence that the same is the property of the registered owner of such timber mark; and possession by the offender, or by others in his employ or on his behalf, of any such timber, mast, spar, saw-log or other description of lumber so marked, shall, in all cases, throw upon the offender the burden of proving that such timber, mast, spar, saw-log or other description of lumber came lawfully into his possession, or into the possession of such others in his employ or on his behalf. R. S. C. c. 174, s. 228.

The Act respecting the marking of timber is c. 64, R. S. C. *See* ss. 338 and 572, *ante.*

EVIDENCE UNDER SECTIONS 385, ET SEQ.

709. In any prosecution, proceeding or trial under sections three hundred and eighty-five to three hundred and eighty-nine inclusive for offences relating to public stores proof that any soldier, seaman or marine was actually doing

duty in Her Majesty's service shall be *primâ facie* evidence that his enlistment, entry or enrolment has been regular.

2. If the person charged with the offence relating to public stores mentioned in article three hundred and eighty-seven was, at the time at which the offence is charged to have been committed, in Her Majesty's service or employment, or a dealer in marine stores, or a dealer in old metals, knowledge on his part that the stores to which the charge relates bore the marks described in section three hundred and eighty-four shall be presumed until the contrary is shown. 50-51 V. c. 45, s. 13. 38-39 V. c. 25 (Imp.).

See ss. 384, *et seq.*

EVIDENCE OF FRAUDULENT TRADE MARKS.

710. In any prosecution, proceeding or trial for any offence under Part XXXIII. relating to fraudulent marks on merchandise, if the offence relates to imported goods evidence of the port of shipment shall be *prima facie* evidence of the place or country in which the goods were made or produced. 51 V. c. 41, s. 13.

2. Provided that in any prosecution for forging a trade mark the burden of proof of the assent of the proprietor shall lie on the defendant.

See ss. 443, *et seq.*

VERDICT OF ATTEMPT.

711. When the complete commission of the offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly. R. S. C. c. 174, ss. 183, 185.

This section does not apply to murder, s. 713. *See* remarks under ss. 64 and 529; and as to punishment, in cases not specially provided for, ss. 528, 529 and 951. Under s. 713 the defendant may be convicted of attempting to commit any offence included in the offence charged.

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

"As the law existed before the passing of this Act (except in the case of the trial for murder of a child, and the offences falling within the 1 V. c. 85, s. 11,) there was no power upon the trial of an indictment for any felony to find a verdict against a prisoner for anything less than a felony, or upon the trial of an indictment for a misdemeanour to find a verdict for an attempt to commit such misdemeanour: *see* R. v. Catherall, 13 Cox, 109; R. v. Woodhall, 12 Cox, 240;

R. v. Bird, 2 Den. 94; 1 Chit. 251, 639. At the same time the general principle of the common law was, that upon a charge of felony or misdemeanour composed of several ingredients the jury might convict of so much of the charge as constituted a felony or misdemeanour: R. v. Hollingberry, 4 B. & C. 329. The reason why, upon an indictment for felony, the jury could not convict of a misdemeanour, was said to be that thereby the defendant would be deprived of many advantages; for if he was indicted for the misdemeanour he might have counsel, a copy of his indictment, and a special jury: R. v. Westbeer, 2 Str. 1133, 1 Leach, 12. The prisoner is now entitled, in cases of felony, to counsel, and to a copy of the depositions, and though not entitled to a copy of the indictment yet as a matter of courtesy his counsel is always permitted to inspect it. With regard to a special jury, in the great majority of cases a prisoner would not desire it, and it can in no case be obtained unless the indictment has been removed by *certiorari*. Very little ground, therefore, remained for objecting to the jury being empowered to find a verdict of guilty of an attempt to commit a felony upon an indictment for such felony, and the prisoner obviously gains one advantage by it, as where he is charged with a felony he may peremptorily challenge jurymen, which he could not do if indicted for a misdemeanour. No prejudice, therefore, being likely to arise to the prisoner, and considerable benefit in the administration of criminal justice being anticipated by the change, the jury are now empowered, upon the trial of any indictment for a felony, to convict of an attempt to commit that particular felony, and upon the trial of any indictment for a misdemeanour to convict of an attempt to commit that particular misdemeanour."

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

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

Cockburn, C.J., said: "The effect of the statute is, that if you charge a man with stealing certain specified goods, he may be convicted of an attempt to commit "the felony or misdemeanour charged;" but can you convict him of stealing other goods than those specified? If you indict a man for stealing your watch you cannot convict him of attempting to steal your umbrella. I am of opinion that this conviction cannot be sustained. The prisoner was indicted for breaking and entering the dwelling-house of the prosecutor, and stealing therein certain specified chattels. The jury found specially that, although he broke and entered the house with the intention of stealing the goods of the prosecutor, before he did so somebody else had taken away the chattels specified in the indictment; now, by the recent statute it is provided, that where the proof falls short of the principal offence *charged* the party may be convicted of an attempt to commit the *same*. The word attempt clearly conveys with it the idea, that if the attempt had succeeded the offence charged would have been committed, and therefore the prisoner might have been convicted if the things mentioned in the indictment or any of them had been there; but attempting to commit a felony is clearly distinguishable from intending to commit it. An attempt must be to do that which, if successful, would amount to the felony charged; but here the attempt never could have succeeded, as the things which the indictment charges the prisoner with stealing had been already

removed, stolen by somebody else. The jury had found him guilty of attempting to steal the goods of the prosecutor, but not the goods specified in the indictment."

An attempt to commit a felony can only be made out where, if no interruption had taken place, the felony itself could have been committed. The prisoner was indicted for attempting to commit a felony by putting his hand into A.'s pocket, with intent to steal the property in the said pocket then being. The evidence was that he was seen to put his hand into a woman's pocket, but there was no proof that there was anything in the pocket: *held*, that on the assumption that there was nothing in the pocket the prisoner could not be convicted of the attempt charged: R. v. Collins, L. & C. 471; though he was guilty of an assault with intent to commit a felony. But that case is overruled; *see* s. 64, *ante*, and R. v. Brown, 24 Q. B. D. 357; R. v. Ring, 17 Cox, 491.

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

But the case of R. v. Goodhall, 1 Den. 187, where it was held that on an indictment for using an instrument with intent to procure the miscarriage of a woman, the fact of the woman not being pregnant is immaterial, Greaves admits, is a direct authority that a man may be convicted of an attempt to do that which it was impossible to do. And if a person administers any quantity of poison, however small, however impossible that it could have caused death, yet if it were done with the intent to murder the offence of administering poison with intent to murder is complete: R. v. Cluderay, 1 Den. 514; 1 Russ. 901, note by Greaves.

It was held in R. v. Johnson, L. & C. 489, that an indictment for an attempt to commit a larceny, which charges the prisoner with attempting to steal the goods and chattels of A., without further specifying the goods intended to be stolen, is sufficiently certain.

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

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

It is said in 2 Russ. 599, on this right given to convict the defendant of the attempt to commit the offence charged: "There are some offences which may be attempted to be committed, whilst there are others which cannot be so attempted. It is obvious that where an offence consists in an act that is done, there may be an attempt to do that act which will be an attempt to commit that offence. But where an offence consists in an omission to do a thing, or in such a state of things as may exist without anything being done, it should seem that there can be no attempt to commit such offence. Thus if an offence consists in omitting or neglecting to turn the points of a railway, it may well be doubted whether there could be an attempt to

commit that offence. And a very nice question might perhaps be raised on an indictment on the 9 & 10 Wm. III. c. 41, s. 2, for *having possession* of marked stores, where the evidence failed to prove that the stores actually came into the prisoner's possession though an attempt to get them into his possession, as in R. v. Cohen, 8 Cox, 41, and knowledge of their being marked, might be proved; for in order to constitute the offence of having possession of anything it is not necessary to prove any act done, and, therefore, it would be open to contend that there could not be an attempt to commit such an offence."

It is to be observed, however, that s. 387, *ante*, corresponding to the 9 & 10 Wm. III. c. 41, s. 2 (Imp.), cited as above in 2 Russ., has the words "receives, possesses;" and on a count charging the receiving of stores there seems no reason to doubt that there might be a conviction of an attempt to receive; for receiving clearly includes an act done. Thus in R. v. Wiley, 2 Den. 37, where a prisoner went into a coach office and endeavoured to get possession of stolen fowls which had come by a coach, there seems no reason why she might not have been convicted of an attempt to receive the fowls.

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

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

In R. v. Hapgood, 11 Cox, 471, H. was indicted for rape, and W. for aiding and abetting. Both were acquitted of felony, but H. was found guilty of attempting to commit the rape, and W. of aiding H. in the attempt. The conviction was affirmed both as to W. and H. *See* R. v. Bain, L. & C. 129, *and note (a) thereto:* R. v. Mayers, 12 Cox, 311: R. v. Barratt, 12 Cox, 498: R. v. Dungey, 4 F. & F. 99.

Many cases of attempts to commit indictable offences may now fall under s. 263, *ante*, which provides for the punishment of any one who assaults any person with intent to commit any indictable offence.

The prisoner wrote a letter to a boy of fourteen inciting him to commit an unnatural offence: *held*, that this was an attempt to incite to commit a crime, and a misdemeanour. Any step taken with a view to the commission of a misdemeanour is a misdemeanour; *per* Lord Denman in R. v. Chapman, 1 Den. 432.

The attempt or inciting to commit a felony or a misdemeanour is a misdemeanour: R. v. Martin, 2 Moo. 123; R. v. Roderick, 7 C. & P. 795; Anon, 1 Russ. 85; R. v. Ransford, 13 Cox, 9. *See* R. v. Gregory, 10 Cox, 459.

ATTEMPT CHARGED, FULL OFFENCE PROVED.

712. When an attempt to commit an offence is charged but the evidence establishes the commission of the full offence, the accused shall not be entitled to be acquitted, but the jury may convict him of the attempt, unless the court before which such trial is had thinks fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for the complete offence

2. Provided that after a conviction for such attempt the accused shall not be liable to be tried again for the offence which he was charged with attempting to commit. R. S. C. c. 174, s. 184.

Section 184, R. S. C. c. 174, upon which the above section is based enacted that if upon a trial for a misdemeanour a felony was also proved the prisoner was not therefore to be acquitted. It was taken from the 14 & 15 V. c. 100, s. 12 of the Imperial Acts, upon which Greaves says: "This section was introduced to put an end to all questions as to whether on an indictment for a misdemeanour, in case upon the evidence it appeared that a felony had been committed, the defendant was entitled to be acquitted on the ground that the misdemeanour merged in the felony: R. v. Neale, 1 Den. 36; R. v. Button, 11 Q. B. 929. The discretionary power to discharge the jury is given in order to prevent indictments being collusively or improperly preferred for misdemeanours where they ought to be preferred for felonies, and also to meet those cases where the felony is liable to so much more severe a punishment than the misdemeanour, that it is fitting that the prisoner should be tried and punished for the felony. For instance, if on an indictment for attempting to commit a rape it clearly appeared that the crime of rape was committed it would be right to discharge the jury."

Formerly, where upon an indictment for an assault with intent to commit rape a rape was actually proved, an acquittal would have been directed on the ground that the misdemeanour was merged in the felony: R. v. Harmwood, 1 East, P. C. 440; R. v. Nicholls, 2 Cox, 182; though in R. v. Neale, 1 Den. 36, cited, *ante*, by Greaves, it was held before this enactment that where a prisoner was indicted for carnally knowing a girl between ten and twelve years of age, and it was proved that he had committed a rape upon her, he was not thereby entitled to be acquitted.

OFFENCE CHARGED PART ONLY PROVED.

713. Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included:

2. Provided, that on a count charging murder, if the evidence proves manslaughter but does not prove murder the jury may find the accused not guilty of murder but guilty of manslaughter, but shall not on that count find the accused guilty of any other offence.

This is an extension of s. 191, c. 174, R. S. C. The abolition of the distinction between felonies and misdemeanours by itself alone extends very largely the number of cases where a verdict may be given for another offence than that one directly charged, as it has always been a principle of the common law that upon a charge of an offence composed of several ingredients the jury might, as a general rule, convict of any offence included in the one directly charged: R. v. Hollingberry, 4 B. & C. 330; though on an indictment for a felony the jury could not convict of a misdemeanour. Where an indictment contains divisible averments, as that the defendant "forged and caused to be forged," proof of either averment is sufficient: R. v. Middlehurst, 1 Burr. 400; and where a defendant is charged with composing, printing and publishing a libel he may be convicted of printing and publishing: R. v. Williams, 2 Camp. 646; a verdict of manslaughter may always be given, at common law, on a charge of murder, "Because, say the books, manslaughter is included in the charge of murder": Fost. 328. Greater offences include the lesser of a kindred character. On an indictment founded on a statute the defendant can be found guilty at common law: 2 Hale, 191, 192; 1 Chit. 638; 2 Gabbett, 525. *See* R. v. Bullock, 1 Moo. 324 note; R. v. Oliver, Bell, 287; R. v. Yeadon, L. & C. 81; R. v. Taylor, 11 Cox, 261. Where the offence appears from the evidence to be of a higher degree than is charged in the indictment it is in the discretion of the court to discharge the jury, and to direct another indictment to be preferred: 1 Chit. 639; but if the offence charged is proved the court may receive a verdict upon it; the defendant cannot complain of having been found guilty of a lesser offence than what he might have been found guilty of on another indictment. But a verdict for an offence of a higher degree than the one

charged can never be received. By s. 713 a verdict for the attempt to commit any offence included in the offence charged may be given, and on a count for murder no other verdict can be given than for either murder or manslaughter; or on a charge of child murder for concealment of birth; s. 714; but, on an indictment for manslaughter, a verdict may be given for any offence included in that charge. *See* R. v. Bird, 2 Den. 94; R. v. Phelps, 2 Moo. 240; R. v. Ganes, 22 U. C. C. P. 185; R. v. Smith, 34 U. C. Q. B. 552.

On an indictment for stealing from the person a verdict for stealing simply may be given: R. v. Sterne, 1 Leach 473; a conviction may be returned for any minor offence which was substantially charged by the residue of the indictment after striking out that portion of which the defendant was acquitted: Commonwealth v. Murphy, 2 Allen Mass. 163; but the offence found must be the offence proved: R. v. Gorbutt, Dears. & B. 166; R. v. Langmead, L. & C. 427; R. v. Adams, 1 Den. 38; R. v. Rudge, 13 Cox, 17.

The following decisions on the repealed clause may be usefully referred to for the construction of s. 713.

In a joint indictment for felony one may be found guilty of the felony and the other of assault under this clause: R. v. Archer, 2 Moo. 283. In an indictment for felony a conviction cannot be given under this clause of an assault completely independent and distinct, but only of such an assault as was connected with the felony charged: R. v. Guttridge, 9 C. & P. 471; and that case was followed in R. v. Phelps, 2 Moo. 240, and in R. v. Bird, 2 Den. 94. The case of R. v. Pool, 9 C. & P. 728, where Baron Gurney held that if a felony was charged and a misdemeanour of an assault proved the defendant might be convicted of the assault although that assault should not be connected with the felony, stands, therefore, overruled. In R. v. Boden, 1 C. & K. 395, it was held that on an indictment for assaulting with intent to rob, if that intent is negatived by the

jury, the prisoner may be convicted of assault under this enactment. In R. v. Birch, 1 Den. 185, upon a case reserved, it was held that upon an indictment for robbery the defendant, under this clause, may be found guilty of a common assault. The judges thought, upon consulting all the authorities, that this enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault. *See* also R. v. Ellis, 8 C. & P. 654. But they were of opinion that, in order to convict of an assault under this section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the crown prosecutes as a felony by the indictment. And it was suggested that it would be prudent that all indictments for felony including an assault, should state the assault in the indictment.

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

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

In R. v. St. George, 9 C. & P. 483, the prisoner was charged with attempting to fire a pistol with intent, etc. The question was whether the prisoner could be convicted of an assault committed with his hand prior to having drawn out the pistol. Baron Parke held that the prisoner could only be found guilty of that assault which was involved in and connected with firing the pistol; but that

case is overruled: *see* R. v. Brown, 10 Q. B. D. 381; R. v. Duckworth, 17 Cox, 495, [1892] 2 Q. B. 83.

In R. v. Phelps, 2 Moo. 240, the prisoner with others was indicted for murder. It was proved that Phelps, in a scuffle, struck the deceased once or twice and knocked him down; that after this Phelps went away to his own home and took no further part in the affray; that, about a quarter of an hour afterwards, the deceased, on the same spot, was again assaulted by other parties, and received then an injury of which he died on the spot. On these facts the jury acquitted Phelps of the felony and found him guilty of the assault. But the judges were unanimously of opinion that the conviction was wrong, as for a verdict of assault under the clause mentioned the assault must be such as forms one constituent part of the greater charge of felony, not a distinct and separate assault as this was.

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

In the case of R. v. Ganes, 22 U. C. C. P. 185, already cited, the court followed the rule laid down by the majority in R. v. Bird, and decided that a verdict of assault cannot be given upon an indictment for murder or manslaughter. It may be remarked that, in this case, Chief Justice Hagarty distinctly said that his own individual opinion was wholly with that of the minority in R. v. Bird, viz., that, in such cases, a verdict of assault is legal.

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

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

Upon an indictment for rape, or for an assault with intent to commit rape, a boy under fourteen may be convicted of a common assault or an indecent assault, though not of an attempt to commit rape: R. v. Brimilow, 2 Moo. 122. *See* R. v. Waite, (1892) 2 Q. B. 600.

Upon an indictment for feloniously assaulting with intent to murder, a verdict of common assault may be given: R. v. Cruse, 2 Moo. 53; R. v. Archer, 2 Moo. 283.

But to authorize such a verdict the felony *charged* must necessarily include an assault on the person, and, for instance, on an indictment for administering poison with intent to murder, a verdict of assault cannot be given under this clause. Nor can it be given on an indictment for burglary with intent to ravish: R. v. Watkins, 2 Moo. 217; R. v. Dilworth, 2 M. & Rob. 531; R. v. Draper, 1 C. & K. 176; but such a verdict may be given, if the indictment charges an assault, and the wilfully administering of deleterious drugs: R. v. Button, 8 C. & P. 660; *per* Stephen, J., "Poisoning is not an assault: R. v. Clarence, 16 Cox, 526.

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

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

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

A prisoner accused of assault with intent to rob may be found guilty of a simple assault: R. v. O'Neill, 11 R. L. 334.

The case of R. v. Dungey, 4 F. & F. 99, where it was held that after an acquittal upon an indictment for rape the prisoner may be indicted for a common assault, is not law in Canada, under ss. 631-713.

Held, that on an indictment for murder in the short form given in schedule A. to c. 29, of 32 & 33 V., a prisoner cannot be convicted of an assault under s. 51 of that chapter; *held*, also, that the fact of the prisoner's counsel having, at the trial, consented that he could be convicted, and requested the judge so to direct the jury, did not preclude him from afterwards objecting to the validity of the conviction on this ground: *see* R. v. Sirois, 27 N. B. Rep. 610; R. v. Mulholland, 4 P. & B. (N.B.) 512.

Greaves' following note to R. v. Phillips, 3 Cox, 226, may be inserted here.

"It may admit of some doubt whether the construction of s. 11 of the 1 V. c. 85, is finally settled. The framer of the clause probably intended that the clause should apply to those cases where, upon an indictment for a felony, including an assault, the jury should acquit on the ground that the felony, although attempted, was not completed. But if such were the intention the words do not so clearly express it as they ought, as they authorize the jury to convict 'of assault' on any indictment for felony 'where the crime charged shall include an assault.' These words are so general that they might include any assault, whether at the time of the felony charged or not; and the learned judges have therefore been obliged to put some limitation upon them, and the proper limitation seems to be that which has been put upon them by the very learned Baron in R. v. St. George, namely that the assault must be an assault involved in and connected with the felony charged; and it is submitted that it must be such an assault as is

essential to constitute part of the crime charged. A felony including an assault may be said to consist of the assault, the intent to commit the felony, and the actual felony. Thus in robbery there is the assault, the intent to rob, and the actual robbery; and in such a case it is submitted the assault, of which the prisoner may be convicted, must be such an assault as constitutes one step towards the proof of the robbery. Upon this the question arises whether an assault, where the jury negative any intention to commit a felony, is within the section, and it is submitted that it is not, as such an assault cannot be said to be involved in or connected with the felony charged in any manner whatsoever. It is true that an assault is included in the felony but it is an assault coupled with an intent, and if the jury negative the intent such an intent in no way tends to prove the felony; and it certainly would be a great anomaly if the prisoner was indicted for a felony, and the jury found he had no intention of committing a felony, that he might be sentenced to three years' imprisonment and hard labour, while if he had been indicted for the offence of which he was really guilty he could only be sentenced to three years' imprisonment without hard labour, R. v. Ellis, 8 C. & P. 654, therefore seems deserving of reconsideration, and the more so as it was decided before R. v. Guttridge, 9 C. & P. 471; R. v. St. George, 9 C. & P. 483; R. v. Phelps, Gloucester Sum. Ass. MSS. cited 1 Russ. 781. The intention, no doubt, was to punish attempts to commit felonies including assaults, and it is to be regretted that the provision, instead of being what it is, was not that upon any indictment for felony, if the jury should think that the felony was not completed, they might find the prisoner guilty of an attempt to commit the felony charged in the indictment."

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

VERDICT OF CONCEALMENT OF BIRTH ON A CHARGE OF CHILD MURDER.

714. If any person tried for the murder of any child is acquitted thereof the jury by whose verdict such person is acquitted may find, in case it so appears in evidence, that the child had recently been born, and that such person did, by some secret disposition *of such child* or of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence as if such person had been convicted upon an indictment for the concealment of birth. R. S. C. c. 174, s. 188.

See s. 240 as to the offence of concealment of birth.—

Section 714 is taken from 24 & 25 V. c. 100, s. 60, (Imp.), upon which Greaves remarks: "Cases have not unfrequently occurred where endeavours have been made to conceal the birth of children, and there has been no evidence to prove that the mother participated in those endeavours, though there has been sufficient evidence that others did so, and under the former enactments, under such circumstances, all must have been acquitted. The present clause is so framed as to include every person who uses any such endeavour, and it is quite immaterial under it whether there be any evidence against the mother or not."

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

The terms of the former enactments were "by secret burying or otherwise disposing of the dead body," and on these terms many questions had arisen: *see* R. v. Goldthorpe, 2 Moo. 240; R. v. Perry, Dears. 471. Under this clause "any secret disposition" is sufficient.

Under the former enactments the mother alone could be convicted of this offence where she was tried for the murder of her child. Under this clause any person tried for the murder of a child may be convicted of this offence whether the mother be convicted or not. The words "of such child" are not in the Imperial Act.