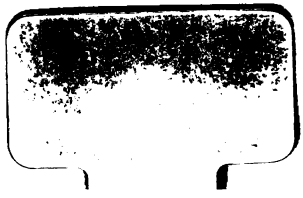

THE

JURISDICTION

AND

Practice

OF THE

COURT OF QUARTER SESSIONS.

WITH

FORMS OF INDICTMENTS, NOTICES OF APPEAL, &c.

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PREFACE.

THERE are few subjects, which require and deserve the attention of the junior members of the profession, so much as the Practice of the Court of Quarter Sessions. A perfect acquaintance with it, often gains for the party a reputation for talent and legal knowledge in other respects, which probably he may not deserve; whilst the slightest indication of ignorance in the most trifling particular of it, often has the effect of lowering the party in the estimation of the many, who are perhaps incapable of judging of his merits in other respects as a Lawyer. To the Solicitor, who intends to practise at the Quarter Sessions, an intimate knowledge of the practice of the Court is of great and often serious importance, particularly in the conduct of appeals. How often are appeals decided upon mere preliminary objections, arising upon points of practice, entirely beside the merits of the case,—objections which a knowledge of the practice of the Court would readily have obviated. And those who have witnessed, upon such occasions, the exultation of the successful party, and the mortification of the party defeated,—parties not always of the highest or most intelligent class, and who often judge of the talents of their solicitor, and even of their advocate, by the result,—may easily

judge of the probable consequences of the victory and defeat to the respective solicitors. Barristers, also, who practise at Sessions, will find it greatly to their advantage to have a correct and perfect knowledge of the jurisdiction and practice of the Court, for reasons sufficiently obvious. But above all others, the Magistrates, who have to decide upon the regularity or irregularity of the proceedings before them, should have a minute acquaintance with their own rules, the extent of their jurisdiction, and the practice generally of their Court: their decisions upon such subjects are often long and earnestly canvassed out of Court; and a mistake, arising from want of attention to or ignorance of a point of practice, familiar probably to many who hear their decision, would do more to detract from that confidence which persons usually have in their administration of the law, than even erroneous decisions upon the merits. As the subject, therefore, appears to me to be important, and as I have been informed that a work upon it would be acceptable to the profession and to Magistrates, I have written the present volume.

It consists of Four Chapters. The first, treats of the Jurisdiction and Practice of the Court of Quarter Sessions generally:—the jurisdiction under the Commission and by Statute; when, where, and before whom the Court is to be holden; its officers; proceedings before it, generally, in appeals and in criminal cases; its decisions, in what cases and how revised, upon a writ of error, certiorari, special case, or mandamus; and its members, how far punishable, and how protected. The second chapter, treats of

the Practice of the Court in Criminal Cases; and after treating shortly of the persons dispunishable for crime, by reason of insanity, coverture, infancy, and the like, and the degree of guilt of criminals, as principals and accessories, it in the first place gives an alphabetical list of the offences punishable upon indictment, their punishment, &c., and a reference to the text books, &c. in which the law upon the subject, the form of the indictment, and the evidence necessary to sustain it, in each case, will be found; it then treats of the Indictment and Evidence generally; it next gives the Forms of Indictments, and the evidence necessary to support them, in all those cases which usually occur at Sessions, such as larceny, embezzlement, obtaining goods by false pretences, receiving stolen goods, uttering counterfeit coin, assaults, assault by poachers, riot, forcible entry, keeping disorderly houses, nuisances by carrying on offensive trades, obstructing or not repairing highways, &c., disobeying the orders of justices, refusing to serve office, and conspiracy; and lastly, it treats of the proceedings and practice in criminal cases,—the grand and petty jury, the preferring and finding of the bill of indictment, the arraignment of the prisoner and his plea, traverse, &c., the trial, arrest of judgment, judgment, costs, and restitution of goods. The third chapter, treats of the jurisdiction and practice of the Court of Quarter Sessions, as a Court of Appeal, first treating of appeals generally, in what cases they lie, by and against whom to be brought, in what Court, and when, to be brought, notice of appeal, entry and adjournment of the appeal, proceedings at the hearing, amendment,

judgment, and costs; it then treats of the proceedings in appeals against orders of removal, against poor-rates, against the appointment of overseers, against the allowance or disallowance of overseers' accounts, against county rates, against orders for stopping up highways, appeals under Inclosure Acts, and appeals against convictions. The fourth chapter, treats of the jurisdiction and practice of the Court of Quarter Sessions in other matters; such as the exhibiting of articles of the peace; the allowance and enrolment of the rules of friendly societies; registering the chapels of Protestant Dissenters and Catholics; licensing lunatic asylums; proceedings with respect to the building, repairing and ordering of gaols; assessing the county rate; diverting and stopping up highways; allowance of coroners' fees; the punishment of a certain class of vagrants; and the disposing of applications in bastardy cases.

As to the manner in which I have treated these various subjects, it would be unbecoming in me to make any observation. The great pains, however, which I have taken with this little work, lead me to hope that it will meet with the same favour and approval, which the profession have kindly and indulgently bestowed upon my other works.

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ERRATA.

Page 12, line 17 from top, for "*Harmam*," read "*Hannam.*"

26, — 25 —— dele "*in cases of misdemeanor.*"

32, — 7 from bottom, for "*Burn*," read "*Burr.*"

39, — 13 ——— for "*when*," read "*where.*"

70, — 23 ——— for "*Baker*," read "*Barker.*"

72, — 18 ——— for "*Durdey*," read "*Durden.*"

103, — 1 from top, for "*Larceny*," read "*Letter.*"

126, — 7 —— for "*Section* 5," read "*Section* 4."

156, — 1 —— for "*Section* 6," read "*Section* 5."

233, — 12 —— for "4 *B. & Ald.*" read "3 *B. & Ald.*"

237, — 26 —— for "6 *G.* 4, *c.* 56," read "6 *G.* 4, *c.* 50."

THE

JURISDICTION AND PRACTICE

OF

The Court of Quarter Sessions.

In this little Work, I intend to treat of the Court of Quarter Sessions, its jurisdiction and practice,—*First*, generally; *Secondly*, as a Court for the trial of offences, by Jury; *Thirdly*, as a Court of Original Jurisdiction, in other matters; and *Fourthly*, as a Court of Appeal.

Chapter I.

The Jurisdiction and Practice of the Court of Quarter Sessions, generally.

The Court of General or General Quarter Sessions of the Peace, is an ancient Court, established in this country in the reign of Edward III. and continued to the present day, for the trial of felonies, and of those misdemeanors and other matters, which justices of the peace, by virtue of their commission or otherwise, may lawfully hear and determine.—*Vide infra.* It is a Court of Record. But although authority is given to the justices, by their commission, to "hear and determine," the Court is not in strictness a Court of oyer and terminer; and an authority given by statute to a Court of oyer and terminer, expressly and by name, would not extend to the Quarter Sessions.—*Hal. Sum.* 165. The Court is styled the General [Quarter] Sessions of the Peace: when holden quarterly, at the usual times appointed for that purpose, they are styled the General Quarter Sessions of the Peace; when holden otherwise, the General Sessions of the Peace. This, however, makes no distinction in the authority or jurisdiction of the Court, except in cases where the jurisdiction is given by a statute, and is thereby expressly given to the Court

of Quarter Sessions only. In the heading of orders of sessions, captions of indictments, and in pleadings, the style of the Court is set out more formally, thus:

"East Riding of } The General Quarter Sessions of the
the County of York. } Peace, holden at Beverley, in and for the said Riding, on the —— day of ——, in the —— year of the reign of our sovereign lord William the Fourth, of the united kingdom of Great Britain and Ireland king, defender of the faith, before *R. B.* and *H. B.* esquires, and others, their associates, justices of our said lord the king, assigned to keep the peace in the said Riding, and also to hear and determine divers felonies, trespasses and other misdemeanors in the said Riding committed."

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1. *Its Jurisdiction.*

Under the Commission.] By stat. 34 Edw. 3, c. 1, it is enacted, that in every county in England, certain persons shall be assigned to keep the peace, with power to restrain offenders, rioters, and all other barators, and to pursue, arrest, take and chastise them, according to their trespass or offence, and to cause them to be imprisoned and duly punished according to the law and customs of the realm, &c.; "and also to hear and determine at the king's suit all manner of felonies and trespasses done in the same county, according to the laws and customs aforesaid." And in pursuance of this statute, the commission, after assigning the persons to whom it is directed to be His Majesty's justices to keep his peace in the county of ——, &c., proceeds to define their jurisdiction to hear and determine offences, in these words:—"We have also assigned you, and every two or more of you (of whom any one of you the aforesaid [*A. B., C. D.*, &c.] we will shall be one) our justices to inquire the truth more fully, by the oath of good and lawful men of the aforesaid county, by whom the truth of the matter shall be better known, of all and all manner of felonies, poisonings, inchantments, sorceries, arts magic, trespasses, forestallings, regratings, ingrossings and extortions whatsoever; and of all and singular other crimes and offences, of which the justices of our peace may or ought lawfully to inquire, by whomsoever and after what manner soever in the said county done or perpetrated, or which shall happen to be there done or attempted; and also of all those who, in the aforesaid county, in companies, against our peace, in disturbance of our people, with armed force have gone or rode, or hereafter shall presume to go or ride; and also of all those who have there lain in wait, or hereafter shall presume to lie in wait, to maim, or cut or kill our people; and also of all victuallers, and all and singular other persons, who, in the abuse of weights or measures, or

in selling victuals, against the form of the ordinances and statutes, or any one of them, therefore made for the common benefit of England and our people thereof, have offended or attempted, or hereafter shall presume in the said county to offend or attempt; and also of all sheriffs, bailiffs, stewards, constables, keepers of gaols, and other officers who, in the execution of their offices about the premises or any of them, have unduly behaved themselves, or hereafter shall presume to behave themselves unduly, or have been or shall happen hereafter to be careless, remiss, or negligent in our aforesaid county; and of all and singular articles and circumstances, and all other things whatsoever, that concern the premises or any of them, by whomsoever and after what manner soever in our aforesaid county done or perpetrated, or which hereafter shall there happen to be done or attempted in what manner soever; and to inspect all indictments whatsoever, so before you or any of you taken or to be taken, or before others late our justices of the peace in the aforesaid county made or taken, and not yet determined; and to make and continue processes thereupon against all and singular the persons so indicted, or who before you hereafter shall happen to be indicted, until they can be taken, surrender themselves or be outlawed; and to hear and determine all and singular the felonies, poisonings, enchantments, sorceries, arts magic, trespasses, forestallings, regratings, ingrossings, extortions, unlawful assemblies, indictments aforesaid, and all and singular other the premises, according to the laws and statutes of England, as in the like case it has been accustomed and ought to be done; and the same offenders and every of them, for their offences, by fines, ransoms, amerciaments, forfeitures, and other means, as according to the law and custom of England, or form of the ordinances and statutes aforesaid it has been accustomed or ought to be done, to chastise and punish.

"And therefore we command you and every of you, that to keeping the peace, ordinances, statutes, and all and singular other the premises, you diligently apply yourselves; and that at certain days and places, which you or any such two or more of you as is aforesaid, shall appoint for those purposes, into the premises ye make inquiries, and all and singular the premises hear and determine, and perform and fulfil them in the aforesaid form, doing therein what to justice appertains, according to the law and custom of England; saving to us the amerciaments, and other things to us therefrom belonging."

Some doubts were formerly entertained, as to the construction that ought to be given to the words "*Felonies*" and "*Trespasses*" in the above commission: some held that they included only such felonies and misdemeanors against the peace, of which cognizance was given to justices of the peace by the express words of a statute or statutes; others held, that as the commission was

created by statute, namely, in pursuance of stat. 34 Ed. 3. c. 1, *ante*, p. 2, these words must be deemed to include only such offences as were felonies and trespasses at the time of the passing of the Act; and that if justices have jurisdiction of any offence created since, it must be given to them by the express words of the statute creating the offence. *See Com. Dig. Justices of Peace*, (B. 1.) *Vin. Abr. Justices of Peace*, C. *R.* v. *Yarrington*, *Salk.* 406. *R.* v. *James*, 2 *Str.* 1256. But these constructions seem very unsatisfactory: if, according to the first of these constructions, we are to hold that the Court of Quarter Sessions are to exercise jurisdiction only in those cases where cognizance of an offence is specially given them by some statute, the Court will have cognizance of very few offences indeed, and no jurisdiction in most of the cases in which we see them continually exercise it; and if, according to the second construction, we confine their authority under the commission to offences which were felonies and trespasses at the time of the passing the stat. 34 Ed. 3. c. 1, then we shall have the absurdity of a commission being granted in 1835 to justices, giving them authority to hear and determine such offences only as were felonies and trespasses in the year 1360. There is nothing in the Act itself or the commission, which at all obliges us to give them so narrow a construction; and in modern times the general opinion of the profession, sanctioned by cases which shall presently be mentioned, is, that with the exception of perjury at common law and forgery, the Court of Quarter Sessions has jurisdiction, by virtue of the commission, of all felonies whatsoever, and of all indictable misdemeanors, whether created before or after the date of the commission. As to the word "trespasses:"—the word used, when the commissions were in Latin, was "transgressiones," which was a word of very general meaning, including all the inferior offences under felony, and also those injuries for which the modern action of trespass now lies; it was usually rendered into law French, by the word "trespas," and that is the word used in the original French of the above stat. of Ed. 3, and it is there rendered into English by the word "trespasses." In perjury at common law, it is indeed settled, that an indictment will not lie for it in a Court of Quarter Sessions; 2 *Hawk. c.* 8. *s.* 38. *R.* v. *Bainton*, 2 *Str.* 1088; but perjury under the stat. 5 Eliz. c. 9, is within the jurisdiction of the Sessions, by the express words of the Act. Forgery at common law also is not cognizable by the Sessions; *R.* v. *Yarrington*, *Salk.* 406. *R.* v. *Gibbs*, 1 *East*, 173; and it seems to be the general opinion that they have not cognizance of a forgery, which is made felony by statute; and it may therefore perhaps be prudent for justices not to try such offences, but to commit such offenders for trial at the assizes. In *R.* v. *Gibbs*, 1 *East*, 173, where the defendant, who was found guilty at the Sessions, upon an indictment for a forgery at common law, removed the record by writ of

error into the Court of King's Bench, that Court reversed the judgment of the Court of Quarter Sessions, upon the ground that the Sessions had no cognizance of the offence. Lord Kenyon, C. J. said, "I have always had a general impression upon my mind, that it was a settled point that forgery was not under the cognizance of the Sessions; and I rather think it was so determined soon after I came to the bar, though I do not remember the particular case. But I am sure it has always been so considered by the profession in my remembrance, and I have formerly given opinions to that purpose. Therefore with all the inclination which I feel against giving way to small objections, I cannot get over this against express authority and received practice for so long a time. The case of *The Queen* v. *Yarrington* stands supported by concurrent opinions down to the present time, and has been acted upon nearly a century; it is now too late to disturb it." In a more recent case, which was an indictment for soliciting a servant to steal the goods of his master, and removed into the Court of King's Bench by writ of error, it was argued that the facts charged in the indictment did not amount to an offence at common law, or if they did, still it was not an offence indictable at Sessions, as it was no breach of the peace. As to the first point, the Court held clearly that the facts stated did amount to an indictable offence: as to the second point, Lord Kenyon, C. J. said, "I am also clearly of opinion that it is indictable at the Quarter Sessions, as falling in with that class of offences, which, being violations of the law of the land, have a tendency, as it is said, to a breach of the peace, and are therefore cognizable by that jurisdiction. To this rule there are, indeed, two exceptions, namely, forgery and perjury: why exceptions, I know not; but having been expressly so adjudged, I will not break through the rules of law. No other exceptions, however, have been allowed, and therefore this falls within the general rule." The other judges being of the same opinion, the judgment was accordingly affirmed. *R.* v. *Higgins*, 2 *East*, 5. So, where an indictment for a conspiracy to charge a man with taking hair out of a bag belonging to one *A. R.*, was preferred and found at Sessions, and the parties convicted upon it; and it was afterwards removed into the Court of King's Bench by certiorari, and a motion was then made in arrest of judgment, on the ground that the Sessions had no jurisdiction of conspiracy, any more than of perjury and forgery, it not being specified in their commission, nor jurisdiction of it given to them by any special statute. The Court however held that the Sessions had jurisdiction. Lord Mansfield, C. J. said, that as no case had been cited to shew whether the Sessions had or had not jurisdiction, the question must be decided upon general principles; that as to the cases of perjury and forgery, mentioned in argument, they stood upon their own special grounds, and it had been determined

that justices had no jurisdiction of them: but as to conspiracy, "it is a trespass, and trespasses are indictable at Sessions; though not committed *vi et armis*, they tend to a breach of the peace, as much as cheats or libels, which are established to be within the jurisdiction of Sessions." *R.* v. *Rispail*, 1 *W. Bl.* 368. 3 *Burr.* 1320. Where however a statute requires a particular offence to be prosecuted before a Court of oyer and terminer or gaol delivery, without mentioning the General or Quarter Sessions, that is deemed to be an implied exclusion of the jurisdiction of the Sessions with respect to that particular offence. But where an indictment for lighting fires on the coast, contrary to stat. 47 Geo. 3, sess. 2, c. 66, was preferred at the Sessions, removed by certiorari, and tried at the assizes; and it was objected for the defendant, that the Sessions had no jurisdiction, as the statute required that the offenders should be carried before a justice of peace, and by him committed to the county gaol, "there to remain until the next Court of oyer and terminer, great session or gaol delivery," which amounted to an implied enactment that the indictment should be preferred in those Courts only: the Court held that, as the offence was a misdemeanor only, and the defendant might be prosecuted for it without being apprehended or in custody, the clause in the Act referred to did not prevent the indictment from being preferred at the Sessions; they held the indictment, therefore, to have been properly originated, and passed sentence on the defendant. *R.* v. *Cock*, 4 *M. & S.* 71.

To what has now been stated, with respect to the offences cognizable by the Court of Quarter Sessions, under and by virtue of the commission of the peace, there are some partial exceptions, with respect to the Sessions holden in London, Middlesex, Essex, Kent, and Surrey, created by the statute which established the Central Criminal Court, stat. 4 & 5 Wm. 4, c. 36. That statute, by sect. 2, first gives jurisdiction to the Central Criminal Court in all treasons, murders, felonies, and misdemeanors committed within certain limits: namely, within the city of London and county of Middlesex; such parts of the county of Essex as are within the parishes of Barking, East Ham, West Ham, Little Ilford, Low Layton, Walthamstow, Wanstead St. Mary, Woodford and Chingford; such parts of the county of Kent as are within the parishes of Charlton, Lee, Lewisham, Greenwich, Woolwich, Eltham, Plumstead, St. Nicholas Deptford, that part of St. Paul Deptford which is within the county of Kent, the liberty of Kidbrook, and the hamlet of Mottingham; and such parts of the county of Surrey as are within the borough of Southwark, the parishes of Battersea, Bermondsea, Camberwell, Christchurch, Clapham, Lambeth, St. Mary Newington, Rotherhithe, Streatham, Barnes, Putney, that part of St. Paul Deptford which is within the county of Surrey, Tooting, Graveny, Wandsworth, Merton, Mortlake, Kew, Richmond,

Wimbledon, the Clink liberty, and the district of Lambeth Palace. The statute afterwards, by sect. 17, enacts that the justices of the peace, acting in and for the cities of London and Westminster, the liberty of the Tower of London, the Borough of Southwark, and the counties of Middlesex, Essex, Kent and Surrey, shall not, at their respective General or Quarter Sessions of the Peace, or any adjournment thereof, try any person or persons charged with any capital offence, or with any of the following offences committed or alleged to be committed within the limits of this Act: that is to say, "housebreaking, stealing above the value of five pounds in a dwelling-house, horse-stealing, sheep-stealing, cattle-stealing, maliciously wounding cattle, bigamy, forgery, perjury, conspiracy, assault with intent to commit any felony, administering or attempting to administer poison with intent to kill or to do some grievous bodily harm, administering drugs or other things or doing any thing with intent to cause or procure abortion, manslaughter, destroying or damaging ships or vessels, the breaking of shops, warehouses, counting-houses, and buildings within the curtilage of dwelling-houses, killing sheep with intent to steal the carcases, the uttering of all forged instruments," and the various offences enumerated in stat. 1 Wm. 4. c. 66, as to forgery, "forging the assay marks on gold and silver plate," and all the offences relating to coin enumerated in stat. 2 Wm. 4, c. 34, "the abduction of women, bankrupts not surrendering under their commission or concealing their effects, breaking down bridges and banks of rivers, taking rewards for helping to stolen goods, personating any officer, seaman or other person, in order to receive any wages, pay, allowance or prize money due or supposed to be due, or any out-pensioner of Greenwich Hospital, in order to receive any out-pension or allowance due or supposed to be due, sending threatening letters and using threats to extort money, larceny on navigable rivers and canals, and stealing and destroying goods in progress in manufacture, and larcenies after a previous conviction, embezzlement, larceny by clerks and servants, and receivers of stolen goods, whether such person or persons shall be charged as principal offenders or as accessories before or after the fact." *See* 2 *Arch. Peel's Acts*, 448, 461.

The above enactment may perhaps fairly be deemed to imply, that the Courts of Quarter Sessions referred to in it, might lawfully have taken cognizance of the several offences enumerated in it, if that Act had not passed; and it may also be considered as a legislative declaration, that all other Courts of Quarter Sessions still have jurisdiction of the above offences. But as to felonies punishable with death, although there is nothing in the commission of the peace, or in any other than the above statute upon the subject, which prevents the justices at Sessions from taking cognizance of them as well as other felonies, yet in prac-

tice the Courts of Quarter Sessions throughout the kingdom never, I believe, hear or determine any such felonies.

As to the extent of the jurisdiction of the Court of Quarter Sessions, namely, the district for which it may act, it is always defined by the commission of the peace. Formerly, where a corporate town formed part of a county, and the county justices had a concurrent jurisdiction with the corporate justices within the town or its liberties, confusion frequently arose from the clashing of the two jurisdictions. But since the late Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, this cannot hereafter happen. The boundaries of the several boroughs are now well defined; *see Id. s.* 7, 8; and these are now deemed the boundaries of those boroughs for all purposes, and, amongst others, as indicating the district within which the Courts of Quarter Sessions for each of those boroughs shall exercise exclusive jurisdiction. *See Arch. Corp. Act*, 30—33. ix. x. A case recently decided by the Court of King's Bench, puts this matter beyond doubt. The facts were these:—At the last General Quarter Sessions for the county of Gloucester, an application was made to confirm and enrol an order of two justices of the county, made since the passing of the Corporation Act, for diverting and turning a public footpath in the parish of Clifton. Clifton was formerly a part of the county of Gloucester for all purposes; it was afterwards added to the city of Bristol, by the Boundary Act (2 & 3 W. 4, c. 64, sch. O), as far as respected voting for members of parliament; and by the recent Corporation Act (5 & 6 W. 4, c. 76, s. 7,) the metes and bounds of the several boroughs to which it relates (including Bristol), shall be the same as those assigned to them by the Boundary Act. It became a question, therefore, whether this 7th section of the Corporation Act had not taken the jurisdiction in this respect from the magistrates of the county, and vested it in the magistrates of Bristol; and the Sessions, holding that such was the case, and that neither the magistrates who made the order, nor the Court of Quarter Sessions for the county, had jurisdiction with respect to this footway, refused the application. A motion was therefore made to the Court of King's Bench, and a rule nisi obtained, for a mandamus to the justices of the county, requiring them to receive and enter the application as of the last Sessions, and to enter continuances, &c. But upon cause being shewn, the Court held, that, with respect to the boroughs mentioned in the first section of schedules A. and B. of the Corporation Act (and of which Bristol was one), every place included within the bounds of any of those boroughs, as described by the Boundary Act, was, by the 7th and 8th sections of the Corporation Act, made a part of that borough for all purposes; that the parish of Clifton, therefore, was part of the borough of Bristol, and the justices of the county had no jurisdiction within it. *R. v. The Justices*

of Gloucestershire, B. R. H. 1836. *Arch. Corp. Act*, ix. x. Also, by the 111th section of the Corporation Act, no part of any borough, in or for which a separate Court of Quarter Sessions of the Peace shall be holden, shall be within the jurisdiction of the justices of any county, from which such borough before the passing of this Act was exempt.

By Statute.] In many other cases, jurisdiction has been given to the Court of Quarter Sessions, either original or as a court of appeal, by the express words of particular Acts of Parliament; such, for instance, as their jurisdiction in appeals against orders of removal, against other orders of justices in some cases, against poor rates, against overseers' accounts, against summary convictions by justices in many cases, &c.; such also as their jurisdiction in matters relating to apprentices, bastards, benefit societies, coroners, dissenting and catholic chapels, gaols, lunatic asylums, stopping up or diverting highways, vagrants, &c. But as it is intended to treat at large of the jurisdiction and practice of the Sessions in these and other instances, in the third and fourth chapters of this work, it is not necessary that they should be noticed more fully in this place.

In Boroughs.] By stat. 5 & 6 Wm. 4, c. 76, s. 107, (the recent Corporation Act,) the Courts of General or Quarter Sessions of the Peace for any borough may be holden until the 1st May, 1836, in like manner and with the same powers as if the Act had not passed; but after the 1st May, "all powers and jurisdictions to try treasons, capital felonies, and all other criminal jurisdictions whatsoever, granted or confirmed by any law, statute, letters-patent, grant or charter whatsoever, to any mayor, bailiff, alderman, recorder, or other corporate or chartered officer, or corporate or chartered justice of the peace whomsoever, in any borough" shall cease.

But by sect. 103 of the same Act, it is enacted, "that the council of every borough, which shall be desirous that a separate Court of Quarter Sessions of the Peace shall be or continue to be holden in and for such borough, shall signify the same by petition to his Majesty in council, setting forth the grounds of the application, the state of the gaol, and the salary which they are willing to pay to the recorder in that behalf; and it shall be lawful for his Majesty, if he shall be pleased thereupon to grant that a separate Court of Quarter Sessions of the Peace shall be thenceforward holden in and for such borough, to appoint for such borough, or for any two or more of such boroughs conjointly, a fit person, being a barrister at law of not less than five years standing, who shall be and be called the Recorder of such borough or boroughs, and shall hold such office during his good behaviour." And by sect. 105, "the recorder of every borough shall hold, once in every quarter of a year, or at such other and

more frequent times as the said recorder in his discretion may think fit, or as his Majesty shall think fit to direct, a Court of Quarter Sessions of the Peace in and for such borough, of which Court the recorder of such borough shall sit as the sole judge; and such Court of Quarter Sessions of the Peace shall be a Court of record, and shall have cognizance of all crimes, offences, and matters whatsoever, cognizable by any Court of Quarter Sessions of the Peace for counties in England, and the recorder shall have power to do all things necessary for exercising such jurisdiction, notwithstanding his being such sole judge, as fully as any such last-mentioned Court." But in all boroughs to which a separate Court of Quarter Sessions shall not be so granted, the justices of the peace for the county in which such borough is situated, shall exercise the jurisdiction of justices of the peace in and for such borough, as fully as by law they and each of them can or ought to do in and for the said county. *Id. s.* 111, *and see s.* 110.

It may be necessary to add, that the word "borough" in the several clauses of the Corporation Act just now mentioned, must be deemed to refer only to the cities and boroughs, &c. enumerated in the schedules A. and B. of that Act. *Sect.* 142.

From the above sections of the Corporation Act, it appears that in all the boroughs to which it relates, (being nearly all the cities and boroughs in England and Wales, with the exception of London), to which a separate Court of Quarter Sessions has been or shall be granted, the jurisdiction of such Court is and will be the same precisely as that of the Sessions of the county. That in such of these boroughs as are named in the first sections of the schedules A. and B. of the Corporation Act, the metes and bounds thereof, as settled by the Boundary Act, will describe the district within which such jurisdiction shall be exercised. *See R.* v. *Justices of Gloucestershire, ante, p.* 8. But of such of these boroughs as are named in the second sections of the said schedules, the metes and bounds are declared by stat. 5 & 6 W. 4, c. 76, s. 7, to be the same as hitherto, without reference to the Boundary Act. In either case, the county justices, in or out of Sessions, cannot exercise jurisdiction within the metes and bounds of such borough. *Vide Id. s.* 111, *supra.*

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2. *Where and before whom the Sessions are to be holden.*

In Counties.] The Sessions must be holden at some place within the county or division for which they are holden. This is differently arranged in different counties: in some counties, they are always holden at the same place; in others, at different places each quarter; and in others, the same Sessions are holden at different places within the county, by adjournment.

It must be holden before two justices at the least; this is

expressly required by the terms of the commission. *See ante, p. 2, and see R. v. Justices of Carmarthen,* 4 *B. & Ald.* 291. As to the Quorum clause in the commission, it may be necessary to state, that most justices are now assigned to be of the quorum. And in all cases where an act is to be done by two or more justices, and it is required by any statute that one of them shall be of the quorum, their act, order, adjudication, &c. shall nevertheless be valid, although it do not express that one of the justices are of the quorum. 26 *Geo.* 2, *c.* 27. *and see* 7 *Geo.* 3, *c.* 27, 4 *Geo.* 4. *c.* 27.

The justices present at the Sessions should refrain from voting or taking any part in matters in which they individually have a personal interest. *See Anon.* 1 *Salk.* 396. *Re Foxham Tithing,* 2 *Salk.* 607. *R. v. Great Chart, Burr. S. C.* 194, 2 *Str.* 1173. By stat. 16 Geo. 2, c. 18, s. 1, indeed, justices are empowered to act in all matters relating to the laws for the relief, maintenance and settlement of the poor, for passing and punishing vagrants, for the repair of highways, and concerning parochial taxes, levies or rates, notwithstanding they are rated to or chargeable with the taxes, levies or rates within any parish, township or place affected by such act. But the statute contains a proviso (s. 3.), that it shall not extend to authorize or empower any justice of peace for any "county or riding at large, to act in the determination of any appeal to the Quarter Sessions for any such county or riding, from any order, matter or thing relating to any such parish, township or place, where such justice of the peace is so taxed or charged or chargeable as aforesaid." And where it appeared that, upon the trial of an appeal against an order of removal, there were fifteen justices present, seven of whom were for quashing, and eight for confirming it; but it was objected that of these eight, three justices were rated in the removing parish, and therefore could not vote; but the Sessions, notwithstanding, confirmed the order, subject to the opinion of the Court of King's Bench upon the point: upon the matter coming before the latter Court, they quashed the order of Sessions, and directed the justices to enter continuances to the following Sessions, when they might again decide the appeal. *R. v. Yarpole,* 4 *T. R.* 71. So, where it appeared that, upon the trial of an appeal against the allowance of overseers' accounts, one of the justices declined to join in the decision because he was a rated inhabitant of the parish; but afterwards, upon application to the Sessions to grant a case, this justice and two others voted for it, and two against it, so that a case was granted: upon the case being returned on the certiorari, a motion was made to quash the certiorari, on the ground that the justice, being a rated inhabitant of the parish, could not vote even upon the question of granting a case; and the Court were of this opinion; they said the safer course was to hold, that magistrates should not interfere in any way, in

cases where they are directly or indirectly interested. *R.* v. *Gudridge*, 5 *B. & C.* 459. 8 *D. & R.* 217. Where it appeared that of two magistrates by whom an order of removal was signed, one was a churchwarden of the removing parish: the Court held the order to be bad upon this ground; for the same party could not be complainant, and also adjudicate upon the complaint. *R.* v. *Great Yarmouth*, 6 *B. & C.* 646.

As to the qualification of justices, *see stat.* 18 *G.* 2, *c.* 20, *s.* 1. And as to their oath of office, *see* 5 *Burn, by D'oy. & W.* 21, 24. Where a person, duly appointed a justice of peace, signed a distress warrant for a poor's rate, before he had taken the oaths, &c. at the Sessions, and the validity of the warrant was questioned on that ground: the Court of King's Bench held the warrant to be valid; it was unlawful for the justice to have acted, and he might be subject to a penalty or other punishment for having done so; but that did not render his acts invalid. *Margate Pier Company* v. *Harmam and others*, 3 *B. & Ald.* 266. As to the wages of justices, during the Sessions, *see stat.* 12 *Rich.* 2, *c.* 10. 14 *Rich.* 2, *c.* 11.

As to the authority to summon the Sessions, and the manner of doing it: the commission of the peace, after giving jurisdiction to the justices to hear and determine felonies, &c. as already mentioned, *ante*, p. 2, 3, proceeds thus: "And therefore we command you —— that at certain days and places which you or any such two or more of you as is aforesaid shall appoint for these purposes, into the premises you make inquiries, and all and singular the premises hear and determine, and perform and fulfil them in the aforesaid form, doing therein what to justice appertains, according to the law and custom of England, saving to us the amerciaments, and other things to us therefrom belonging. And we command, by the tenor of these presents, our sheriff of ——, that at certain days and places, which you or any such two or more of you as is aforesaid shall make known to him, he cause to come before you, or such two or more of you as aforesaid, so many and such good and lawful men of his bailiwick (as well within liberties as without), by whom the truth of the matter in the premises shall be the better known and inquired into." Accordingly a precept, under the hands and seals of two justices, is issued, directed to the sheriff of the county, commanding him to have the jurors before the justices of peace for the county on a day and at a place certain therein mentioned, and to make known to all coroners, gaolers, high constables, &c. to be then in attendance, and to proclaim throughout the county that the Sessions will be then and there holden, &c. *See the form*, 3 *Burn, D. & W.* 846. This precept ought to bear teste fifteen days at least before the day appointed for the Sessions, and be delivered to the under-sheriff forthwith, in order that he may have time to make the necessary arrangements. The time and place of hold-

ing the Sessions is then publicly advertised (the advertisement usually stating the order in which the business will be taken); the jurors are summoned, &c. and every other necessary preparation made for the holding of the Sessions, at the time and place mentioned in the precept.

In Boroughs.] In the different boroughs mentioned in schedules A. and B. of the Corporation Act (5 & 6 Wm. 4, c. 76), to which his Majesty has granted or may grant a separate Court of Quarter Sessions (*See ante, p.* 9), the recorder of the borough shall sit as the sole judge of the Court; and he shall have power to do all things necessary for exercising the jurisdiction, notwithstanding his being such sole judge, as fully as the Court of Quarter Sessions for a county. 5 & 6 *W.* 4, *c.* 76, *s.* 105.

The recorder is appointed by the crown, with a certain salary to be paid by the treasurer of the borough out of the borough fund; he must be a barrister of at least five years standing; he is entitled to precedence next after the mayor; but he cannot be a member of parliament for the borough, nor alderman, councillor, or police magistrate of the borough. 5 & 6 *W.* 4, *c.* 76, *s.* 103. Before he acts, he must take the same oaths as justices of peace for counties, with the exception of the oath as to qualification by estate; and must also make this declaration: "I *A. B.* do hereby declare, that I will faithfully and impartially execute the office of recorder for the borough of ——, according to the best of my judgment and ability." *Id. s.* 104. In case of "sickness or unavoidable absence," the recorder is empowered, "under his hand and seal, and with the consent of the council of the borough, to appoint a deputy recorder, being a barrister of five years standing, to act for him at the Quarter Sessions of the Peace then next ensuing, and no longer or otherwise." 5 & 6 *Wm.* 4, *c.* 76, *s.* 103. In the absence of the recorder and his deputy (if he have appointed one) the mayor of the borough may, at the proper times appointed for the holding of the Quarter Sessions, open the Court and adjourn it, and may respite all recognizances conditioned for appearing at the same, "until such further day as such mayor then and there, and so from time to time, shall cause to be proclaimed;" but he shall not sit as judge, or do any other act as such. *Id. s.* 106.

By the same statute (5 & 6 Wm. 4, c. 76, s. 121,) the clerk of the peace of every such borough, shall give public notice of the time and place of holding every such Quarter Sessions of the Peace, ten days at the least before the holding thereof; and he shall, seven days at the least before the holding thereof, cause to be summoned a sufficient number of burgesses, to serve as grand jurors at such Sessions; and he shall also cause to be summoned not less than 36 nor more than 60 burgesses, to serve as jurors at every such Sessions.

3. *At what Time the Sessions are to be holden.*

In Counties.] By stat. 11 Geo. 4, and 1 Wm. 4, c. 70, s. 25, reciting that "whereas the General Quarter Sessions of the Peace are now directed to be held in each year in the first week after the 11th day of October, in the first week after the Epiphany, in the first week after the clause of Easter, and in the first week after the translation of St. Thomas the Martyr; and whereas it will be expedient that the times of holding the General Quarter Sessions of the peace should be altered in part": it is therefore enacted, that the justices of the peace in every county, riding or division for which Quarter Sessions of the Peace ought to be held, shall hold their General Quarter Sessions of the Peace "in the first week after the 11th day of October, in the first week after the 28th day of December, in the first week after the 31st day of March, and in the first week after the 24th day of June; and that all acts, matters and things done, performed and transacted at the times appointed by this Act for the holding of the General Quarter Sessions of the Peace, shall be as valid and binding, to all intents and purposes, as if the same had been done, performed and transacted at General Quarter Sessions of the Peace holden at the times by law limited for the holding thereof before the passing of this Act."

And before the passing of this Act, the times of holding the Sessions were regulated by stat. 36 Ed. 3, c. 12, 12 R. 2, c. 10, 2 Hen. 5, st. 1, c. 4, and 54 Geo. 3, c. 84. By stat. 36 Ed. 3, c. 12, it was enacted, that in commissions of the peace, it should be expressed that the justices should hold their Sessions four times a year; that is to say, one within the octave of the Epiphany, another within the second week of Midlent, the third between the feasts of Pentecost and of St. John the Baptist, and the fourth within eight days of St. Michael. By stat. 12 R. 2, c. 10, the justices of the peace shall keep their Sessions "in every quarter of the year *at the least*," and by three days, if need be. By stat. 2 Hen. 5, st. 1, c. 4, the justices of the peace shall "make their Sessions four times by the year; that is to say, in the first week after the feast of St. Michael, and in the first week after the Epiphany, and in the first week after the clause of Easter, and in the first week after the translation of St. Thomas the Martyr, *and more often, if need be;* and that the same justices shall hold their Sessions throughout the realm of England in the same weeks every year from henceforth." By stat. 54 Geo. 3, c. 84, reciting that "whereas the time now appointed for holding the Quarter Sessions for the Michaelmas quarter might be altered, so as to render the attendance at the same more generally convenient than it is at present:" it is enacted, that the Quarter Sessions for the Michaelmas quarter shall in every year be holden "in the first week after the 11th

day of October, instead of at the time now appointed for holding the same; and that all acts, matters and things done, performed and transacted, at the time appointed by this Act for holding the said Michaelmas Quarter Sessions, shall be as valid and binding, to all intents and purposes, as if the same had been done, performed and transacted at the time heretofore appointed for the holding of such Sessions." Where, since this latter Act, it was objected that an order made at the Michaelmas Quarter Sessions was bad, on the ground that the Sessions were holden on the 12th of October, the 11th being Friday, and that by the stat. 54 Geo. 3, c. 84, they could not have been legally holden before the Monday following: but the Court held, that as the statute was in the affirmative, and contained no negative words, it should be construed as directory only, as was the case with all former statutes on the subject; and therefore that this was a valid holding of the Sessions, notwithstanding the statute. *R.* v. *Justices of Leicester*, 7 *B. & C.* 6. This decision is equally applicable to the stat. 11 Geo. 4, and 1 Wm. 4, c. 70, s. 25, above mentioned, both statutes being very similar in the manner in which they are worded. And therefore it may now fairly be assumed, that although the justices are directed by the stat. 11 Geo. 4, and 1 Wm. 4, to hold their Quarter Sessions at the times therein mentioned, yet the holding of their Sessions at any other time will not on that account be invalid. *But see stat. 4 & 5 W. 4, c. 47, infra.*

As to the Easter Sessions: by stat. 4 & 5 Wm. 4, c. 47, reciting the above Act of 11 Geo. 4 and 1 W. 4, and that in some counties of England and Wales the time usually fixed for holding the Spring Assizes interferes with the due holding of the Sessions thereby appointed to be holden in the first week after the 31st March; "and although the justices of peace have authority to hold General Sessions of the Peace at other times of the year besides those specified by the said recited Act, such Sessions are not Quarter Sessions within the intents of various Acts of Parliament which give jurisdiction to justices of the peace in their Quarter Sessions or in their General Quarter Sessions; and for the purpose of preventing the inconvenience arising from such interference as aforesaid, it is expedient to allow to the justices of the peace a discretion as to the time of holding their General Quarter Sessions, which are now required to be held in the week next after the 31st day of March;" it is enacted, that in every county &c. it shall be "lawful for the justices assembled in their General Quarter Sessions, in the week next after the 28th day of December in every year, to name (if they shall see occasion so to do) two justices of the peace, who shall be empowered, as soon as may be after the time for holding the Spring Assizes shall be appointed, to fix the day for holding the next General Quarter Sessions of the Peace for such county, riding, or division,

so as such time shall not be earlier than the 7th day of March, nor later than the 22nd day of April, and to give notice of the day so fixed by advertisement in such newspaper as shall be directed by the justices so assembled; and in every such case, the General Quarter Sessions held on the day so fixed and notified, shall be valid, and it shall not be necessary to hold any Sessions of the Peace for such county, riding, or division in the next week after the 31st day of March, any thing in the said recited Act to the contrary notwithstanding. Provided always, that in every county, riding, and division where no other day shall be fixed in the manner hereinbefore mentioned, the justices of the peace shall hold their General Quarter Sessions of the Peace in the week next after the 31st day of March, as by the said recited Act they are required."

The words, " the first week," in the stat. 11 G. 4, and 1 W. 4, above mentioned, must be understood to mean the first whole week after the time there specified, and the week must be considered as commencing on the Sunday; so that if the 11th of October, 28th December, 31st March, or 24th June, happen to fall on a Sunday, the Sessions cannot be holden on the following Monday, or during that week, but must be holden on the Monday or other day in the following week.

What we have been hitherto considering, is the time of holding the Quarter Sessions. But it appears clearly from the words " at the least " in the stat. 12 R. 2, c. 10, *ante, p.* 14, and the words " and more often if need be " in the stat. 2 Hen. 5, st. 1, c. 4, *ante, p.* 14, and more particularly by the recital in the stat. 4 & 5 Wm. 4, c. 47, *supra*, that besides the Quarter Sessions, the justices may hold General Sessions of the Peace at such other times as they may think fit, when the business of the county may require that they should do so. *See* 5 *Burn J.* 194 *n.* And in Middlesex, besides the four Quarter Sessions, it is usual to hold also four General Sessions, in the intervals between the Quarter Sessions. But it appears from the recital in the stat. 4 & 5 W. 4, c. 47, *ante, p.* 15, that where authority is given to justices in their *Quarter* Sessions, it cannot be exercised by them in their General Sessions. *See R.* v. *JJ. of Carmarthen*, 4 *B.* & *Ald.* 291.

In Boroughs.] By stat. 5 & 6 Wm. 4, c. 76, s. 105, the Recorder of every borough shall hold a Court of Quarter Sessions of the Peace in and for such borough, once in every quarter of a year, or at such other and more frequent times as the said Recorder in his discretion may think fit, or as His Majesty shall think fit to direct.

4. *Officers of the Court of Quarter Sessions.*

Custos Rotulorum.] The custos rotulorum is an officer to whose custody the records and rolls of the Sessions are committed. He is always one of the justices of the peace for the county, and usually a nobleman or gentleman of considerable consequence. He is nominated by the King, under the sign manual; *see* 37 *H.* 8, *c.* 1. 1 *W. and M. c.* 21, *s.* 4; and the warrant so signed being delivered to the Lord Chancellor, a commission of the peace is thereupon made out, which, besides being directed to the custos amongst others, contains a clause appointing him to his office in these words; "Lastly, we have assigned you, the aforesaid ——, keeper of the rolls of our peace in our said county; and therefore you shall cause to be brought before you and your said fellows, at the days and places aforesaid, the writs, precepts, processes, and indictments aforesaid, that they may be inspected, and by a due course determined, as is aforesaid." *See ante, p.* 3, He performs this part of his duty by his deputy, the clerk of the peace.

Clerk of the Peace.] Up to the time of Henry the 8th, the custos rotulorum always appointed the clerk of the peace. *Harding* v. *Pollock*, 6 *Bing.* 25. By stat. 27 H. 8, c. 1, reciting this, and that of late several persons, unlearned, and incapable for want of learning of executing the office of clerk of the peace, had obtained by favour from the King grants of the said office for their lives; and that by reason of such their want of learning, "many and sundry indictments, as well of felony, murder, and other offences and misdemeanors, and the process awarded upon the same indictments, have been by reason thereof made clearly frustrate and void, sometimes by reason of the negligent ingrossing and keeping of the said indictments, and sometimes by reason of the embezzling or rasure of the same indictments," &c., it is enacted, by sect. 3, that every custos rotulorum for the time being should at all times thereafter, in every county &c. nominate, elect and appoint all persons, who should thereafter be clerks of the peace within the said county, &c., and should "give and grant the said office of the clerkship of the peace to such able person, instructed in the laws of this realm, as shall be able to exercise and occupy the same, to hold and enjoy the same during the time the said custos rotulorum shall exercise the aforesaid office of custos rotulorum, so that the said clerk demean himself in the said office justly and honestly; and that it shall be lawful to every such grantees of the said clerkship, to occupy and enjoy the same office of the clerkship of the peace, by himself, or by his sufficient deputy instructed in the laws of this realm, so that the same deputy be admitted, taken, and reported by the said

custos rotulorum to be sufficient and able to exercise, occupy, keep, and enjoy the same office of the clerkship of the peace. The 5th section reserves the right of the Archbishop of York, the Bishop of Durham, the Bishop of Ely, and all bodies corporate, to whom the King had granted, or who otherwise had, the power of appointing to the offices of custos rotulorum or of clerk of the peace.

Also by stat. 1 W. & M. c. 21, s. 5, the custos rotulorum or other person, to whom of right it doth or shall belong to nominate or appoint the clerk of the peace for any county, &c., shall from time to time, when the office shall be void, nominate one able and sufficient person, residing in the said county &c., to execute the same by himself or his sufficient deputy, and to take and receive the fees, profits and perquisites thereof, for so long time only as such clerk of the peace shall well demean himself in his said office. And by sect. 8, the person so appointing shall not sell the place, or take money &c. for appointing to it, under a certain penalty; and by sect. 9 the clerk of the peace shall make oath to the contrary. *See the form of the appointment*, 1 *Burn, D'Oy. & W.* 627.

And by 1 Will. & M. c. 21, s. 6, if any clerk of the peace shall misdemean himself in the execution of his said office, and thereupon a complaint and charge in writing of such misdemeanor shall be exhibited against him to the justices of the peace in their General Quarter Sessions, it shall be lawful for the said justices, or the major part of them, upon examination and due proof thereof, openly in their said General Quarter Sessions, to suspend or discharge him from the said office; and in such case the custos rotulorum shall appoint another able and sufficient person to the office, or in case of refusal or neglect so to do, the justices at the General Quarter Sessions may appoint &c. *See R.* v. *Lloyd*, 2 *Str.* 996. *R.* v. *Baines*, 2 *Salk.* 680.

The clerk of the peace, though appointed by the custos rotulorum, acts as clerk to the Court of Quarter Sessions; he records all their proceedings, calls over and swears the grand and petty juries, receives the bills from the grand jury, arraigns the prisoners, charges the jury with them, receives the verdict, taxes costs, &c. As to the fees of the clerk of the peace; by stat. 57 Geo. 3, c. 91, the justices of the peace for Kent and Lancaster, at their Annual General Sessions, and the justices of the peace for every other county &c. at their General Quarter Sessions, shall make a table of the fees to be taken by the clerk of the peace, subject to the approbation of the justices of the peace at the next sessions; and when so approved of, the list shall be laid before the justices of assize, who shall ratify and confirm the same, either as already settled, or with such alterations &c. as to them shall seem just and reasonable; and (by sect. 2) the clerk of the peace shall not demand or receive other fees, under a pe-

nalty of £5. *See stat.* 10 & 11 *W.* 3, *c.* 23, *s.* 7. 55 *Geo.* 3, *c.* 50. *R.* v. *Williams*, 3 *B.* & *Ald.* 215. *R.* v. *Houldgrave*, 1 *B.* & *Ald.* 312.

No clerk of the peace, or his deputy, shall act as attorney or agent at any General or Quarter Sessions at which he shall act as clerk of the peace or deputy, under penalty of £50. 22 *Geo.* 2, *c.* 46, *s.* 14.

County Treasurer.] The county treasurer is an officer appointed by the justices of the peace at their General or Quarter Sessions, for the purpose of receiving the sums levied for county rates, and paying the same to the orders of the justices in Sessions. *See* 12 *Geo.* 2, *c.* 29, *s.* 6. As to the security found by them, *see Farr* v. *Holles*, 9 *B.* & *C.* 315. *R.* v. *Pattison*, 4 *B.* & *Adolph.* 9. He shall account before the justices at every General or Quarter Sessions, 12 *Geo.* 2, *c.* 29, *s.* 7—9, and shall publish an abstract of his accounts once in every year. 55 *Geo.* 3, *c.* 51, *s.* 18. The justices at Sessions may allow him such remuneration as they shall think proper; *see* 55 *G.* 3, *c.* 51, *s.* 17, *and* 12 *G.* 2, *c.* 29, *s.* 12; and they may continue him in his office, or remove him at their pleasure and appoint another. 12 *G.* 2, *c.* 29, *s.* 12.

Sheriffs, Constables, &c.] The precept to summon the Sessions, mentioned *ante*, *p.* 12, requires the sheriff to make known to all coroners, keepers of gaols and houses of correction, high constables, and bailiffs of liberties within the county, that they be at the Sessions at the time appointed, to do and fulfil those things which by reason of their offices shall be to be done; and also that the sheriff himself be then there, to do and execute those things which belong to his office; all these may be deemed officers of the court. The sheriff, by himself or deputy, must attend there, for the purpose of returning jurors, receiving fines, &c.; the gaoler and keeper of the house of correction, to bring up their prisoners for trial &c., give in a calendar of those in their custody, and receive those who may be committed to their prisons by the court. The constables are the proper officers for keeping the court, attending the grand jury, waiting on the petty jury &c.; they must also be in attendance.

Attornies.] The attornies who practise at Quarter Sessions, although not required to be specially admitted by those Courts, yet they may be deemed officers of such Courts whilst they practise there. But in order to practise as an attorney at Sessions, the party must be admitted as such in one of the superior Courts at Westminster, 22 *G.* 2, *c.* 46, *s.* 12, and must have obtained his annual certificate, in the same manner as is necessary to enable him to act as attorney in the Courts at Westminster. *See*

1 *Arch. Pr. C. P.* 14, *&c.* [5] &c. The clerk of the peace or his deputy shall not act as attorney at Sessions, as has been already mentioned, *ante*, p. 19.

Officers of the Court in Boroughs.] The town clerk shall have the charge and custody of the records of the borough, and be responsible for the same; which records shall be kept in such place as the council from time to time shall direct. 5 & 6 *Wm.* 4, *c.* 76, *s.* 65. *See Arch. Corp. Act*, 92, 9.

A clerk of the peace shall be appointed in every borough to which a separate Court of Quarter Sessions shall be granted; "the council of any such borough shall appoint a fit person to be clerk of the peace during his good behaviour." 5 & 6 *Wm.* 4, *c.* 76, *s.* 103. He shall not be clerk to the magistrates. *Id. s.* 102. He shall give public notice of the time and place of holding every Quarter Sessions of the Peace for the borough, ten days at least before the holding thereof, and shall, seven days at least before the holding thereof, cause the grand and petty jurors to be summoned, and make out lists of such jurors, stating their christian and surname, places of abode and descriptions. *Id. s.* 121. His other duties are not defined by the Act, but it may be presumed that he will have to perform all those other duties, in relation to the borough, which a clerk of the peace for a county performs with reference to his county. A table of the fees to be taken by the clerk of the peace for a borough shall be made out by the council, and shall be submitted to and confirmed by one of the principal secretaries of state; and until such confirmation, the usual fees paid to the clerk of the peace for the adjoining county may be demanded. *Id. s.* 124.

A treasurer (not being the town clerk or a member of the council) shall be appointed every year by the council, who shall fix his salary or allowance, and take such security for the due execution of his office as they shall deem proper. *Id. s.* 58. This may be deemed an officer of the Sessions, as part of his duty consists in the paying of money to the order of the Court. *See Id. s.* 113, 59.

A sheriff is appointed every year by the council of the city of Oxford, town of Berwick-upon-Tweed, and all cities and towns which are counties of themselves. *Id. s.* 61. These are officers of the Court of Quarter Sessions of their respective boroughs. In all other cases the sheriff of the county, by himself or deputy, must attend.

As to coroners, *see Id. s.* 62, 63, 64.

Besides these officers, the council of the respective boroughs shall every year appoint all such other officers as have been usually appointed in such boroughs, and as they may deem necessary, and may fix their salaries &c. *Id. s.* 58.

5. *Proceedings of the Court of Quarter Sessions generally.*

Routine of Business.] As to the order in which the business is to be taken, the practice is different at different Courts of Quarter Sessions, and depends very much upon the nature and quantity of the business to be done. Some Courts begin with the appeals, others with the trials by jury. Most Courts of Quarter Sessions, however, begin with the appeals; and if there be a certainty of their lasting one day or more, the grand and petty juries are summoned for the day next after that on which the appeals are likely to terminate. If, on the other hand, the appeals are not likely to occupy an entire day, the jurors are of course summoned for the first day of the Sessions. And on the day for which the jurors are summoned, it is a rule with nearly all Courts of Quarter Sessions, to commence the business with the criminal trials, and to continue them without intermission from day to day, if necessary, until that part of the business of the Sessions is completed; for so many persons are attendant upon criminal trials, as jurors, prosecutors, witnesses, &c., to many of whom, engaged in business, a lengthened attendance, or indeed an attendance at all, at Sessions, may be a matter of serious inconvenience, that the justices, anxiously endeavouring to make the matter as little irksome to them as possible, after the criminal business has once begun, usually postpone all the other business of the Sessions until after that has been fully completed. Also, in fixing upon the order in which the business of the Sessions is to be taken, regard must be had to the prisoners, some of whom may possibly be innocent, and whose imprisonment therefore ought not to be prolonged one instant beyond what is unavoidably necessary. If, however, the quantity of business of all kinds, expected to come before the Court, be likely to occupy more time than is usually devoted to the Sessions, it will in that case be incumbent of the justices to take the necessary measures for dividing the Court, in the manner described in the next paragraph.

Division of the Court.] By stat. 59 Geo. 3, c. 28, s. 1, reciting that "Courts of Quarter Session, by reason of the great increase of business therein, have of late been occupied during many days, to the great delay of suitors, to the inconvenience of witnesses and jurors, and to the increase of the county rates; and such inconvenience is likely to continue, unless some remedy be provided for the same: And whereas it would tend materially to remedy this inconvenience if two or more of the justices attending the Quarter Sessions should be enabled to sit and proceed when occasion should so require, while other justices should proceed in

may be cross-examined by the appellant's counsel, and re-examined by the counsel for the respondents. The counsel for the appellant next addresses the Court, and either confines his observations to the respondents' case and proofs, in which case the respondents' counsel has no right to reply; or, after observing upon the respondents' case and proofs, he may open a case for the appellant, and adduce evidence and witnesses in support of it, which witnesses may be cross-examined by the respondents' counsel, and re-examined by the counsel for the appellant. The respondents' counsel is thereupon entitled to the general reply; or before he replies, he may call witnesses to disprove the case set by the appellant, in which case the appellant's counsel has a right again to address the Court, (confining his observations, however, to the testimony of the witnesses so called by the respondents); and then the respondents' counsel is entitled to a general reply upon the whole case. 1 *Arch. P. L.* 20, 21. Where, upon the hearing of an appeal against an order of removal, the counsel for the appellants, admitting a primâ facie case for the respondents, opened a case of a subsequent settlement elsewhere, and proved it; the counsel for the respondents, instead of calling witnesses to disprove that case, and then replying, replied in the first instance, and then proposed to call witnesses: but the Sessions refused to allow him to do so, and decided the case for the appellants. Upon a motion for a mandamus to the justices to enter continuances and rehear the appeal, the Court of King's Bench held, that as the appeal was actually heard, they could not interfere, unless a case were stated for their opinion by the Sessions. *R. v. JJ. of Carnarvon*, 4 *B. & Ald.* 86.

As soon as the case has thus been closed on both sides, the Court by their chairman, or in boroughs the recorder, deliver the judgment, and either confirm the order &c., or quash it.

Proceedings in Criminal Cases.] As this subject will be treated of in detail hereafter, a very short statement of the practice of the Court of Quarter Sessions in trials by jury will be sufficient in this place.

After the Court has been opened, by the cryer making proclamation, as is already mentioned, *ante*, p. 23, the clerk of the peace, after calling upon the sheriff to return the precept to him delivered, and which is returned accordingly, and after calling over the names of the chief constables, bailiffs, &c., then calls and swears the grand jury. The usual proclamation against vice and profaneness is next read by him, and then the chairman of the Court charges the grand jury. After the charge has been delivered, a bill or bills of indictment, on which the witnesses have been sworn, are delivered to the grand jury; they thereupon retire to their room, examine the witnesses whose names

the dispatch of the other business of the same Court:" it is enacted, "that whenever and as often as any Court of Quarter Sessions or General Session of the Peace shall be assembled for the dispatch of business thereunto belonging, the justices then present may, on the first day of their being so assembled, take into their consideration the state of the business likely to be brought before them at such Quarter Sessions or General Session; and if it shall appear to them that such business, if heard and determined by the whole Court, is likely to occupy more than three days, including the day of their being so assembled, it shall and may be lawful for the said justices to appoint two or more justices, one of whom shall be of the quorum, to sit apart from themselves in some place in or near the Court, there to hear and determine such business as shall be referred to them, whilst others of the justices are at the same time proceeding in the dispatch of the other business of the same Court; and that the proceedings so had by and before such two or more justices so sitting apart, shall be as good and effectual in the law to all intents and purposes as if the same were had before the Court assembled and sitting as usual in its ordinary place of sitting, and shall be enrolled and recorded accordingly."

By sect. 2, it is provided, that, "when two or more justices shall have sat apart in manner before directed by this Act, and orders, rules, and regulations shall have been made for the apportionment of business, such orders, rules, and regulations shall remain and continue in force as long as shall be thought expedient, without the necessity of renewing such orders, rules, and regulations at each succeeding Session, to the intent that the same may become public and better known to all professional and other persons engaged in or in any manner interested in the business of such Quarter Session."

And by sect. 3, in every such case the clerk of the peace or his deputy shall appoint "a fit and sufficient person to record the proceedings so had before the justices sitting apart; and such proceedings shall be delivered over to the clerk of the peace or his deputy, and shall be equally deemed to be a part of the records of such session, as if the same proceedings had been recorded by the clerk of the peace himself; and it shall be lawful for the justices assembled at the Quarter Sessions to make an order upon the treasurer of the county to pay to the clerk of the peace such sum or sums of money as they shall deem a fit and reasonable remuneration to the clerk of the peace for such purpose as aforesaid; and it shall be lawful for such justices to appoint an additional cryer, and to grant him such remuneration for his care and pains as they shall deem reasonable, which shall in like manner be paid by the treasurer of the county."

Of course what is here said as to the division of the Session,

can have reference only to the Courts of Quarter Sessions for counties or ridings, and perhaps of such boroughs as are not within the Corporation Act.

Proceedings in Appeals.] The appeals must be entered with the clerk of the peace; those which may be respited until the next Sessions, and are intended to be so, may be entered at any time during the Sessions, upon a motion for that purpose by counsel; but in those which are not only to be entered, but tried also at the same Sessions, the entry should be in strictness before the sitting of the Court, and most Courts of Quarter Sessions, I believe, require it to be so; for otherwise the justices, upon their assembling, cannot be aware of the number of appeals they have to try. The appeals then which are to be tried, are either those which were entered at the last Sessions, and respited to the present Sessions, or those which were entered previously to the sitting of the Court at these Sessions; both appear in the book of the clerk of the peace, in the order in which they were entered.

The first thing done at Sessions is, of course, to open the Court. This is done by the cryer of the court making proclamation in these terms: "*Oyez, Oyez, Oyez, all manner of persons who have any thing to do at the General* [*Quarter*] *Sessions of the Peace for this county, draw near and give your attendance.*"

The clerk of the peace then calls on the appeals in their order, as they appear entered in his book. If the parties to an appeal do not appear, by themselves or counsel, when it is thus called on, the Court will order the appeal to be struck out of the list; and they will not usually allow it to be restored to it, without the consent of the opposite party, or a very strong and satisfactory statement on the part of the appellant, supported by affidavit, or the oath of witnesses present, accounting for his absence. If the appellant appear, but the respondent do not, then upon the appellant's proving the service of the notice of appeal, &c., and that appearing to be regular, the Court will quash the order or conviction &c. appealed against; or if the respondent appear, and the appellant do not, the Court will confirm such order, &c.

If both parties be present when the appeal is called on, but one of them, by reason of the absence of witnesses or otherwise, be not ready to proceed, he may apply to the Court to postpone the trial until the next Sessions; and the Court may, in their discretion, grant the application, if they will, and upon such terms as they may think fair and reasonable. Where, upon an appeal against an order of filiation being called on at Sessions, the appellant applied to the Court to postpone the trial; upon an affidavit of the absence of a material witness, and the non-appearance of another of his witnesses on being called upon his subpœna; the Sessions however refused the application, and

confirmed the order. The appellant then applied to the Court of King's Bench for a mandamus to the justices to hear the appeal; but the Court refused it, saying that as this was a question peculiarly for the Sessions, they ought not to interfere. *Ex parte Becke*, 3 *B. & Adolph.* 704. Where, upon notice of appeal against an order of removal being duly given, both parties attended at the Sessions, but the appeal was not entered, up to a late period of the day, and then the appellants moved that it might be entered and adjourned, on an affidavit stating the absence of a material witness. The Sessions, however, refused to allow this, unless the appellants would pay the respondents the costs of the day; which the appellants declined doing, and the appeal accordingly was not entered. The appellants thereupon afterwards applied to the Court of King's Bench for a mandamus to the justices, to enter continuances and hear the appeal: but the Court refused it, saying that as the appellants declined paying the costs of the day, the justices had exercised a very proper discretion in refusing the adjournment. *R.* v. *JJ. of Monmouthshire*, 1 *B. & Adolph.* 895.

If both parties be present, and ready to proceed with the appeal, the respondent, who in most cases has to begin, (as we shall see hereafter, when we come to consider the practice of the Sessions in particular cases of appeal), may, in strictness, require the appellant to prove the service of his notice of appeal, before the respondent opens his case to the Court; for unless notice of appeal has been given, the Court have no jurisdiction to try the appeal. 2 *Nol. P. L.* 439. This however, in practice, is seldom done; but as it may be done, appellants should take care to come prepared with the proof. Where, upon an appeal against a rate being called on at Sessions, and the appellant being then ready to prove his notice and proceed with the case, the respondents applied to put off the trial until the next Sessions, which application was granted on payment of costs, and the respondents' counsel thereupon handed a copy of the notice of appeal to the clerk of the peace, to enable him to draw up the order; at the next Sessions both parties appeared, but the respondents objected to the appeal being heard until the appellant first proved service of the original notice of appeal, and he not being prepared to do so, the Sessions confirmed the rate. But upon an application to the Court of King's Bench for a mandamus to the justices to enter continuances and try the appeal, the Court granted it, holding that, as the respondents had acted upon the notice, so as to render any further proof of it unnecessary, the justices ought to have heard the appeal. *R.* v. *JJ. of Hertfordshire*, 4 *B. & Ad.* 561.

Upon the notice being proved, or proof of it not being required, the counsel for the respondents states his case to the Court, and adduces evidence and witnesses to prove it; which witnesses

may be cross-examined by the appellant's counsel, and re-examined by the counsel for the respondents. The counsel for the appellant next addresses the Court, and either confines his observations to the respondents' case and proofs, in which case the respondents' counsel has no right to reply; or, after observing upon the respondents' case and proofs, he may open a case for the appellant, and adduce evidence and witnesses in support of it, which witnesses may be cross-examined by the respondents' counsel, and re-examined by the counsel for the appellant. The respondents' counsel is thereupon entitled to the general reply; or before he replies, he may call witnesses to disprove the case set by the appellant, in which case the appellant's counsel has a right again to address the Court, (confining his observations, however, to the testimony of the witnesses so called by the respondents); and then the respondents' counsel is entitled to a general reply upon the whole case. 1 *Arch. P. L.* 20, 21. Where, upon the hearing of an appeal against an order of removal, the counsel for the appellants, admitting a primâ facie case for the respondents, opened a case of a subsequent settlement elsewhere, and proved it; the counsel for the respondents, instead of calling witnesses to disprove that case, and then replying, replied in the first instance, and then proposed to call witnesses: but the Sessions refused to allow him to do so, and decided the case for the appellants. Upon a motion for a mandamus to the justices to enter continuances and rehear the appeal, the Court of King's Bench held, that as the appeal was actually heard, they could not interfere, unless a case were stated for their opinion by the Sessions. *R. v. JJ. of Carnarvon*, 4 *B. & Ald.* 86.

As soon as the case has thus been closed on both sides, the Court by their chairman, or in boroughs the recorder, deliver the judgment, and either confirm the order &c., or quash it.

Proceedings in Criminal Cases.] As this subject will be treated of in detail hereafter, a very short statement of the practice of the Court of Quarter Sessions in trials by jury will be sufficient in this place.

After the Court has been opened, by the cryer making proclamation, as is already mentioned, *ante*, p. 23, the clerk of the peace, after calling upon the sheriff to return the precept to him delivered, and which is returned accordingly, and after calling over the names of the chief constables, bailiffs, &c., then calls and swears the grand jury. The usual proclamation against vice and profaneness is next read by him, and then the chairman of the Court charges the grand jury. After the charge has been delivered, a bill or bills of indictment, on which the witnesses have been sworn, are delivered to the grand jury; they thereupon retire to their room, examine the witnesses whose names

are indorsed upon each bill, and return into Court with such bills as they have examined, having indorsed upon them the words "A true bill," or "Not a true bill," according as they find or ignore them. Other bills are then delivered to them, and so from time to time, until all the business to be done by the grand jury has been in like manner disposed of by them; and they are then discharged by the chairman.

Whilst the grand jury are engaged with the first bill or bills delivered to them, the clerk of the peace calls over the names of the common jury, and the first twelve, who answer to their names, go into the jury box. And as soon as the grand jury return a bill of indictment indorsed "A true bill," the prisoner, against whom the bill is found, is then placed at the bar, and arraigned upon it, and he pleads either guilty or not guilty. If he plead guilty, of course all that then remains to complete the proceeding, is the judgment of the Court upon him. But if he plead not guilty, the jury are then sworn, (the prisoner, in the case of felony, being previously told that he may challenge them or any of them before they are sworn); the clerk of the peace then charges the jury with the prisoner, by reading over to them the indictment, plea, &c. The counsel for the prosecution next states the case to the jury, and calls the witnesses to prove it; which witnesses may be cross-examined by the prisoner or his counsel, and re-examined by the counsel for the prosecution. The prisoner or (in cases of misdemeanor) his counsel may then address the jury in his defence, and may call his witnesses to prove it, which witnesses may be cross-examined by the counsel for the prosecution, and re-examined by the prisoner or his counsel; or he may call witnesses to character, and it is not usual in practice to cross-examine them, except under very peculiar circumstances. If, in a case of misdemeanor, the defendant call witnesses to prove facts, the counsel for the prosecution is entitled to the general reply.

When the case is closed on both sides, the chairman, or in boroughs the recorder, sums up the evidence to the jury, who, after deliberating upon the case, return their verdict of "guilty" or "not guilty" to the clerk of the peace, who records it accordingly. If the prisoner be acquitted, the Court will order him to be discharged either then or at the end of the sessions; but if found guilty, the chairman or recorder delivers the judgment of the Court, by passing sentence upon him. In some Courts of Quarter Sessions, sentence is thus passed upon each prisoner, immediately after he is convicted; in others, at the end of each day, on all the prisoners who on that day have been convicted; and in others, not until the end of the sessions, when sentence will be passed upon all the prisoners who have been convicted during the sessions.

Contempts of the Sessions, how punishable.] Contempts of the Court of Quarter Sessions, such as abuse or contemptuous words of it or any of its members, if committed in the face of the Court, may be punished in a summary manner; that is to say, the Court may order any of its bailiffs to take the party into custody, and may order him to be detained in prison for a reasonable time, as a punishment for his contempt. *See* 2 *Hawk. c.* 1. *s.* 15. *c.* 22. *s.* 1. So, any riotous, noisy, or indecent conduct in Court, calculated to interrupt the business of the Court, or to bring its proceedings into disrepute, may be treated in the same way as contempts. Where, in an action for false imprisonment by a woman against a magistrate, it appeared that the plaintiff having obtained a warrant for an assault against some other person, which was not executed, called upon the defendant, a magistrate, upon the subject; and he being engaged upon other business in his private office at the time, she forced her way into his room, behaved there with great indecency, making a great noise, and insisting on her business being attended to; the defendant desired her to be quiet, and threatened to commit her unless she altered her conduct; but she still persisting, he committed her to Bridewell, where she remained two months. Lord Kenyon, C. J. expressed some doubt whether a magistrate, " not sitting as a chairman of a Court, but at his private office," could commit for a contempt; but thinking it a matter fit to be seriously considered and determined by the whole Court, he directed a verdict for the plaintiff, subject to the opinion of the Court upon the point. The case seems to have been afterwards argued, but no judgment was delivered. *Pettit* v. *Addington, Peake R.* 87. *See R.* v. *Ellers*, 1 *Wils.* 222. But for contemptuous words by one of the justices of the Court to another, the party, it seems, is not punishable. 2 *Hawk. c.* 8. *s.* 46.

Contempts of the Court, such as disobedience of its lawful orders, libels upon its administration of justice, or the like, committed, not in the face of the Court, but out of Court, are punishable, not in a summary way as contempts committed in the face of the Court, but as misdemeanors at common law, upon indictment, by fine or imprisonment, or both. Where upon the trial of an information, filed by the Attorney-General against the proprietor of a newspaper, for a libel on a judge and jury, before whom the captain of a merchant ship had been tried for murder and acquitted, the libel affirming that the prisoner had murdered one of his crew, and in a gross and abusive style censured the judge and jury for acquitting him: it was contended, on the part of the defendants, that every one has a right to canvass the proceedings of Courts of Justice, and that the article complained of was a fair exercise of that right. Grose, J. said it certainly was lawful, with decency and candour, to discuss the propriety of the verdict of a jury or the decisions of a judge; and if the defendant should be

thought to have done no more in this instance, he would be entitled to an acquittal; but, on the contrary, he had transgressed the law, and ought to be convicted, if the extracts from the newspaper set out in the information contained no reasoning or discussion, but only declamation and invective, and were written, not with a view to elucidate the truth, but to injure the character of individuals, and to bring into hatred and contempt the administration of justice in the country. The defendant was found guilty on this and a similar information, and sentenced to three years imprisonment. *R.* v. *White*, 1 *Camp.* 359. *and see R.* v. *Watson*, 2 *T. R.* 199. But words spoken of a magistrate, in his absence, are not the subject of an indictment. *R.* v. *Weltje*, 2 *Camp.* 142. *R.* v. *Wrightson*, 2 *Salk.* 698. *R.* v. *Pocock*, 2 *Str.* 1157.

When, how, and to what Time the Court may be adjourned.] If the Sessions last more than one day, they must be adjourned to another, and so on until the business is finished; if there be no adjournment, the Sessions are at an end, and the justices cannot afterwards legally proceed with the business. Thus, where an appeal was entered at the General Quarter Sessions for Suffolk, held on the 7th April, and the Sessions were then adjourned to the 9th April at Woodbridge, but nothing could be done for want of a sufficient number of justices; on the 11th April a Sessions was holden at Ipswich, and adjourned to the 14th at Bury, where the appeal was determined. But this was holden to be wrong; there being no adjournment of the Sessions from the 9th to the 11th April, the Sessions had no jurisdiction when they determined the appeal. *R.* v. *Polstead*, 2 *Str.* 1262. *See also R.* v. *Hadingham*, *Burr. S. C.* 112. So, where it appeared that the Sessions for the county of Lincoln were holden on the 9th January at Kirton, and then adjourned to the 11th at Caistor, where however they were not holden; on the 13th the Sessions were holden, without adjournment, at Horncastle, where an appeal was heard, and an order of removal quashed. But the Court, upon application, quashed the order of Sessions, holding that after the Quarter Sessions for the county holden at Kirton, no other Sessions could have been holden in the same quarter but by adjournment; the justices therefore had no authority to try the appeal, or quash the order. *R.* v. *West Torrington*, *Burr. S. C.* 293. As to this latter decision, there can be no doubt of its propriety in point of law; but the reason given for it is not exactly correct, and may possibly be a mistake of the reporter: for it is well understood now, that according to the fair construction of the statutes upon the subject, the justices may hold a General Sessions and a Quarter Sessions during the same quarter; *see ante*, *p.* 16; but to enable them to hold the second Sessions, without adjournment, there must be a new precept issued to the

sheriff to summons the sheriff, new summons to the jurors, constables, &c. &c., which was not so in the case above-mentioned.

In counties, the adjournment must be by two justices, at the least; for it is laid down, that if there be not justices enough present to hold a Sessions, there are not enough to adjourn it legally; and if in such a case the Sessions were actually adjourned, every act done at such adjourned Sessions would be void. *R.* v. *Westrington*, 2 *Bott*, 981. In boroughs within the Corporation Act, the adjournment is by the recorder or his deputy; and in their absence it may be by the mayor. 5 & 6 *W.* 4, *c.* 76, *s.* 106. The adjournment is made by proclamation by the cryer of the Court, thus: "*Oyez, Oyez, Oyez, All manner of persons who have any thing further to do at the General Quarter Sessions of the Peace for this county, let them depart hence, and give their attendance at* [" *this place*" or " *at* —— *in this county,*"] *on* [" *the morrow*" or " *Tuesday the* 3*d day of April instant,*" as the case may be] " *at* [*nine*] *of the clock in the forenoon. God save the King and this honourable Bench.*" The clerk of the peace makes a minute of the adjournment in his book accordingly.

The Sessions may be thus adjourned, either until the next day, or to any other day before that on which the next Quarter Sessions are to be holden. *See* 2 *Str.* 832, 865. *Thurston* v. *Slatford*, *Lutw.* 911. *Linfield* v. *Battle*, 2 *Salk.* 605. Where an indictment was found against a constable, for not obeying a justice's order, at the Epiphany Sessions, and the defendant was afterwards tried, convicted, and sentenced at an adjournment of those Sessions holden on the 3d May, (which was after the Easter Quarter Sessions had begun): upon error brought, the Court reversed the judgment, on the ground that the Court of Quarter Sessions have no authority by law to adjourn to a day beyond that on which the next Sessions are to be holden. *R.* v. *Grince*, *T.* 4 *G.* 1. 19 *Vin. Ab.* 358. It has therefore been holden, that in stating the style of an adjourned Sessions, in the caption of an indictment, order of Sessions, or the like, it is not sufficient to say 'at such a Sessions holden by adjournment on such a day,' but the holding of the original Sessions, and the day on which it was holden, must be set forth, and that it was continued from thence to such further time by adjournment, in order to show that no other Sessions had intervened; and for this defect, in one case, judgment upon an indictment was arrested, and in another an indictment was quashed; *R.* v. *Fisher*, *R.* v. *Saunders*, 2 *Str.* 865; and in another, an order of Sessions was quashed. *St. Michael Coslany* v. *Ipswich*, 2 *Str.* 831.

Where an application was made to a Court of Quarter Sessions under a particular act of parliament, and the Sessions then entertained it, but adjourned the consideration of it to a future day certain, before which day the act of parliament was repealed; the Court of King's Bench held that the jurisdiction of the Ses-

sions was thereby determined, and that they could not proceed any further in the matter. *R. v. JJ. of London*, 3 *Burr.* 1456.

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6. *Decisions of the Sessions, in what Cases, and how revised.*

By Writ of Error.] After judgment given against a defendant upon an indictment at Sessions, if the indictment be bad in substance, or the judgment be erroneous, or any other defect in substance appear upon the face of the record, the defendant may have the judgment reversed by writ of error; or where his property, real or personal, is forfeited by the judgment, the writ of error may be brought after the death of the defendant, by his heir or personal representative respectively. *See* 2 *Bac. Abr. Error, A.* 1, 2. And in ordinary cases, it is the only way in which the judgment can be reversed. *Rice's case, Cro. Jac.* 404. *R. v. JJ. of W. R. Yorkshire*, 7 *T. R.* 467. 9 *Vin. Abr. Error, D.* But if the judgment be given by persons who have no jurisdiction in the matter, as where a commission authorizes an indictment to be taken before A, B, C, and twelve others, and by colour thereof the commissioners proceed on an indictment taken before eight persons only, there the books say that the judgment may be falsified, by shewing the special matter, without writ of error, because it is void; 3 *Inst.* 231. 2 *Hawk. c.* 50, *s.* 3. 4 *Bl. Com.* 390, 391; which appears to me to mean, that upon the record being brought before the Court of King's Bench by *certiorari*, that Court, upon a statement of the special matter on affidavit, uncontradicted, will reverse the judgment. Or, if such matter appear upon the face of the record, the judgment may be reversed upon writ of error. 2 *Bac. Abr. Error, A.* 1.

But judgment must have been given, otherwise a writ of error will not lie. And therefore formerly, when a man was indicted for felony and found guilty, and he prayed his clergy, which was allowed to him, he could not afterwards have a writ of error; for he was convicted only, not attainted. *Long's case, Cro. Eliz.* 489. 2 *Bac. Abr. Error, A.* 2. *Vin. Abr. Error, C.*

And the judgment must have been upon an indictment; for no writ of error will lie upon a mere summary conviction; *Anon. Vent.* 33. *Anon. Id.* 171. *Berry's case*, 2 *Jon.* 167. *Vin. Abr. Error, D.* 2 *Bac. Abr. Error, A.*; not even upon a conviction of forcible entry by justices of the peace upon view; *Anon. Vent.* 171; nor in any other case.

And it must be a judgment against the defendant; 3 *Inst.* 214. 2 *Bac. Abr. Error, A.* 1; for there is no instance of error being brought upon a judgment for a defendant after an acquittal.

There seem to be two modes of proceeding, either of which the party may adopt at his option: he may bring the writ of error directed to the justices, and have the record returned to the Court

of King's Bench under and by virtue of it; or he may have the record removed into the Court of King's Bench by *certiorari*, and then bring a writ of error *coram nobis* upon it. *R.* v. *Foxley*, 1 *Salk.* 266. 3 *Com. Dig. Error, B.*

Before a writ of error in a criminal case, however, is sued out, the attorney general's *fiat* for it must first be obtained. This is granted as a matter of course in misdemeanors, upon sufficient cause being shewn for it; but in cases of felony, it is granted only *ex gratiâ*. 4 *Bl. Com.* 392. *See Com. Dig. Error, A. Eq. Ca. Abr.* 414. *Gargrave's case, Roll. Rep.* 175. *Vin. Abr. Error, F.* The writ is then sued out in the ordinary way with the cursitor, the fiat being his warrant to do so. It is then delivered to the clerk of the peace, and he immediately makes up the record on parchment in this form, beginning with the caption of the indictment, thus:

"*Berkshire to wit: At the General Quarter Sessions of the Peace holden at* ——, *in and for the said county, on the* —— *day of* ——, *in the* —— *year of the reign of our sovereign lord William the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland King, defender of the faith, before R. B. and H. B. esquires, and others their associates, justices of our said Lord the King, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, by the oath of twelve good and lawful men of the county aforesaid, sworn and charged to inquire for our said Lord the King and for the body of the county aforesaid, it is presented that* [*A. B. late of* —— *in the county aforesaid, yeoman,*" &c. continuing the indictment to the end. And then in continuation, thus:] "*And the said A. B. forthwith being asked concerning the premises in the said indictment above laid to his charge, how he will acquit himself thereof, saith that he is not guilty thereof, and of this he puts himself upon the country, &c. And W. S. clerk of the peace for the said county, who prosecutes for our said Lord the King in this behalf, doth the like. Therefore the sheriff is commanded that he cause to come immediately before the said justices &c. twelve &c. by whom &c. and who neither &c. to recognise &c. because as well &c. And the jurors of the said jury by the said sheriff in this behalf impanelled, to wit,*" [here name the jurors] "*being called, now come, who being chosen, tried and sworn to speak the truth of and concerning the premises, upon their oath say that the said A. B. is guilty of the* [*premises,*" or in cases of felony, "*of the felony*] *in the said indictment above laid to his charge, in manner and form as by the said indictment is above supposed against him. Whereupon all and singular the premises being seen, and by the said justices here fully understood, it is considered by the Court here that the said A. B., for the offence aforesaid, be* [*imprisoned and kept to hard labour in the house of correction for the county afore-*

said, at —— in the said county, for the space of six calendar months," or as the sentence may be.]

It is not necessary to set out the names of the grand jurors in the caption of the indictment; it is sufficient to say "*twelve good and lawful men of the county*" &c. as in the above form. *Aylett* v. *R., in error*, 3 *Bro. Parl. C.* 529.

Having thus engrossed the record on parchment, let the clerk of the peace indorse upon the writ of error the following return: "*The record and proceedings, whereof mention is within made, appear in a certain schedule to this writ annexed. The answer of the justices within named.*" Or it may be in a similar form to the return to a certiorari, given *post*, p. 45. Let the record be then annexed to the writ, and transmitted to the Crown Office of the Court of King's Bench in London.

As to the proceedings in the Court above, upon the writ of error, it is beside the purpose of this little work to treat of them.

By Certiorari.] The writ of certiorari is a writ issuing from the crown side of the Court of King's Bench, directed to the justices at Sessions, justices of the peace, or the judges of inferior courts, requiring them to certify to that Court some indictment, conviction, order of Sessions, order of justices, or other matter of a judicial nature (*See* 1 *Burn J., by D. & W.* 536.) depending before them, in order that the same may be disposed of there in such manner as to the Court shall seem fit. (*See the form of the writ*, 10 *Went.* 473.) By means of this writ, the Court of King's Bench exercises its superintending jurisdiction over those inferior tribunals, and quashes or confirms their acts, or assumes to itself the cognizance of matters which, from circumstances, can be proceeded upon with more certainty of justice to the parties before that Court, than before the inferior tribunal. And this jurisdiction is so inherent in the Court of King's Bench, that nothing can deprive it of the right to issue this writ, or parties of their right to apply for it, but the express words of an Act of Parliament, forbidding them to do so. *R.* v. *Abbott*, 2 *Doug.* 553, *n.* 113. Thus, where a statute gave an appeal to the Sessions against a conviction, and provided that it should be *finally* determined there *only*, and no other Court should intermeddle with causes of appeal upon that Act: yet the Court of King's Bench held that their right to issue a certiorari to remove the conviction, even after an appeal, was not thereby taken away. *R.* v. *Moreley, Reeve and others*, 2 *Burn*, 1040. 1 *W. Bl.* 231. *S. P. R.* v. *Jukes*, 8 *T. R.* 542. So where a statute creating an offence, punishable upon indictment, directed that any person charged with it should be committed to prison, "there to remain until the next General or Quarter Sessions, and upon conviction of the said offence at the said General or Quarter Sessions, shall suffer the pain and penalty of £20.:" it was argued that this, by ne-

cessary implication, confined the cognizance of the offence to the General or Quarter Sessions, and that the Court therefore could not remove the indictment from the Sessions by certiorari; but the Court held otherwise, and the defendants, being tried and convicted at *nisi prius* before Lord Kenyon, C. J., received judgment in the Court of King's Bench. *R.* v. *Hube and others*, 5 *T. R.* 542. *S. P. R.* v. *Wadley*, 4 *M. & S.* 508. So, where a statute made the buying of certain yarn punishable on summary conviction, gave an appeal to the Sessions, and took away the certiorari by express words, and another statute, the Vagrant Act, (which did not expressly take away the certiorari,) made the party punishable as an incorrigible rogue; and a party being convicted of one offence under the first statute, and being for a second offence committed until the Sessions by a magistrate, appealed against the conviction, which was accordingly quashed for some defect, but the Sessions ordered him to be imprisoned and kept to hard labour for two years, as an incorrigible rogue, for the second offence: upon an application for a certiorari to remove those proceedings, which was resisted on the ground that the provision in the first Act, taking away the certiorari, must be deemed to extend to the second Act by necessary implication; the Court held that, as far as the proceedings were had under the Vagrant Act, the certiorari might be awarded, but not as to such of the proceedings as were under the first Act. *R.* v. *Terrett*, 2 *T. R.* 735. Where the 12 G. 1, c. 3, which punished cloth manufacturers by summary conviction, for paying their workmen in goods, was extended to silk manufacturers by stat. 22 G. 2, c. 27, which latter statute also created other offences, and by stat. 17 G. 3, c. 56, the certiorari is expressly taken away in all cases of offences against stat. 22 G. 2, c. 27: the Court held that the effect of 17 G. 3, c. 56, was to take away the certiorari only as to the offences created for the first time by stat. 22 G. 2, c. 27, but that it did not take away the certiorari as to silk manufacturers paying their workmen in goods. *R.* v. *Rogers*, 5 *B. & Ald.* 773. Where an Act relating to appeals by overseers against the disallowance of items in their accounts, took away the certiorari by express words, this was holden not to extend to an order of Sessions upon an appeal by a parishioner against the allowance of overseers' accounts. *R.* v. *Bird*, 2 *B. & Ald.* 522. But where an Act, which made it punishable upon summary conviction for masters to employ children in factories more than a certain number of hours in the day, expressly took away the certiorari; and a second Act made other provisions and restrictions; and a third Act extended the former Acts to foremen as well as masters, and made other restrictions, and altered the penalties &c., and by this last Act it was enacted that all the powers, provisions, exemptions, matters, things &c. in the former Acts, should be "as good, valid and effectual for carrying this

Act into execution, as if the same had respectively been repealed and re-enacted in the body of this Act:" Upon an application to remove a conviction against a foreman, under this latter Act, the Court held that the clause in the first Act, taking away the certiorari, must be deemed a "provision" incorporated into the last Act by the above words, and they therefore refused the writ. *R.* v. *Fell*, 1 *B. & Adolph.* 380. *S. P. R.* v. *Liverpool*, 3 *D. & R.* 273. It may be necessary to mention, however, that where the party seeking to bring an order of Sessions &c. under the review of the Court of King's Bench, is in custody upon it, a writ of habeas corpus, and not a certiorari, is in that case the proper remedy. *R.* v *Bowen*, 5 *T. R.* 156. *per Lord Kenyon, C.J.* But the Court, it should seem, would not interfere in this manner, in a case where the certiorari is expressly taken away by statute. In a case where the certiorari was expressly taken away, the justices made a mistake in entering up a judgment on a verdict, and a mandamus was moved for to direct them to rectify it; but the Court held that as the statute did not allow of the proceedings being removed by certiorari, they could not indirectly bring them under review by a mandamus. *R.* v. *JJ. of Yorkshire*, 1 *Ad. & E.* 563. So in all other cases where the certiorari is expressly taken away by statute, the Court of King's Bench will not interfere in any way, directly or indirectly, to enable a defendant to remove the proceedings before them, *see R.* v. *Young*, 2 *T. R.* 472. *R.* v. *Casson*, 3 *D. & R.* 136, whether there be any other mode of appeal provided by the statute or not, *R.* v. *JJ. of St. Alban's*, 3 *B. & C.* 698, unless indeed it appear clearly that the proceeding relate to some matter of which the justices have no jurisdiction whatever. *R.* v. *JJ. of Somersetshire*, 5 *B. & C.* 816. *R.* v. *JJ. of W. R. Yorkshire*, 5 *T. R.* 629. *and see R.* v. *Long*, 1 *Man. & R.* 139. Even where the Sessions, upon an appeal against a conviction, confirmed it subject to a case, the Court of King's Bench held that no certiorari could issue, to bring the case and order of Sessions before them; as by a clause in the Act on which the conviction was founded, it was provided that no "rate, proceeding, conviction, matter or thing" should be removed by certiorari or any other process whatsoever into His Majesty's Courts of Record at Westminster. *R.* v. *JJ. of Middlesex*, 8 *D. & R.* 117. But it has been holden, that where an indictment contains several counts, some at common law, some upon a statute by which the certiorari is expressly taken away, the defendant is not precluded, by reason of the latter counts, from having the indictment removed by certiorari; for otherwise the prosecutor, by introducing such a count, might easily deprive a defendant of the right he would otherwise have to remove the proceedings. *R.* v. *Saunders*, 5 *D. & R.* 611.

It must be observed, however, that these clauses in Acts of Parliament, taking away the certiorari, however general they

may be in their terms, usually affect defendants only; for the general rule is, that the Crown is not included in such a restriction, unless there be some clause in the Act to shew that the legislature so intended it. *Per Buller, J.* in *R.* v. *Davies*, 5 *T. R.* 628. Therefore it has been holden that an indictment on stat. 13 G. 3, c. 78, s. 24, for a nuisance in a highway, might be removed into the Court of King's Bench by certiorari, at the instance of the prosecutor, although by the Act no indictment or presentment should be removed by certiorari, until the same should be traversed and judgment thereupon given; for the Court held, that it was clear, from the words, "until such indictment be traversed," that this restriction was not intended to extend to the Crown. *R.* v. *Inhabitants of Bodenham*, *Cowp.* 78. So, where an indictment for keeping a disorderly house, found at Sessions, was removed into the Court of King's Bench by certiorari, at the instance of the prosecutor, and an application was made to set aside the certiorari *quia improvidè emanavit*, on the ground that by stat. 25 G. 2, c. 36, s. 10, no such indictment "shall be removed by any writ of certiorari into any other Court, but such indictment shall be heard, tried and finally determined at the same General or Quarter Sessions or Assizes, where such indictment shall be preferred" &c.: but as there were no words in the Act shewing that it was intended to extend this restriction to the Crown, the Court held that the above clause extended only to defendants, and did not prevent the prosecutor from removing the indictment by certiorari. *R.* v. *Davies*, 5 *T. R.* 626. The same doctrine was again laid down by the Court of King's Bench, in a very elaborate judgment by Lord Kenyon, C. J., in *R.* v. *Inhabitants of Cumberland*, 6 *T. R.* 194, which was afterwards affirmed in the House of Lords. 3 *Bos. & P.* 354. So, where a statute gave an appeal to the Sessions against a conviction relating to the malt duties, and provided that "no writ of certiorari should be alleged or brought to set aside any order &c. of the Sessions;" and upon an appeal against such a conviction, it was quashed by order of the Sessions: the Court held that the Crown might remove the order of Sessions by certiorari, notwithstanding the above provision of the Act; and afterwards upon motion they quashed this order of Sessions. *R.* v. *Allen*, 15 *East*, 333. And, according to the practice of the Crown Office, if the Attorney General apply for a certiorari on behalf even of a defendant, where such defendant is an officer of the crown, or a person whose defence the crown for any other reason takes up, the writ is always granted as a matter of course, without any special ground being laid for it, even in cases where the certiorari is taken away by statute. 1 *East*, 303 *n.*

Having treated of the writ of certiorari thus far generally, we shall next consider it more particularly as used to remove indictments, convictions and orders. The whole of this subject,

indeed, does not properly come under the title of the present section; for the certiorari is used, not merely for the purpose of having the opinions or decisions of the Sessions reviewed, but is also used for the purpose of removing the convictions and orders of magistrates made out of Sessions, and for the purpose of withdrawing indictments from the jurisdiction of the Court of Quarter Sessions, to be tried elsewhere, before that Court has expressed any opinion or decision upon them. But as a notice of the whole subject may be useful to magistrates and attornies, and it can be comprised in a space very little greater than would be required to treat of the removal of orders of Sessions merely, I have thought it best to treat here of the removal by certiorari of indictments, convictions and orders generally.

An indictment may be removed from the Sessions, for the purpose of making it a record of the Court of King's Bench, and having it sent thence to the assizes for trial. Formerly, an application by a prosecutor for a certiorari, to remove an indictment, presentment or conviction from Sessions, was granted as of course, without any grounds being stated for it by affidavit or otherwise; but where a defendant applied for it, he must state upon affidavit sufficient grounds to induce the Court to grant it. *R.* v. *Eaton*, 5 *T. R.* 89, *per Buller, J. R.* v. *Lewis*, 3 *Burr.* 2458, *per Lord Mansfield, C. J.* This rule still remains as to applications by a defendant; but by stat. 5 & 6 W. 4, c. 23, reciting that it was expedient to prevent prosecutors of indictments and presentments from vexatiously removing the same out of inferior courts into the Court of King's Bench, it is enacted, "that no writ of certiorari shall issue from the Court of King's Bench at Westminster, for removing into that Court any indictment or presentment from any Court of Session, assize, oyer and terminer or gaol delivery, or any other Court, at the instance of the prosecutor or any other person (except his Majesty's Attorney General) without motion first made in the Court of King's Bench or before some judge of that Court, and leave obtained to remove such indictment or presentment, in the same manner as similar motions may now be made and leave given where such application is made on the part of defendants." And at the time of the passing of this Act, defendants were and still are required to show, by affidavit, such reasons as may satisfy the Court that it is probable the case will not be fairly or satisfactorily tried at Sessions. Thus, where the defendant's affidavit shewed that he could not have a fair and impartial trial at the Sessions, the Court granted a certiorari to remove an indictment against him for felony, from the Sessions. *R.* v. *Fowls*, 2 *Ld. Raym.* 1452. So the Court granted a certiorari to remove an indictment for petty larceny from the Sessions for the borough of Colchester, upon an affidavit of the defendant, stating that he was not guilty, and that from the prejudice entertained against him by the

recorder and town clerk, whose advice the mayor took in all cases that came before him for trial, he could not have a fair and impartial trial at the Sessions. *R.* v. *Ward*, 4 *M. & S.* 444, *n.* But merely shewing a general prejudice as existing against the defendant, is not a sufficient ground, unless it be shewn to exist in the Court below. *R.* v. *Matthews*, 1 *Chitt. R.* 571, *n. and see R.* v. *Harris*, 3 *Burr.* 1330. The Court have granted a certiorari at the instance of a defendant, to remove an indictment for perjury, from the Central Criminal Court, upon an affidavit of the defendant that some points of law would arise at the trial, the proceedings out of which the indictment arose being in Chancery, and the transactions being matters of account. *R.* v. *Wartnaby*, 2 *Ad. & E.* 435. *See R.* v. *Duchess of Kingston*, *Cowp.* 283. But it seems that circumstances must be stated in such an affidavit, from which the Courts may judge of the probability of such points arising; and therefore where the affidavit merely stated that the defendant was advised that several matters of law of the greatest importance would arise upon the trial of the indictment, and that it was fit and proper it should be tried before persons learned in the law, the Court refused to grant it, but allowed the defendant to renew the application at chambers if a better affidavit could be obtained. *R.* v. *Harrison*, 1 *Chit. R.* 571. Where it was sought to remove an indictment, on the ground of its being vague, and merely charging the defendants with being common cheats, and that they had conspired to obtain goods and chattels, without saying from whom: the Court refused the certiorari. *R.* v. *Brian and others*, 2 *Ad. & E.* 436, *n.* As to the right to remove indictments for not repairing highways, *see R.* v. *Inhabitants of Taunton St. Mary*, 3 *M. & S.* 465. Where the Attorney General, on the part of the crown, moved for a certiorari, to remove an indictment for murder, found at the Sessions of the city of Rochester against a marine of one of his Majesty's ships, upon an affidavit of the prisoner, disclosing circumstances, from which the Court might be induced to think that he would not have an impartial trial at the Sessions: the Court granted it, although it appeared that the Court below, by their charter, had authority to try for murder, and although at first a difficulty suggested itself as to whether, supposing the defendant to be convicted at the assizes, the judge at *nisi prius* there had authority to pass sentence of death upon him. *R.* v. *Thomas*, 4 *M. & S.* 442. And where the Attorney General, on the part of the crown, moved for a certiorari for the defendants, to remove an indictment against an officer of excise, who with two others was indicted for a riot and assault at the Dover Sessions: the Court immediately granted it, without requiring any affidavit in support of the motion. *R.* v. *Stannard*, 4 *T. R.* 161. *and see ante*, *p.* 35. But in ordinary cases, where the motion is not made on the part of the crown, the Court will not grant a cer-

tiorari to remove an indictment against several defendants for a misdemeanor, unless they all concur in the application; and it seems that a consent by counsel is not sufficient, unless supported by an affidavit of such consent by the defendants themselves. *R.* v. *Hunt*, 2 *Chit. R.* 130. But the Court have refused a certiorari to remove an indictment, after verdict and before judgment, where the application was made by the defendant, in order that he might afterwards move the Court of King's Bench in arrest of judgment; the Court saying that he might have redress by writ of error after judgment, if he were advised that the record was erroneous. *R.* v. *Jackson*, 6 *T. R.* 145. So, where an indictment for the non-repair of a bridge was tried on the crown side at the assizes, and the defendants convicted, they moved for a certiorari to remove the record into the Court of King's Bench, in order that they might move for a new trial: but the Court refused it, Lord Ellenborough, C. J. saying, "I would not have the notion for a moment entertained, that we have the power of entering into the merits of verdicts, and granting new trials, in proceedings before inferior jurisdictions." *R.* v. *Inhabitants of Oxfordshire*, 13 *East*, 411. So, where an indictment for an offence punishable by fine only, was removed by certiorari from Sessions by the prosecutor, after verdict and before judgment, the Court sent it back by *procedendo*, holding that as the offence was punishable by fine, and they knew nothing of the circumstances of the case so as to be able to apportion the fine, they could not pass judgment upon the defendant. *R.* v. *Nichols*, 13 *East*, 412, *n.* 2 *Str.* 1227. So where an indictment at Sessions for an assault, was removed by certiorari, after the defendants had confessed the offence in the Court below, the Court sent the record back by *procedendo*, although it was sworn on the part of the prosecutor that several of the justices were near relations of the defendants. *R.* v. *Gwynne and others*, 2 *Burr.* 749. So, where a certiorari to remove from the Sessions an indictment for not repairing a road, was not served on the proper officer there until after verdict and judgment, although issued before: the Court of King's Bench upon application quashed the writ; and Lord Kenyon C. J. said, "in the case of summary proceedings, orders and convictions before magistrates, the proceedings may be removed by certiorari after judgment, because such proceedings can only be removed by certiorari; but where a judgment has been given upon an indictment, the record must be removed by writ of error." *R.* v. *Inhabitants of Seton*, 7 *T. R.* 373. And where an indictment for not repairing a bridge was found at Sessions, and after verdict and judgment against the defendants, an application was made for a certiorari to remove it, for the purpose of taking objections to it: the Court refused the writ, saying that the defendants, after taking their chance of succeeding at Sessions, were then too late

to apply for the certiorari; if they wished to take objections to the indictment, they might do so upon a writ of error. *R.* v. *Inhabitants of Penmegoes and Mackynlleth*, 1 *B.* & *C.* 142.

Summary convictions by magistrates may be removed by certiorari into the Court of King's Bench, for the purpose of moving that Court to quash them, for errors appearing upon the face of them. But as the Court are to judge of the validity of a conviction, thus removed before them, from what appears upon the face of it, and not from any extraneous facts alleged in order to support or quash it, *R.* v. *Liston*, 5 *T. R.* 338, they will not grant the rule for the certiorari, unless it be shewn to them that the alleged defect appears upon the face of the conviction, even in a case where there is no appeal, and no other mode of having the decision of the justices reviewed, except by certiorari. *R.* v. *Justices of Cashiobury*, 3 *D.* & *R.* 35. Where an application was made for a certiorari to remove a conviction, which, on the face of it, appeared to be for a common assault, but it was alleged to be in fact for an assault with intent to commit a felony, which by 9 G. 4, c. 31, s. 29, was not an offence within the jurisdiction of the justices; the Court refused the writ; and Lord Tenterden, C. J. said, that "the conviction here shews a jurisdiction upon the face of it, and I should feel great difficulty, in any such case, in granting the writ;" but the circumstances mentioned in the deposition before the convicting magistrates, even if believed by them, did not prove clearly an intention to commit a felony; and as the 29th section made the magistrates the judges whether such an attempt was proved or not, and they had negatived it by their conviction, the Court, even taking these circumstances into consideration, thought they would not be warranted in granting the defendant the rule for the certiorari. *Anon.* 1 *B.* & *Ad.* 382. Bayley, J. however, is reported to have granted a certiorari, to remove a conviction for selling by other than the Winchester bushel, on the ground of the vendee having been rejected as an incompetent witness by the justices. *R.* v. ——, 2 *Chitt. R.* 137. But even in cases when the Court may grant the writ, the party is not entitled to it *ex debito justitiæ*, but the Court may grant it or not in their discretion; in the exercise of that discretion, the Court will always grant the writ, if there be a probable ground that injustice has been done below, in order that the conviction being removed, the Court may have an opportunity of reviewing it; but they will not do so, for the purpose of enabling the parties to litigate any probable cause, particularly if they be satisfied that upon the whole the magistrates have come to a right conclusion. *R.* v. *Bass*, 5 *T. R.* 251. The certiorari, however, may be awarded after appeal to the Sessions against the conviction has been determined, (*See R.* v. *Jukes*, 8 *T. R.* 625,) as well as before; if the Sessions on appeal

have confirmed it, and it be bad on the face of it, the defendant may still have it brought before the Court of King's Bench by certiorari, and quashed; *R.* v. *Jukes, supra;* but if the Sessions have quashed it, as in that case it will not appear on the face of the order of the Sessions but that the Sessions have quashed the conviction upon the merits, the prosecutor has no remedy, unless the Sessions have merely quashed it subject to a case for the opinion of the Court; if indeed a case be granted, the order of Sessions and case may then be removed by certiorari, and the opinion of the Court taken upon them; and if the Court thereupon quash the order of Sessions, it will have the effect of setting up the conviction, which may then be enforced. *See R.* v. *Allen*, 15 *East*, 333. The Court however will not grant a certiorari to remove a conviction, pending an appeal against it: and therefore where the defendant, who was committed by a justice until the Sessions as a vagrant, against which he appealed; and pending that appeal, he obtained a certiorari to remove the proceedings which were had before the justice, in order to have them quashed: the Court, upon application, and an affidavit of the facts, quashed the certiorari, saying that it ought not to have issued pending the appeal. *R.* v. *Sparrow and Urquhart*, 2 *T. R.* 196, *n.* Where the conviction has been removed by certiorari, and confirmed by the Court of King's Bench, that Court will then, upon application, send the conviction back to the justices by procedendo, in order that they may enforce it by warrant of distress or otherwise. *R.* v. *Neville*, 2 *B. & Adolph.* 299.

So all orders of justices, at or out of Sessions, may be brought before the Court of King's Bench by certiorari, and there quashed, if they appear to be bad upon the face of them. The reader will find a great variety of these cases, among the cases as to the relief of children by parents, and as to orders of removal, collected in 2 *Arch. Poor Law, pl.* 1—160. Where an order of filiation was appealed against, and the appeal dismissed on the ground that it had not been made to the next Sessions after service: the order being afterwards removed into the Court of King's Bench by certiorari, was there quashed upon motion, for a defect appearing upon the face of it. *R.* v. *Stanley, Cald.* 172. If the justices appear to have jurisdiction, the Court will only look to the order itself; and if that be good upon the face of it, they will not enter into any examination of the facts or reasons upon which the order is founded, *R.* v. *St. James, Westminster*, 2 *B. & Ad.* 241, unless in the case of an order of Sessions made subject to a special case. And therefore where, upon the hearing of an appeal, the Court being equally divided, they adjourned the appeal to the next Sessions; but the appellants in the meantime moved for a certiorari to remove the

order of adjournment and the order of removal, on the ground that one of the magistrates, who voted for the respondents, was a rated inhabitant of the respondent parish, and that the Sessions, therefore, instead of adjourning the appeal, should have quashed the order of removal: the Court held, that as there was nothing on the face of the order of adjournment to impeach it, they had no jurisdiction as a court of error to review it; and they accordingly refused the writ. *R.* v. *Justices of Monmouthshire*, 8 *B.* & *C.* 137. Where also it appears clearly to the Court that substantial justice had been done by the order, the Court will seldom grant a certiorari to remove it, to let in a mere formal objection to it, having no reference to the merits of the case. *R.* v. *Justices of Denbighshire*, 1 *B.* & *Adolph.* 616. And where the party complaining of an order, is in custody under it, his proper remedy is by habeas corpus, and not certiorari; for upon the former writ, not only will the validity of the order be determined, but the party will also be discharged out of custody if the order be bad. *Per Lord Kenyon, C. J. in R.* v. *Bowen*, 5 *T. R.* 158, 156. If the Sessions upon appeal quash or confirm an order of justices, and both orders are brought before the Court of King's Bench by certiorari: there, if the order of justices be bad upon the face of it, and the order of Sessions confirm it, the Court will quash both orders; if the order of Sessions quash it, the Court will intend that it was quashed for defect of form, and will confirm the order of Sessions: but if the order of justices be good upon the face of it, then if the Sessions confirm it, the Court of course will confirm the order of Sessions; or if the Sessions quash it, the Court will intend that it was quashed upon the merits, and confirm the order of Sessions. *South Cadbury* v. *Braddon*, 2 *Salk.* 607. *Set.* & *Rem.* 172. 2 *Arch. P. L. pl.* 214. It may be necessary to mention, that where an order of Sessions is made, subject to a case, the certiorari (if not taken away by statute) is granted as a matter of course, where it is applied for in proper time, &c.

The application for a certiorari must be made within six calendar months after the proceeding had, which is sought to be removed by it. For by stat. 13 G. 2, c. 18, s. 5, for the better preventing vexatious delays and expense, occasioned by the suing forth of writs of certiorari for the removal of "convictions, judgments, orders and other proceedings before justices of the peace," it is enacted that "no writ of certiorari shall be granted, issued forth or allowed, to remove any conviction, judgment, order or other proceedings, had or made by or before any justice or justices of the peace of any county, city, borough, town corporate or liberty, or the respective General or Quarter Sessions thereof, unless such certiorari be moved and applied for within six calendar months next after such conviction, judgment, order or other proceedings shall be so had or made." The words,

"other proceedings" in this Act, must be deemed to mean proceedings *ejusdem generis* with those immediately preceding them in the same sentence; and therefore the Act does not apply to indictments. *Per Lord Kenyon, C. J., in R. v. Battams*, 1 *East*, 304, 298. But in the case of indictments, we have seen that the certiorari must be sued out and served before verdict; *ante*, p. 38; and in misdemeanors, it must be delivered before the jury is sworn, otherwise the trial shall proceed. 60 *Geo.* 3, *c.* 4, *s.* 3, 5. By the 4th section of this latter statute, in the case of an indictment for a misdemeanor, a writ of certiorari "may be applied for and issued before such indictment has been found, in the like cases, in the same manner, and upon the same terms and conditions, as if such writ of certiorari had been applied for after such indictment had been found." The Act contains a proviso (s. 10,) that nothing in it shall extend to any prosecution for the repair of a highway; but at common law, the writ of certiorari removed all such records as were described in it, which were *in esse* at any time before the return of it, although not so at the time it was sued out. 2 *Hawk. c.* 27, *s.* 73. A certiorari to remove a conviction must be moved for within six calendar months from the date of it. *R. v. Boughey*, 4 *T. R.* 281. But if the conviction be appealed against, and quashed or confirmed, subject to a case, the certiorari in that case may be sued out at any time within six months from the date of the order of Sessions; but the statute being peremptory in requiring the application to be made within six months, it precludes the Court from extending the time by any indulgence to the parties. *R. v. Bloxham*, 1 *Ad. & E.* 386. So a certiorari to remove an order of Sessions, must be applied for within six calendar months from the making of the order, otherwise it cannot be granted; even where the order was made subject to a special case, and the party intending to sue out the certiorari had been prevented from applying within the six months, by reason of his opponent not having settled the case, the Court refused afterwards to award the certiorari. *R. v. Justices of Sussex*, 1 *M. & S.* 734. So, the Court refused a certiorari to remove an order of bastardy, because it was not made within the six months. *R. v. Howlet*, 1 *Wils.* 35. But the crown is not bound by this statute; and therefore, where the Attorney General applied for a certiorari to remove a conviction, the Court granted it to him, although more than six months from the date of the conviction had elapsed. *R. v. James*, 1 *East*, 303, *n. R. v. Berkley*, 1 *Ld. Ken.* 80.

Also, by the same statute, 13 G. 2, c. 18, s. 5, no writ of certiorari shall be granted or issued, to remove any conviction, judgment, order or other proceedings had or made by or before any justice or justices of the peace or General or Quarter Sessions, "unless it be duly proved upon oath that the party or

parties suing forth the same hath or have given six days' notice thereof in writing to the justice or justices, or to two of them (if so many there be) by and before whom such conviction, judgment, order, or other proceeding shall be so had or made, to the end that such justice or justices, or the parties therein concerned, may shew cause, if he or they shall so think fit, against the issuing or granting such certiorari." This statute, as has been already (p. 42) mentioned, does not extend to indictments; and therefore a certiorari to remove an indictment from the Sessions, may be applied for, without previously giving any notice to the justices. *R.* v. *Battams*, 1 *East*, 298. Nor is the crown bound by it; (*ante*, p. 42); and therefore the Attorney General, applying upon the part of the crown, may obtain a certiorari to remove a conviction, &c. although no notice of the application be given to the justices. But in all other cases, the notice must be given, otherwise the Court cannot grant the certiorari; even where an order of Sessions was made, subject to a case, and the case was settled by the justices, the Court refused a certiorari to remove it, as the required notice had not been given, saying that the statute in this respect was imperative. *R.* v. *Justices of Sussex*, 1 *M. & S.* 631. And if the certiorari be sued out, without giving any notice or sufficient notice, the Court, upon motion, will quash the writ. *R.* v. *Nicholls*, 5 *T. R.* 281, *n.* The notice must be given six days before the rule nisi is moved for, *R.* v. *Justices of Glamorganshire*, 5 *T. R.* 279, one day inclusive, the other exclusive; *R.* v. *Goodenough and others*, 2 *Ad. & E.* 463; and where the notice was, of an intention to move "on the first day of next Hilary term, or as soon afterwards as I can be heard," and it was served on the first day of term, but the motion was not actually made until after six days from the day of service, the Court held it to be insufficient, and refused to grant the certiorari. *Re Flounders*, 4 *B. & Adolph.* 865. Where the party intending to sue out the writ, made an affidavit in support of the rule, but the notice, which was signed "Lace, Miller, & Lace, attornies," made no mention of the party's name, the Court held it to be insufficient; for it might be material to the justices to know at whose instance the motion was intended to be made. *R.* v. *JJ. of Lancashire*, 4 *B. & Ald.* 289. So, where the notice was of a motion on behalf of the churchwardens and overseers of the poor of the parish of S. and it was signed by one of the churchwardens only, the Court held it to be insufficient, as it should have been signed by all. *R.* v. *JJ. of Cambridgeshire*, 3 *B. & Adolph.* 867. Where a rule was obtained by A. for a certiorari to remove an order of justices for diverting a highway and turning the new line of road through the lands of B., and also to remove an order of Sessions confirming and enrolling the same, the regular notice being given to the justices; and A. afterwards abandoned the proceeding; and B. then took it up, and moved that he might be

at liberty to sue out the writ: the Court held that it could not be done; the writ must be sued out by the party who has given the notice. *R.* v. *JJ. of Kent*, 3 *B. & Adolph.* 250.

The application is by motion for a rule nisi, upon an affidavit stating the grounds of it; which affidavit must not be entitled in any cause, for there is no cause then in Court, nor can it be read if so entitled. *Ex parte Nohro*, 1 *B. & C.* 267. Where the Attorney General however moves on the part of the crown, it is usual to grant the rule absolute in the first instance. So, where an order of Sessions, made subject to a case, is to be removed, the practice, I believe, is to draw up the rule absolute upon a motion paper merely signed by counsel. In the case of an application, by a party indicted, to remove an indictment for a misdemeanor from Sessions, it must be made to the Court of King's Bench by counsel in term time, or to a judge of that Court in vacation; 5 & 6 *W. & M. c.* 11, *s.* 2 & 4; and the practice is the same in other cases.

As to the recognizances required upon the removal of indictments or presentments from Sessions: It is enacted by stat. 5 & 6 *W.* 4, *c.* 33, that "every person indicted or presented in any Court of Session, assize, oyer and terminer, gaol delivery, or any other Court, who shall obtain a writ of certiorari for removing any indictment or presentment whatever into the Court of King's Bench, (not being in custody for want of bail to answer such indictment or presentment) shall, before the allowance of such writ, enter into a recognizance before one of his Majesty's justices of the Court of King's Bench, or before a justice of the peace of the county or place in which the offence is charged to have been committed, or in which such person shall reside, in such sum and with such sureties as the said Court of King's Bench or one of his Majesty's justices of the said Court shall, by indorsement on the said writ, order and direct." The condition of the recognizance must be the same as is required by stat. 5 & 6 *W. & M. c.* 11. *s.* 2, and stat. 8 & 9 *W.* 3, *c.* 33, *s.* 2. If the recognizance be given, it shall be certified to the Court of King's Bench, together with the certiorari and indictment; if not given, the Sessions may proceed to trial upon the indictment. 5 & 6 *W. & M. c.* 11, *s.* 2. And if the defendant be convicted, the prosecutor, if he be the party grieved, or a justice or officer whom it may concern as such to prosecute, shall be entitled to his costs from the defendant, to be recovered by attachment. 5 & 6 *W. & M. c.* 11, *s.* 3. *See the cases upon this latter section as to costs.* 1 *Burn, D. & W.* 545—549. 2 *B. & Adolph.* 287. 5 *Id.* 405. 1 *Ad. & E.* 603.

As to the recognizances required upon the removal of convictions, orders, &c.: By stat. 5 *Geo.* 2, *c.* 19, after making (*in sect.* 1) provision for the amendment of such judgments and orders as his Majesty's justices of the peace are by law empowered to give or make, it is enacted by sect 2, that no certiorari shall be al-

lowed to remove any such judgment or order, unless the party or parties prosecuting such certiorari, before the allowance thereof, shall enter into a recognizance with sufficient sureties, before one or more justice or justices of the peace of the county or place, or before the justices at their General Quarter Sessions or General Sessions, where such judgment or order shall have been given or made, or before any one of his Majesty's justices of the said Court of King's Bench, in the sum of £50, with condition to prosecute the same at his or their own costs and charges with effect, without any wilful or affected delay, and to pay the party or parties, in whose favour and for whose benefit such judgment or order was given or made, within one month after the said judgment or order shall be confirmed, their full costs and charges, to be taxed according to the course of the Court where such judgments or orders shall be confirmed." The word "judgment" here, includes convictions. If no recognizance be entered into, the justice may proceed and make such further order as if no certiorari had issued. *Id.* (*See the form of the recognizance, Arch. on Convictions*, 114.) By sect. 3, the recognizance shall be certified to the Court of King's Bench, with the certiorari and order, &c., and the party entitled to his costs may have his remedy there for the same by attachment. Where the sureties entered into a recognizance in £25 each, the Court held it to be insufficient; it should be for one entire sum of £50. *R.* v. *Dunn*, 8 *T. R.* 217. The party suing out the certiorari must also join in the recognizance. *R.* v. *Boughey*, 4 *T. R.* 281.

As to the return, if the writ be to remove an indictment or other matter from Sessions, in which case it is directed to the justices generally, it is returned by the chairman of the Sessions; if it be to remove a conviction or order made by magistrates out of Sessions, and of course directed to them individually, the return must be made by them. And in the latter case, if the magistrate have already transmitted the conviction to the Sessions, he may state that fact in his return, and certify a copy of it. *R.* v. *Eaton*, 2 *T. R.* 285. A conviction may be returned by a magistrate in a more formal shape than that in which it was first drawn; *R.* v. *Barker*, 1 *East*, 186; an order cannot. *R.* v. *JJ. of Cheshire*, 5 *B. & Adolph.* 439.

The return is thus made: first indorse upon the writ these words: "*The execution of this writ appears in a certain schedule to this writ annexed. The answer of R. B. esquire,*" [and if this writ be to the Sessions, add: "*and the justices assigned to keep the peace in and for the county of* ——"]. Then write a schedule on parchment, in this form: "*County of* ——, *to wit: I, R. B. esquire,* [*chairman of the Quarter Sessions of the Peace for the said county of* ——, *and*] *one of the justices of our sovereign lord the King assigned to keep the peace in and for the said county, and also to hear and determine divers felonies, trespasses and mis-*

demeanors in the said county committed, by virtue of this writ to me delivered, do under my seal [for myself and other the justices assigned to keep the peace in and for the said county,] humbly certify unto his Majesty, in his Court of King's Bench, the [indictment] of which mention is made in the said writ, together with all things touching the same. Given at ——, in the said county, the —— day of ——, in the —— year of the reign of King William the Fourth. R. B." [seal].

Then make out the record of the indictment, together with the caption, as directed *ante*, p. 31, or the conviction or order, &c. as the case may require, upon parchment; inclose in it the schedule, and annex them to the writ; then transmit them and the recognizance to the Crown Office of the Court of King's Bench.

Special Case.] Where the justices at Sessions are by law made justices of facts as well as of law, as in appeals, their decision is final, and cannot be reviewed by any Court whatever, without their consent. If, however, they feel a difficulty in the application of the law to facts in any particular case, they may put those facts into a special case for the opinion of the Court of King's Bench, and confirm or quash the order or conviction before them, subject to such opinion; and the Court of King's Bench will thereupon confirm or quash the order of Sessions and the order or conviction appealed against, according as they are warranted by the facts stated. But it is perfectly optional with the Sessions, whether they will thus state a special case or not; neither the parties, nor even the Court of King's Bench itself, can compel them to do so. Where, upon the hearing of an appeal against an order of removal at Sessions, it appeared that the father of the pauper, settled at Oulton, lived there with his wife and children, and died there; the widow, with the children, then went to reside in a copyhold messuage and lands which she had in Burnham Overy, and dwelt in the house, and continued there for three months, when she sold the property; the children, afterwards becoming chargeable to a third parish, were removed to Oulton, as their last place of settlement, and Oulton appealed. At the hearing of the appeal, it was argued for the appellants, that, as the mother gained a settlement in Burnham by a residence upon her estate, her children, living with her and unemancipated, gained a derivative settlement there also; but the Sessions, being of a different opinion, confirmed the order, and refused to state a case; whereupon the counsel for the appellants tendered exceptions in the nature of a bill of exceptions, and the orders and these exceptions were afterwards removed into the Court of King's Bench by certiorari: but because the facts of the case did not appear, otherwise than in the exceptions, which could only be deemed the suggestions of counsel, that Court could not interfere. An application was then made for a rule upon the

clerk of the peace, to embody the facts of the case in the order of Sessions; but the Court refused it, and said that, although the Sessions had come to a wrong decision, there was no mode of compelling them to state a case, nor any other mode of bringing the facts before the superior Court, to have that decision reviewed and altered. *Rex* v. *Oulton*, *Burr. S.C.* 64. In one case, indeed, where an order of removal, and an order of Sessions confirming it, were removed into the Court of King's Bench, that Court directed the justices at Sessions to inquire into a particular fact which appeared doubtful upon the face of the order of removal, and that they should examine witnesses upon the subject; which being done, and the fact reported by the Sessions, the Court quashed both the orders. *R.* v. *Margam*, 1 *T. R.* 775. But this is, I believe, the only instance in which the Sessions have been compelled to inquire of, and state facts relative to, a matter which had already been under their consideration, and decided upon by them. Where, indeed, the Sessions grant a case, and that from circumstances afterwards becomes nugatory, and the case is not settled, the Court of King's Bench will, in some cases, interfere, and grant a mandamus to the Sessions to state the case. Thus, where upon the hearing of an appeal between two parishes, the Sessions (consisting of seven justices) confirmed the order, and, upon the application of the appellants, granted a special case; at the latter part of the Sessions, when only three magistrates were present, the counsel on both sides tendered a case for their approbation, and two of the three then refused to permit the case to be stated: an application was thereupon made to the Court of King's Bench for a mandamus to the justices at Sessions, requiring them to state the special case; and the Court, after argument, awarded the mandamus, and said that, if there were any doubt or difference about the facts, the justices should re-examine the witnesses, to enable them to state the case. *R.* v. *Earl of Effingham and others*, 2 *B. & Adolph.* 393. But where, upon the trial of an appeal against an order of removal, the Sessions confirmed the order, subject to a case, generally, without specifying as to any particular point; the attornies, not being able to agree upon the case, applied to the chairman, who declared that the Court were of opinion that certain alleged facts, upon which it was intended to raise the point in the case for the consideration of the Court, did not exist, and he refused to sign any case which would state those facts: the appellant therefore applied to the Court of King's Bench for a mandamus to the justices, requiring them to state a case; but the Court, although they admitted that there might be cases in which they would grant such a mandamus, refused to do so in this instance, under the circumstances. *R.* v. *JJ. of Pembrokeshire*, 2 *B. & Adolph.* 391.

I think it may be laid down as a general rule, that in all cases

of appeals to the Sessions, that Court may grant a special case, if they think fit to do so. This is a common and ordinary practice upon the trial of appeals against orders of removal, poor-rates, &c.; and where, upon an appeal against a conviction, the Sessions quashed it, subject to a special case for the opinion of the Court of King's Bench, and it was argued, in the latter Court, that no case could be reserved at Sessions upon a conviction: the Court held that it might, and that such had been the practice. *R.* v. *Allen*, 15 *East*, 343, 333. A case, however, cannot be reserved upon the trial of an indictment or presentment. And where, upon the trial of a presentment of a bridge, as being out of repair, the jury at Sessions found the defendants guilty, subject to the opinion of the Court of King's Bench upon a case; the record and case being thereupon removed by certiorari, the case coming on to be argued, Lord Ellenborough, C.J. said, "It is quite a new thing that a case should be reserved upon the trial of an indictment by a jury at the Sessions; it is a very great irregularity, and ought to be noticed, in order to prevent the repetition of it; we shall take no notice of the case reserved." His lordship was then informed that it had been done by the consent of both parties, as the readiest means of taking the opinion of the Court upon the point of law intended to be raised. But Lord Ellenborough merely said, "The indictment is well removed by the certiorari; but we shall take no notice of the case; we shall leave the matter as it is, and pronounce no judgment upon it." *R.* v. *Inhabitants of Salop*, 13 *East*, 95.

The facility with which these cases are granted, varies very much in different Courts of Quarter Sessions: in some, they hesitate not to grant it upon almost every occasion, when they are asked by counsel to do so; in others, they refuse it in almost every instance. Both extremes are bad. Granting it upon occasions where the facts raise no point of real difficulty or doubt, is worse than useless: it puts the litigating parties to a great unnecessary expense; it encumbers the crown paper of the Court of King's Bench with cases, which often scarcely admit of argument; it gives a great deal of unnecessary trouble to the judges of that Court; and impedes the progress of other business there, of infinitely more importance. On the other hand, refusing it where it ought to be granted,—refusing it where the facts raise a new and difficult point of law, or a point which is doubtful, owing to conflicting decisions upon the subject, or otherwise,—is very like a denial of justice to one at least of the litigating parties, and is a serious detriment to the administration of justice, in such cases, in the other Courts of Quarter Sessions throughout the kingdom; for the decisions of the Court of King's Bench upon difficult points of Sessions' law, being widely diffused throughout the kingdom by means of the Reports, they become known to, and are guides and precedents for, all the Courts of Quarter Ses-

sions in the kingdom, and thereby create an uniformity of decision in those Courts upon the points so decided and reported, which is extremely desirable.

The great thing to be attended to in drawing a special case, is, to state facts, and not merely the evidence from which facts are to be inferred. In most instances, facts are proved by express evidence; in some, they are to be implied from circumstantial evidence; and, in these latter cases, it is the fact which is to be so implied, which must be stated, and not the circumstances from which it is to be implied. See *R.* v. *Bray, Burr. S. C.* 682; *R.* v. *Page*, 2 *Bott*, 736. Where a special case stated that the pauper's husband hired himself as waiter to a tavern, and at the same time had the tap, (that is, a privilege of selling liquors there,) and had the use of a cellar for his liquors, and that for his place of waiter, and the tap, &c. he paid the yearly sum of £60: it was argued, that as the hiring as waiter appeared to have been general, the Court would presume it to be a hiring for a year; but the Court held, that, as the Sessions had not found it to be a hiring for a year, they could not presume it to be so. *R.* v. *Seacroft*, 2 *M. & S.* 472. Where a servant left her mistress before the end of a year, and what passed between them upon that occasion was stated in the special case, but it was not stated whether there was a dissolution of the contract or a dispensation only: the case, on this account, was sent back to the Sessions to be restated; Lord Kenyon, C.J. expressing his regret that "the Courts of Quarter Sessions departed from the rule formerly established, by stating evidence instead of facts in the special case;" and Grose, J. said, "the Court of Quarter Sessions should state the result of the evidence; and, in a case of this kind, they should state the fact one way or the other, whether this were a dispensation with the service, or a dissolution of the contract." *R.* v. *St. Peter Mancroft*, 8 *T. R.* 477. So, where a Session's case stated, that in 1774 the pauper's father was put apprentice by the parish officers of Ditcheat, with the assent of two justices, to one Powell, a farmer in that parish, "for and in respect of Mr. Wm. Wilmot his estate," and there was a covenant by Powell to teach him the farming business; Powell was tenant of a farm in Ditcheat, belonging to Wilmot, who was a stocking-maker, and the indenture was, in fact, executed by Wilmot, but the case did not state that it was executed by Powell; the apprentice never, in fact, served Powell, but served Wilmot, in the parish of St. Cuthbert, as a stocking-weaver. It was contended, that this was a binding to Powell, with intent that the pauper should serve Wilmot; and that, after the lapse of time since the binding and service, it ought to be presumed that Powell either assigned the apprentice to the latter, or assented to his serving him: but the Court held, that these ought to have been found as facts by the Sessions; and as it was not found that Powell had either assigned

the indentures to Wilmot, or assented to the apprentice serving him, it did not appear from the case that the pauper's father gained any settlement by a service under the indenture. *R.* v. *St. Cuthbert, Wells*, 5 *B.* & *Adolph.* 939. So, the Court will not presume fraud, from any circumstances whatever which may be stated in a Session's case; it must be found specifically by the Sessions. Where a pauper, after being removed under an order of removal, returned the same night to the tenement he had occupied at the time of his arrival, and afterwards resided there a sufficient time to gain a settlement: it was objected, that the pauper's return was fraudulent, and, therefore, that he gained no settlement; but the Court held, that they could not presume fraud, it must be stated. *R.* v. *Fillongley*, 2 *T. R.* 709. So, where in a Session's case it appeared that the pauper hired for a year, and served until within six days of the end of the year, when two substantial inhabitants of the parish (who were afterwards reimbursed by the parish officers) gave him two guineas to leave his service and the parish, before his year expired, and he accordingly applied for, and got his discharge from, his master, who paid him his wages, deducting a portion for the time he had not served: but, because fraud was not specifically found by the Sessions, the Court would not imply it from the facts found; and, as it appeared that the pauper had not actually served a year, the Court held that he had not gained a settlement. *R.* v. *Preston*, 2 *Bott*, 310. Where a Session's case stated facts relating to the taking of a tenement by a pauper, from which fraud might fairly be inferred, and the Sessions were therein stated to have holden, that, "under these circumstances," the pauper gained no settlement; the Court held, that, as the Sessions had not expressly found this renting of the tenement to have been fraudulent, they could not presume it to be so, and they therefore held that the pauper gained a settlement, and they quashed the order of Sessions. *R.* v. *Weston*, *Burr. S. C.* 166; 2 *Str.* 1156. Where from a Session's case it appeared that the pauper, settled in Tillingham, rented a tenement in Bradwell, and, being unable to pay his year's rent, the overseers of Tillingham lent him money for that purpose: the Court said, that they could not hold this to be fraudulent, as fraud had not been expressly found by the Sessions; if the overseer had advanced this money merely for the purpose of relieving the pauper, there was no fraud in the case; if for the purpose of his gaining a settlement in Bradwell, there was; the Court therefore sent the case back to the Sessions, to find the fact one way or the other. *R.* v. *Tillingham*, 1 *B.* & *Adolph.* 180. Where, in a similar case, the Sessions found payment of rent by overseers to have been fraudulent, the Court held, that no settlement was gained by it. *R.* v. *St. Sepulchre, Cambridge*, 1 *B.* & *Adolph.* 924. Where the Sessions, in a case, after stating the renting of a tenement by the

pauper, and the circumstances attending it, stated that it was fraudulent, but that the parish was not privy to the fraud: the Court held, that, as the Sessions had stated the renting to be fraudulent, that finding was conclusive. *R.* v. *Llanwinio*, 4 *T. R.* 473. Whether such a finding by the Sessions, be conclusive or not of the fact of fraud, came in question in *R.* v. *Woodland*, 1 *T. R.* 261; but the Court then said that it was unnecessary, in that particular case, to consider the point, as they were of opinion that the Sessions were right in finding fraud, under the particular circumstances of the case. But in a subsequent case, where it was stated that the pauper's husband, who was settled in the parish of Great Glenn, took a house in the parish of Leir, as tenant from year to year, at the yearly rent of £3, and resided there with the pauper from April, 1827, until the 14th May, 1831, when he died; she resided in the house afterwards, and was relieved by the parish of Great Glenn; in the August following the husband's death, the attorney for the parish of Great Glenn called upon the pauper, and offered to take out letters of administration for her to her husband, and did take them out afterwards, and it was stated in the case that this was done fraudulently, and at the expense of the parish of Great Glenn, for the purpose of settling the pauper in the parish of Leir: the Court held, that although the Sessions had found fraud, yet, as they had also stated the grounds upon which they found it, the Court could examine and see whether those grounds warranted the finding; and, in considering the facts stated, they did not think they amounted to that species of fraud which would prevent the estate of the intestate from vesting in the pauper as administratrix, as she was bound by law to take out administration, and consented to its being done; they therefore held, that she gained a settlement. *R.* v. *Great Glenn*, 5 *B. & Adolph.* 188. But where the Sessions, in a case, state their own conclusion of fact from doubtful facts and circumstances which may or may not warrant them, the Court will not in general disturb their decision. And therefore where, upon the trial of an appeal against an order of removal, the respondents set up a settlement in the appellant parish by hiring and service, and the Sessions confirmed the order, subject to a case, which stated a very doubtful case of settlement: the Court of King's Bench held, that, as the Sessions, by confirming the order, had virtually found that there was a contract of hiring for a year, and a service for a year, and as there were premises to warrant that decision, the Court would not disturb it; it was entirely a question of fact for the Sessions to decide. *R.* v. *St. Andrew, Cambridge*, 8 *B. & C.* 664. So, where it was stated in a case that the pauper's mother, wishing to obtain a service for her son, asked one Slater if he wanted a boy, and, upon his answering yes, she asked him what wages he would give, and he said, "let him stop what time he will, I will give him satisfaction, if not in

money, in clothes;" the pauper accordingly went into the service, and stopped 13 months, when he ran away on account of his master beating him: the Sessions found there was no general hiring; and as there were some facts in the case, from which such a conclusion might be drawn, the Court of King's Bench refused to disturb the decision. *R.* v. *Rosliston*, 8 *B.* & *C.* 668. So, where the Sessions found an implied hiring for a year, from facts (stated in a case) which warranted such a conclusion, the Court of King's Bench said, that as it was a question of fact for the justices to decide, and as they had exercised their judgment upon it, they would not disturb their decision. *R.* v. *St. Martin in Leicester*, 8 *B.* & *C.* 674.

The special case may be in this form:

Between { *The township of* A. *in the county of* B. *Appellants, and The township of* C. *in the same county, Respondents.*

This was an appeal against [*an order of two justices for the removal of* D. E., *and Anne, his wife, from the township of* C. *in the county of* B. *to the township of* A. *in the same county, as the place of their last legal settlement.*] *The appeal was tried at the Michaelmas Quarter Sessions for the county of* B., *when that Court confirmed the said* [*order*], *subject to the opinion of the Court of King's Bench on the following*

CASE.

[Here state the facts of the case, as proved at the trial of the appeal. And you may conclude thus:]

If the Court shall be of opinion that the pauper D. E. *gained a settlement in the township of* A., *by the hiring and service aforesaid, then the orders aforesaid shall stand confirmed; but if the Court shall be of a contrary opinion, then the order of removal aforesaid, and the order of Sessions confirming the same, shall be quashed.* [This of course must be varied as circumstances may require.]

J. N. *for the Appellants.*
J. S. *for the Respondents.*

If the case be insufficiently stated, the Court of King's Bench, if they see that it is necessary for the purposes of justice, will send it back to the Sessions to be restated. Although, according to modern practice, this is now unusual, it is entirely optional with the Court whether they will do so or not. Where, upon an appeal against an order of removal, the Sessions confirmed the order, subject to a case; the case however was so imperfectly stated, the Court would not give any opinion upon the point submitted to them, but ordered both orders to be quashed. *Burr. S. C.* 232. The reporter, indeed, questions the authority of the

Court to quash the orders on this ground, and suggests that they ought to have sent the case back to be re-stated. *Id. but see R.* v. *Seacraft, R.* v. *St. Cuthbert, and many of the cases of fraud, mentioned supra.* Where a Session's case stated that an indenture being produced by the appellant upon notice, they had ruled that the respondents were bound to prove it, and in default of their doing so it was not received; and the Court of King's Bench held, that it was not necessary, under the circumstances, for the respondents to prove it: it then became a question, whether the case should not be sent back to the Sessions to be restated; but the Court held, that if the indenture had been received in evidence, it was clear what the decision ought to be, and they decided accordingly. *R.* v. *Middlezoy*, 2 *T. R.* 41. Where, upon the hearing of an appeal, the Sessions granted a case, but the counsel not agreeing upon the facts, each submitted his statement to the chairman, that he might draw up a case from them and from his notes; a case purporting to be signed by the chairman was afterwards sent up with the orders, in return to the certiorari, but the attorney for one of the parties, conceiving it not to accord with the facts proved, applied to the chairman upon the subject, who stated that he had no recollection of having signed the case; but the clerk of the peace, on the contrary, made oath that the case sent up was a true copy of one which was signed by the chairman, the practice being to send up a copy and not the original: upon an application to the Court of King's Bench for a rule to have the case sent back to be restated, the Court refused it, saying, that as the case came before them with the signature and apparent authority of the chairman, they could not, without very strong grounds, presume it not to be his, and that the matter alleged was not sufficient to impeach it. *R.* v. *Matlock*, 5 *B. & Adolph.* 883.

When a case is sent back to be restated, it is sometimes necessary to examine witnesses again to enable the Court of Quarter Sessions to do so; sometimes the evidence already taken, as it appears upon the chairman's notes, will be sufficient for the purpose. Where a case was sent back to the Sessions to be restated, and at the following Sessions, when the matter came under the consideration of the justices, they refused to hear the witnesses again, although there were justices then on the bench who had not been on it when the appeal was heard; but the Court of King's Bench afterwards held, that under the circumstances of the case it was not necessary that they should do so. *R.* v. *Bray*, *Burr. S. C.* 682. But where, upon an appeal by a person, to whom a pauper child had been bound apprentice by a parish, the Sessions gave their decision subject to a case; and having stated evidence only, and not the conclusions to be drawn from that evidence, the Court sent it back to them to be restated in this respect, and also that it might be stated whether the defend-

ant was the occupier of certain tithes in his own right, or whether he was merely bailiff to another: the Sessions accordingly restated the case, but refused to hear evidence again; but the Court of King's Bench made an order that they should hear evidence as to the fact of the defendant being occupier. *R.* v. *Page*, 2 *Bott*, 736. Upon an appeal against a conviction, the Sessions quashed it, subject to a case; a certiorari was thereupon sued out by the respondents, and the proceedings and case brought up; but, upon argument, the Court ordered the case to be sent back to the Sessions to be restated: the Sessions then reheard the appeal, and confirmed the conviction, subject to a case; and at the following Sessions, upon application, they ordered that the case should be restated, and returned to the Court of King's Bench under the original certiorari. More than six months having elapsed since the appeal was reheard, and no new certiorari being sued out, the respondents moved for a procedendo; the appellant accounted for the delay, by saying that the respondents refused to agree to the stating of the case, but argued, that as the Court had sent the case back merely to be restated, the Sessions had no authority to make a new order, and that it was incumbent on the respondents to bring up the restated case under the original certiorari. But the Court held, that when a case is sent back to Sessions to be restated, that implies that the Sessions may rehear it, for it may be necessary that they should do so in order to restate the case; and if they rehear it, and reverse their former judgment, subject to a case, it is incumbent upon the party, against whom the decision is, to have these new proceedings and case brought before the Court by a new certiorari; and the stat. 13 G. 2, c. 18, s. 5, being peremptory in requiring this to be done within six months, it precluded the Court from extending the time by any indulgence to the parties; as the case, however, was not before them, they said they could not award a procedendo, but they discharged all the rules, thereby leaving the parties in the same situation as if there had been no appeal. *R.* v. *Bloxham*, 1 *Ad. & E.* 386.

Mandamus.] As the writ of mandamus, like a writ of certiorari, may be directed to the justices in Sessions, and also to the justices out of Sessions, I shall treat of it here generally, for the same reason that I have already treated generally of the writ of certiorari. *See ante*, *p.* 35, 36.

The writ of mandamus is a high prerogative writ, issuing from the Court of King's Bench, directed to the judges of inferior Courts of judicature, &c. alleging that complaint had been made of their refusal to do some certain act pertaining to their office, and commanding them in the King's name to do it, "or that you shew us cause to the contrary thereof, least in your default the same complaint should be repeated to us." It issues

from the Court of King's Bench, it being the peculiar business of that Court to superintend all inferior tribunals, and therein to enforce the true exercise of those judicial or ministerial powers with which the crown or legislature have invested them. 3 *Bl. Com.* 110. If therefore justices in Sessions, or out of Sessions, from a mistake of the law or otherwise, refuse to do some act, which by law they ought to do, the Court of King's Bench, upon application, will in the first instance grant a rule calling upon the justices to shew cause why a writ of mandamus should not issue; and if no sufficient cause be shewn, the rule is made absolute, and the writ issues accordingly, in the alternative in the first instance, that they should do the act required, or shew cause to the contrary; to which writ they are bound to make a return; and if that return be insufficient, a peremptory mandamus issues, which must be obeyed, and the Court of King's Bench will allow of no other return to it, except that what was commanded by the writ has been duly executed.

The Court of King's Bench have accordingly granted writs of mandamus to the justices at Sessions, to administer the oaths and declaration to a dissenting minister; *R.* v. *JJ. of Gloucestershire*, 15 *East*, 577; to justices out of Sessions, to swear overseers of the poor to their accounts; *R.* v. *JJ. of Middlesex*, 1 *Wils.* 125; to justices out of Sessions, to summon a person for not paying poor rates; *Anon.* 2 *Chit. R.* 257; to justices out of Sessions, to examine the mother of a bastard, and grant a summons against the putative father; *R.* v. *Martyr and Fulham*, 13 *East*, 55; to justices out of Sessions, to appoint overseers of the poor; *see R.* v. *JJ. of Bedfordshire*, *Cald.* 157. *R.* v. *JJ. of Peterborough*, *Id.* 238; to justices out of Sessions, to allow a poor rate; *R.* v. *JJ. of Dorchester*, 1 *Str.* 393, *and see R.* v. *Folly*, 1 *Bott*, 76; to the justices at Sessions, for Middlesex, as well as other counties, to award compensation to the sheriff in lieu of gaol fees, under stat. 55 G. 3, c. 50, s. 10, the Court holding that those justices had authority by the Act to do so; *R.* v. *JJ. of Middlesex*, 3 *B. & Adolph.* 100; to justices out of Sessions, to grant to overseers of the poor a warrant of distress against a former overseer, to levy the amount of certain items, disallowed in his accounts by the justices at Sessions; *R.* v. *Pascoe and others*, 2 *M. & S.* 343; to justices at Sessions, to allow a person on behalf of the rate payers to inspect and take copies of the two last county rates, and of all orders of Sessions for the expenditure of the same; *R.* v. *JJ. of Leicester*, 4 *B. & C.* 891; to justices at Sessions, to make up a record of the proceedings upon an indictment, in order to enable the defendant to plead auterfois convict to another indictment for the same offence. *R.* v. *JJ. of Middlesex*, 5 *B. & Ad.* 1113. But they have refused to award a mandamus to justices at Sessions, to proceed to a new election of a county treasurer, where it appeared that the election

which had already taken place was not void. *R.* v. *JJ. of Herefordshire*, 1 *Chit. R.* 700. They have refused to award a mandamus to justices out of Sessions, to order a rate to be levied to reimburse inhabitants of a borough certain damages and costs they had to pay in actions brought against them on stat. 57 G. 3, c. 19, s. 3, for damage done by rioters; first, because they thought that the inhabitants of a town were not within the statutes upon the subject, which entitled only the inhabitants of hundreds to be so reimbursed; and that even if they were, the application should have been made to the justices at Sessions, and not to justices out of Sessions. *R.* v. *JJ. of King's Lynn*, 3 *B. & C.* 147. So, they have refused a mandamus to county justices out of Sessions, requiring them to rate some parish in the county in aid of a parish in an adjoining borough, having an exclusive jurisdiction; because the county magistrates could not legally do so. *R.* v. *Holbeche and another*, 4 *T. R.* 778. So, they have refused a mandamus to a justice out of Sessions, to produce depositions taken before him on a charge of felony, for the purpose of founding an indictment for perjury against the deponents; the magistrate should be subpœnaed to produce them, and they might then be read in evidence before the grand jury. *R.* v. *JJ. of Bedford*, 1 *Chit. R.* 627.

So the Court will not in general direct a mandamus to justices, requiring them to do an act, which may probably subject them to an action, unless it appear very clearly that the act may legally be done. Where an application was made for a mandamus to magistrates, requiring them to grant a warrant of distress against a rector, as occupier of the tithes of a parish, for the amount of composition in lieu of statute duty, where it was doubtful whether a rector was properly chargeable for it: the Court refused it; and Abbott, C. J. said, "it is manifest that if we granted a mandamus commanding the justices to issue a warrant of distress, the rector would bring an action to try the validity of that which we had ordered to be done; I have always felt great reluctance to order any thing to be done by a magistrate, which may subject him to an action, of which the issue is doubtful; if the fear of an action appeared to be a mere pretence, and to have no reasonable foundation, we should not listen to it; but here there is so much doubt, that I am of opinion we ought not to grant a mandamus." *R.* v. *Dayrell and another*, 1 *B. & C.* 485. So, where an application was made for a mandamus to justices, to grant a warrant of distress against a person for non-payment of a poor rate: it appearing that the rate had not been published on the first Sunday after it was allowed, the Court held it bad on that account, and refused the mandamus, even although it appeared that the rate had been appealed against and confirmed on appeal. *R.* v. *Newcomb*, 4 *T. R.* 368. So in *R.* v. *Dyer and Hall*, 2 *Ad. & E.* 606, the Court refused a mandamus requiring justices to

issue a distress warrant for rates, where it was doubtful whether the party rated was legally liable to be so. So, where a doubt appeared whether a particular person was liable to contribute to the repairs of the highways in a parish, the Court refused a mandamus requiring a magistrate to grant a distress warrant against him for a highway rate; the Court saying, "we are not to subject the magistrate to risk, by compelling him to perform an act, where we see a legal probability that an action will be brought against him for doing it." *R.* v. *Greame*, 2 *Ad. & E.* 615, *and see R.* v. *Morgan*, *Id.* 618, *n. and R.* v. *Mirehouse and Elton*, *Id.* 632, *acc. See R.* v. *Trecothick*, *Id.* 405. *R.* v. *JJ. of Middlesex*, 2 *Ld. Ken.* 163, *R.* v. *Freeman*, 2 *Ld. Ken.* 19, *semb. cont.* In *R.* v. *Benn and Church*, 6 *T. R.* 198, the Court refused the mandamus as to a distress warrant for a poor rate, where the objection to it was that the party should first be summoned before the magistrate, before any distress warrant was issued against him; but the Court said that they would award a mandamus to the justice to summon the party and hear the complaint against him, if it should be necessary. So, where a person was summarily convicted in a penalty, and it was doubtful whether the conviction was valid, the Court refused a mandamus to a justice requiring him to issue a distress warrant for a penalty. *R.* v. *Broderip*, 5 *B. & C.* 239. *S. P. R.* v. *Robinson*, 2 *Smith*, 274.

And the Court will in all cases grant a mandamus to justices to receive or hear an appeal or complaint or other matter, of which they have jurisdiction, where by law it is not a matter of discretion with the justices whether they will take cognizance of it or not, but it is a matter of right in the parties that they should do so. *See dict. per Lord Ellenborough, C. J.* 14 *East*, 397, *et infra*. Therefore, where an application by petition was made to the justices at Sessions, to fix the wages of millers within the county, which they refused to do, upon the ground that by law they had authority to fix wages only in the case of labourers in husbandry: upon a motion to the Court of King's Bench for a mandamus commanding them to hear and determine the application, the Court, being of opinion that the justices had jurisdiction, granted the mandamus, Lord Ellenborough, C. J. adding, "We do not, however, by granting this mandamus, at all interfere with the exercise of that discretion which the legislature meant to confide to the justices of the peace in Sessions; we only say that they have a discretion to exercise, and therefore they must hear the application; but, having heard it, it rests entirely with them to act upon it as they think fit." *R.* v. *JJ. of Kent*, 14 *East*, 395. So, where two justices out of Sessions refused to enforce payment of a balance due by a person who had been overseer of the poor, they imagining that they had no authority to do so, as there had been an appeal to the Sessions against the overseer's accounts: upon application for a mandamus commanding them to receive

and hear the complaint against the overseer, it appearing to the Court that the Sessions, although they found a certain balance to be in the overseer's hands, had made no order for him to pay it over, and the Court being of opinion that two justices out of Sessions had in that case authority to make such an order, granted the mandamus. *R.* v. *Carter and another*, 4 *T. R.* 246. Where the justices at Sessions dismissed an appeal against overseers' accounts, without hearing it upon the merits, on the ground that, as the accounts had not previously been examined at a petty Sessions, they had no authority: the Court, after argument, being satisfied that the justices had authority, and ought to have exercised it, granted a mandamus commanding them to enter continuances and hear the appeal. *R.* v. *JJ. of Colchester*, 5 *B. & Ald.* 535. So, where there were two overseers of the poor, and one appealed against the accounts of the other; and at the Sessions, after the appeal was called on, and one of the respondent's witnesses examined, an objection being then taken that the appeal did not lie, the justices, imagining that one overseer could not appeal against the other's accounts, dismissed the appeal, without hearing the appellant: upon an application for a mandamus to enter continuances and hear the appeal, it was urged upon the part of the justices that a co-overseer could not appeal in such a case, and even if he could, as the Sessions had in fact received the appeal and adjudicated upon it, the Court would not grant a mandamus; but the Court held that this was not a hearing of the appeal, but a dismissal of it upon a preliminary objection taken; and being also of opinion that the appeal lay, they granted the mandamus. *R.* v. *JJ. of Gloucestershire*, 1 *B. & Adolph.* 1. So, where the Sessions refused to hear an appeal against an order of filiation, on the ground that merely a parol notice of the appeal had been given, and that the notice ought to have been in writing: the Court, upon application, granted a mandamus commanding the justices to enter continuances and hear the appeal, holding that as the statute upon the subject did not require the notice of appeal to be in writing, the parol notice was sufficient. *R.* v. *JJ. of Salop*, 4 *B. & Ald.* 626. *See also R.* v. *JJ. of Carmarthenshire*, 4 *B. & Adolph.* 563. Where upon an application for a mandamus to justices to receive and hear an appeal against an order of removal, it appeared that the order was made on Tuesday the 8th July, but not executed until Saturday, and the Sessions took place on the Tuesday following, and lasted four days; that upon an application being made at the Michaelmas Sessions to enter an appeal against it, it was refused, on the ground that it was not entered at the Sessions next after the making and service of the order, as required by the statute: the Court granted the mandamus, holding that although the statute required the appeal to be made to the next Quarter Sessions, yet that must mean the next practica-

ble Sessions; the parish officers must have a reasonable time to make inquiries, that they may judge of the propriety of appealing or not. *R.* v. *JJ. of Essex*, 1 *B. & Ald.* 210. *S. P. R.* v. *JJ. of Flintshire*, 7 *T. R.* 200. *R.* v. *Hendon*, 2 *D. & R.* 249. So, where an order of removal from Richmond to Mortlake, both in Surrey, were made and executed on the 11th January, and the Sessions began on the 12th, and lasted 14 days, and were then adjourned to the 2d February, and lasted one day, and were then adjourned to the 1st March, and lasted two days; by the practice of the Sessions the appeal might have been entered at any time during the Sessions, or at the first adjournment; the appellants entered an appeal against this order at the Easter Sessions, and were then ready to try it, having given regular notice of trial; but the justices refused to hear it, on the ground that it ought to have been entered at the previous Sessions: the Court of King's Bench, however, upon application, granted a mandamus commanding them to hear it; they said that the statute never contemplated the continuance or adjournment of the Sessions, but if the appellants have not a reasonable time, between the execution of the order and the first day of the Sessions, to consider whether they will appeal or not, they shall have until the Sessions next after to appeal. *R.* v. *JJ. of Surrey*, 1 *M. & S.* 479. So, where a rate was published only the day before the commencement of the Quarter Sessions for London, and an appeal against it was entered at the following Quarter Sessions, but the Court refused to hear it, because it had not been entered at a General Sessions which had intervened between these two Quarter Sessions: the Court of King's Bench, upon application, granted a mandamus to enter continuances and hear the appeal, holding that the appellant was not bound to enter it at the intervening General Sessions, and that it had therefore been lodged in time. *R.* v. *JJ. of London*, 15 *East*, 632. And where an order of removal was served on the 8th April, and the Sessions were holden on the 15th, and by the practice of the Sessions eight days' notice of appeal was required; notice of appeal was given for the July Sessions, but the justices then refused to allow the appeal to be entered or to try it, on the ground that, although the appellants could not have given notice of appeal for the preceding Sessions, they might have had their appeal then entered and respited: but the Court held that as entering an appeal merely for the purpose of having it adjourned was an useless act, it was unnecessary; it was sufficient to enter it at the Sessions at which the party by his notice was bound to try it; they therefore granted a mandamus commanding the justices to enter continuances and try the appeal. *R.* v. *JJ. of Devon*, 8 *B. & C.* 640 *n. & see R.* v. *JJ. of Southampton*, *Id.* 641 *n. and R.* v. *JJ. of Kent*, *Id.* 639, *accord.* So, where a father and son were removed by separate orders of removal, and notices of appeal were given in both cases, but the

respondents, in order to save expense, requested that only one of the appeals should be entered, and that the decision of that should also determine the other; the appeal against the order removing the father was then tried, and decided for the appellants, but the respondents afterwards refused to abide by the decision with respect to the son; the appellants therefore at the following Sessions applied to be allowed to enter the appeal against the order removing the son, but the Sessions refused to allow it, on the ground that it should have been entered at the Sessions next after the service of the order: the Court, however, upon application, granted a mandamus commanding the justices to enter the appeal *nunc pro tunc*, and enter continuances, saying that as the appellants were not in fault, but were prevented from entering their appeal by the breach of agreement on the part of the respondents, it was but reasonable that they should be put in a situation to try their appeal. *R.* v. *JJ. of Wiltshire*, 1 *East*, 638. *and see R.* v. *JJ. of Devonshire*, *Cald.* 32, *accord.* Where an appeal against an order of removal was entered and respited at the January Sessions, and 15 days before the April Sessions notice of trial was given for these sessions, but there being a rule of the sessions that where an appeal was entered and respited notice thereof should be given to the removing parish within one month after the entry and respite, and such notice not having been given, the justices refused to hear the appeal: upon an application, however, for a mandamus commanding the justices to enter continuances and hear the appeal, the Court granted it, holding that the justices had no authority to require this notice of the entry and respite; the statute only required notice of appeal, and all that the justices could do was to decide whether the notice was given in reasonable time. *R.* v. *JJ. of Norfolk*, 5 *B.* & *Adolph.* 990. So, where an appeal was entered, and at the following Sessions the justices refused to hear it, because it appeared that notice of appeal was given a day too late: the Court of King's Bench, upon application, granted a mandamus, saying that, under the circumstances, justice would be most satisfactorily administered by ordering the justices to enter continuances and hear the appeal. *R.* v. *JJ. of Lancashire*, 7 *B.* & *C.* 691. *see R.* v. *JJ. of Buckinghamshire*, 3 *East*, 342. *R.* v. *JJ. of Wiltshire*, 10 *East*, 404, *accord.* So, where the Sessions refused to receive an appeal, because the notice of appeal had been served on a Sunday, the Court of King's Bench granted a mandamus. *R.* v. *JJ. of Huntingdonshire*, *Cald.* 283. So, where upon an appeal against a rate being called on at Sessions, and the appellant being then ready to prove his notice and proceed with the case, the respondents applied to put off the trial until the next Sessions, which was granted, and the respondents' counsel handed a copy of the notice of appeal to the clerk of the peace, to enable him to draw up the order; at the next Sessions both parties appeared, but the

respondents objected to the appeal being heard, until the appellant first proved service of the original notice of appeal, and he not being prepared to do so, the Sessions confirmed the rate: but the Court, upon application, granted a mandamus commanding the justices to enter continuances and try the appeal, saying, that as the respondents had acted upon the notice, no other proof of it was necessary, and therefore the justices ought to have heard the appeal. *R.* v. *JJ. of Hertfordshire*, 4 *B. & Adolph.* 561. So, where an appeal against an order of removal was entered at the Sessions next after the order, and it was then moved to respite it, no notice of trial having been given; but the justices refused this, as the appellants had sufficient time, between the service of the order and the Sessions, to have given notice of appeal: the Court of King's Bench, however, upon application, granted a mandamus commanding the justices to enter continuances and hear the appeal, saying that the statute was compulsory on the Sessions in such a case to receive and adjourn it. *R.* v. *JJ. of Shropshire*, 7 *East*, 549. So, where a poor rate being appealed against, the overseers abandoned it; the appellants however still proceeded with the appeal, and at the Sessions moved to quash the rate; but the justices being informed of the abandonment refused to entertain the appeal, saying that they had no longer jurisdiction: the Court of King's Bench, however, upon application, granted a mandamus commanding the justices to enter continuances and hear the appeal, holding that the overseers had no power to abandon a rate which had been duly allowed and published. *R.* v. *JJ. of Cambridge*, 2 *Ad. & E.* 370. So, where an appeal was entered and respited at the October Sessions, against a poor rate made in September; and before the next Session due notice of appeal was given; but the justices then refused to hear the appeal, upon the ground that as no proof was given at the former Sessions that no sufficient notice had been given, or that it had been impracticable for the appellant then to try it, it was improperly respited, and they had therefore no jurisdiction: but the Court of King's Bench, upon application, granted a mandamus commanding them to enter continuances and hear the appeal, holding that, although perhaps discretionary with the justices whether they would in such a case adjourn the appeal, yet as they had received and adjourned it, they were bound to try it. *R.* v. *JJ. of Wilts*, 8 *B. & C.* 380. *see R.* v. *JJ. of Oxfordshire*, 1 *M. & S.* 446, *post.* But where a notice of appeal against an order of filiation was bad, in not stating the cause or matter of appeal as required by statute, and the Sessions refused to hear the appeal on that account: the Court of King's Bench, under these circumstances, refused to grant a mandamus, holding that the justices had done rightly in refusing to hear the appeal. *R.* v. *JJ. of Oxfordshire*, 1 *B. & C.* 279. So, where an application was made at the Easter Sessions,

to enter and respite an appeal against an order of filiation made on the 14th January, and the justices then refused the application on the ground that no notice of appeal had been given or recognizance entered into; the appellant then gave notice for the next Sessions, and entered into the recognizance; but at the next Sessions the justices refused to hear the appeal: the Court of King's Bench, upon application, refused to grant a mandamus, as by an express provision in stat. 49 G. 3, c. 68, s. 7, no appeal in such a case shall be "brought, received or heard," unless notice be given ten days before the next Sessions, &c., and the justices therefore had no authority to receive or hear the appeal. *R.* v. *JJ. of Lincolnshire*, 8 *B. & C.* 548. So, where the justices at County Sessions refused to hear an appeal against a poor rate, which had been made for a borough within the county, on the ground that the appeal should have been made to the Sessions for the borough; and upon an application for a mandamus, it appeared upon argument that the magistrates of the borough had jurisdiction: the Court of King's Bench refused the writ. *R.* v. *JJ. of Essex*, 5 *M. & S.* 513. So, where an order of removal was executed on the 12th January, and no appeal was lodged against it at the next Sessions, which were holden on the 18th, but at the next Easter Sessions a motion being made to enter and respite an appeal, the justices refused to receive it; and the Court of King's Bench refused a mandamus to compel them, saying that as the Easter Sessions were the second after the order, and as the appellants did not come prepared to try the appeal at those Sessions, the justices had done right in refusing to receive the appeal. *R.* v. *JJ. of W. R. Yorkshire*, 4 *M. & S.* 327. *and see* *R.* v. *JJ. of N. R. Yorkshire*, 3 *T. R.* 150. Where after an order of removal made and executed, and notice of appeal given, the removing parish abandoned the order, and obtained a supersedeas under the hands and seals of the removing magistrates, and served the same upon the overseers of the appellant parish; at the next Sessions an appeal was tendered against the order, but the justices refused to receive it, on the ground that the order was completely at an end: upon an application for a mandamus, the Court of King's Bench refused the writ, saying that in such a case it was discretionary to receive the appeal or not, and they might do so, if it were necessary, to oblige the respondents to pay costs, or the like; but as the Sessions had exercised their discretion, the Court refused to interfere. *R.* v. *JJ. of Norfolk*, 5 *B. & Ald.* 484. So, where an appeal against a conviction was entered and respited, and at the next Sessions the justices refused to hear it, on the ground that the statute, which gave the appeal, gave them no authority to receive it unless notice of appeal had been given and a recognizance entered into, which at the time of entering the appeal had not been done: and the Court of King's Bench being of opinion that the justices had no-

authority to receive the appeal under the circumstances, refused a mandamus to them to enter continuances and try the appeal, although the recognizance had since been entered into and notice of appeal given. *R.* v. *JJ. of Oxfordshire*, 1 *M. & S.* 446. This case differs from the case of R. *v.* JJ. of Wilts, mentioned *ante*, *p.* 61, for there the justices had the power to receive and respite the appeal, if they chose to exercise it; and having actually respited the appeal, the Court held they were afterwards bound to try it. So, where two justices out of Sessions refused to grant a summons against a clothier, at the instance of a person to whom he was indebted for scribbling wool, conceiving that the case did not come within a certain statute referred to; the Court of King's Bench, being also of that opinion, discharged a rule for a mandamus, with costs. *R.* v. *Haywood and another*, 1 *M. & S.* 624. Where an appeal against an order of removal came on to be tried at the Sessions, but for some cause was respited; when it was called on at the next Sessions, the respondents objected to its being tried, as the appellants had not given a fresh notice of trial, as required by the practice of the Sessions; and the justices, holding that such notice was necessary, confirmed the order, but granted a case, in order that the opinion of the Court might be taken upon the subject; the appellants, however, instead of proceeding with the case, moved for a mandamus to the justices to hear the appeal: but the Court refused it, on the ground that the Sessions, by granting a case, had already afforded the appellants a sufficient remedy. *R.* v. *JJ. of W. R. Yorkshire*, 1 *Ad. & E.* 606. Where a statute gave an appeal against the constable's accounts, to the overseers, if they should "find" that the parish was thereby aggrieved; and out of eight overseers of a parish, seven agreed to the passing of the accounts, but the eighth appealed against them; and the Sessions dismissed the appeal, on the ground that the rest of the overseers had not joined in it: upon an application for a mandamus, the Court of King's Bench refused it, holding that the justices had done rightly; from the word "find," it was evidently the intention of the legislature that the appeal should be a deliberative act of the overseers, and therefore it should have been instituted by a majority of them at the least. *R.* v. *JJ. of Manchester*, 1 *D. & R.* 454. Where a conviction (setting out the information) was confirmed on appeal, but, being brought up to the Court of King's Bench by certiorari, was quashed there for a defect in the information: an application was then made for a mandamus to the justices, to proceed on the original information, which really had not the defect in it; but the Court refused it, saying that it would be obliging the defendant to answer twice for the same offence. *R.* v. *Jukes and others*, 8 *T. R.* 625.

It must be observed, that although the decisions of the Sessions, when such decisions appear bad on the face of them, may be rec-

tified or quashed by the Court of King's Bench; yet in all other cases where the Sessions have authority by law to adjudicate, and exercise it, however erroneously, the Court of King's Bench have no authority whatever to interfere, unless a case be stated for their opinion by the Sessions. Where, in an appeal against an order of removal, the appellants, admitting a *primâ facie* case for the respondents, began, and proved a subsequent settlement; the respondents' attorney then addressed the justices, observed upon the appellants' case, and then proposed to call witnesses to contradict it; but the justices held that as he had not called his witnesses before he addressed the Court, he could not do so afterwards, and they quashed the order: upon an application to the Court of King's Bench for a mandamus, it was refused, the Court saying that there was no instance in which they interfered by mandamus to compel justices to rehear an appeal which they had already heard; "it is the duty of the Sessions to hear and decide, and, if they entertain any doubts, to submit them to this Court; but where they do not desire our interference, we have no jurisdiction;" if indeed, after hearing one side, they had refused altogether to hear the other, the Court might consider the appeal as not having been tried, and might grant the mandamus, which however was not the case in this instance. *R.* v. *JJ. of Carnarvon*, 4 *B. & Ald.* 86. *and see R.* v. *JJ. of Worcestershire*, 1 *Chit. R.* 649. Where, upon the hearing of an appeal against an order of removal, after the justices had deliberated, the chairman of the Sessions pronounced the judgment of the Court, that the order be confirmed; but one of the magistrates who voted for the respondents, understanding that the order had been made by him, and according to the rules of the Sessions he ought not to have voted, begged to withdraw his vote; and as by taking away his vote, there was no longer a majority for the confirming the order, the clerk of the peace was directed to enter a judgment for quashing it: shortly after the Sessions, it being perceived that by taking away this vote, the remaining votes were equally divided, an application was made to the chairman to rectify the mistake, as in such a case no judgment should have been entered, but the appeal should have been adjourned; but this was refused: and upon an application for a mandamus, the Court of King's Bench refused it, saying that as a judgment had been entered, and not altered during the Sessions, they had no authority to interfere. *R.* v. *JJ. of Leicestershire*, 1 *M. & S.* 442. In a similar case, where at the trial of an appeal against an order of removal, the justices being equally divided, quashed the order, instead of adjourning the appeal, the Court of King's Bench refused a mandamus, saying that as the Sessions had decided the case, they could not interfere. *R.* v. *JJ. of Monmouthshire*, 4 *B. & C.* 844. Where an application was made for a mandamus, on the ground that the Sessions, upon the hearing of an appeal, had refused to

receive certain evidence, the Court of King's Bench said they could not interfere; the Sessions had heard the case, and determined the point of law, and if they decided erroneously, still the Court could not interfere to set them right, unless a case had been stated. *R.* v. *Frieston*, 5 *B.* & *Adolph.* 597. *see also R.* v. *JJ. of Cumberland*, 1 *M.* & *S.* 190. *R.* v. *JJ. of Cambridgeshire*, 1 *D.* & *R.* 325. *R.* v. *JJ. of Farringdon*, 4 *D.* & *R.* 735. *R.* v. *JJ. of Surrey*, 5 *D.* & *R.* 308. So, where justices, having jurisdiction, make an order which is good upon the face of it, the Court will not inquire into the insufficiency of their reasons for making it. *R.* v. *The Rector &c. of St. James's*, 2 *Ad.* & *E.* 241. *and see R.* v. *JJ. of Devon*, 1 *Chit. R.* 34.

Also, where a discretionary power is given to justices by statute, the Court of King's Bench will not interfere by mandamus to oblige them to exercise that discretion in any particular way, or to review the manner in which they have exercised it. Therefore, where a parish indenture for apprenticing a poor boy of Wolverston in Suffolk, to a shipowner of Wivenhoe in Essex, was allowed by two justices of Suffolk; but upon being presented for allowance also to two justices of Essex, they refused to allow it, upon the ground that the master, if he wanted an apprentice, might have one among the poor boys of Wivenhoe, his own parish, which, being used to sea, would suit him better: upon an application for a mandamus, the Court refused it, saying that the justices had a general jurisdiction given them by stat. 56 G. 3, c. 139, s. 1, to consider the propriety of the binding, and as they had exercised it, the Court would not interfere. *R.* v. *Mills and another*, 2 *B.* & *Adolph.* 578. So, where a statute gave a power to justices at Sessions to allow a fee to a coroner upon each inquisition "duly taken" by him, and the justices in the exercise of that power disallowed a charge in the coroner's account for attending an inquest, which they thought ought not to have been taken: upon an application for a mandamus to require the justices to allow that item, the Court refused it, saying that the justices were to judge whether the inquisition was duly taken or not, and they saw no occasion to interfere with their judgment in this instance. *R.* v. *JJ. of Kent*, 11 *East*, 229. So, where a mandamus was moved for, to compel a magistrate to make an order upon the parish of C. to relieve a bastard child residing with its mother in another parish, the Court refused it, as it would be obliging the justice to come to a particular decision, namely, that the child was settled in the parish of C. which the Court had no authority to do. *R.* v. *JJ. of Middlesex*, 4 *B.* & *Ald.* 298. So, the Court have refused a mandamus to justices at sessions, to dismiss an appeal. *R.* v. *JJ. of Wilts*, 2 *Chit.* 257. Where the magistrates at Sessions made an order, that prisoners in the house of correction for trial, who refused to work, should be allowed bread and water only as food: upon an application for a mandamus,

requiring the justices to order them other food, on the ground that they could not sustain life upon bread and water alone; the Court held that the magistrates, in doing what they had done, had really not done more than by law they were obliged to do; that it was a matter of discretion with them what food they would order for prisoners, and that the Court would not interfere with their exercise of that discretion by mandamus. *R.* v. *JJ. of N. R. Yorkshire*, 2 *B. & C.* 286. So, where upon an appeal being called on, the applicant applied to put off the trial, on an affidavit of the absence of a material witness, which the Sessions refused to do, and confirmed the appeal; upon application for a mandamus to hear the appeal, the Court said that they could not interfere, as it was entirely in the discretion of the justices whether they would put off the trial or not. *Ex parte Becke*, 5 *B. & Ad.* 704. So, where by a rule of practice at the Sessions for Suffolk, in appeals against a poor rate on the ground that the appellant is overrated, the appellant is to begin; and an appellant in such a case refusing to begin, the justices confirmed the rate: upon an application for a mandamus, the Court refused it, saying they would not interfere with the practice of Sessions, unless it was apparent that gross injustice would otherwise follow; if they did so, it would be attracting to the Court a most inconvenient jurisdiction. *R.* v. *JJ. of Suffolk*, 6 *M. & S.* 57. *and see R.* v. *JJ. of Essex*, 2 *Chit. R.* 385. But where justices at Sessions made a rule requiring that within a month after an appeal should be respited, notice thereof should be given to the respondents; and in a case where such notice was not given, they refused to hear the appeal: the Court, upon application, granted a mandamus requiring them to do so, saying that they had no authority to require any notice of the entry and respite, as the statute required only a notice of appeal, and all the justices could do was to decide whether that notice was given in reasonable time. *R.* v. *JJ. of Norfolk*, 5 *B. & Adolph.* 990. So, we have seen that, where the Sessions upon the trial of an appeal grant a case, the Court of King's Bench will in some cases grant a mandamus to the justices to state it. *See R.* v. *Earl of Effingham and others, and R.* v. *JJ. of Pembrokeshire, ante, p.* 47.

When an application was made for a mandamus, commanding justices at Sessions to receive and hear a complaint against the trustees of a turnpike road, under a local act, for having erected a certain gate upon the road; and it appeared that the gate had been erected 26 years before: the Court held, that even on that ground alone they ought not to interfere by mandamus, but leave the party to his remedy by indictment as for nuisance, if he thought fit to adopt it. *R.* v. *JJ. of Cambridgeshire*, 1 *D. & R.* 325.

7. *Justices, how and in what Cases punishable, and how far protected.*

Criminal Information.] The Court will in general grant a criminal information against justices, for any gross act of oppression committed by them, in the exercise or pretended exercise of their duties as justices, from any vindictive or corrupt motive.

As against justices at Sessions, this is a very rare proceeding, although in strictness it may be adopted. Upon a rule to quash a *certiorari*, upon the ground that it was not delivered to the Court of Quarter Sessions until after judgment, Lord Kenyon, C. J. took occasion to say: "If any fraud or misconduct had been imputed to the magistrates, in proceeding notwithstanding the issuing of the certiorari, that might have been a ground for a criminal proceeding against them; and I believe there are instances in which a criminal information has been granted against magistrates acting in Sessions." *R.* v. *Inhabitants of Seton*, 7 *T. R.* 373. There is no doubt but that a criminal information may be granted against justices acting in Sessions; but it must be a strong, very strong, case indeed, coupled with flagrant proofs of their having acted from corrupt motives, that would induce the Court of King's Bench to grant such an information. *See R.* v. *JJ. of Seaford*, 1 *W. Bl.* 432. *Staundford, P. C.* 173.

As against justices out of Sessions, however, the Court will grant a criminal information, in all cases where they act oppressively, from any vindictive or corrupt motive; and instances frequently occur of such informations being granted. Where, immediately previous to a general election for members of parliament, two justices for a borough, in which the right of voting was in those paying rates, summoned the occupier of a house in the borough for his poor rates, who attended accordingly, and an agent of the landlord (who was bound by his lease to pay the rates) being also present tendered the amount to the overseer; the justices asked him if he tendered it for the tenant, he said not, but for the landlord, and the overseers upon being asked refusing to take the money, the justices made out a warrant of distress against the tenant; and this was sworn to have been done from corrupt and criminal motives, and to serve election purposes: upon an application for a criminal information against the justices, Lord Mansfield, C. J. said: "No justice of peace ought to suffer for ignorance, where the heart is right; on the other hand, where magistrates act from undue, corrupt or indirect motives, they are always punished by this Court: it is impossible for the defendants to excuse themselves upon the ground of ignorance; in many parts of the kingdom the landlord pays the poor rate for his tenants, and it is sworn that the landlord in question had actually paid twenty-eight rates before

this, without any objection or difficulty being raised; what possible reason could there be for raising one now, for the first time? The justices must have acted with a view to make a point to serve the purpose of an election." It was ultimately settled, that upon the defendants paying the whole costs out of pocket incurred in making the application, the rule against them should be discharged. *R.* v. *Cozens*, 2 *Doug.* 426. In another case, where an application was made to remove an appointment of overseers into the Court of King's Bench by certiorari, in order to have it quashed, on the ground that improper persons had been appointed by the magistrates from corrupt motives: the Court refused the certiorari, an appeal to the Sessions being the proper remedy; but they said that if the magistrates had acted corruptly in this instance, and the corrupt motive could be satisfactorily made out, it might be made the subject of a motion for a criminal information against them. *R.* v. *JJ. of Somersetshire*, 1 *D.* & *R.* 443. Where a motion was made for an information against two magistrates, for arbitrarily, obstinately, and unreasonably refusing a licence for a public house: Lord Mansfield, C. J. after stating that the granting such licences was a matter committed by law to the discretion of justices, with the exercise of which discretion the Court would not interfere, added, "But if it clearly appear that the justices have been partially, maliciously, or corruptly influenced in the exercise of this discretion, and have consequently abused the trust reposed in them, they are liable to prosecution by indictment or information;" but it appearing from the affidavits that the justices in this case acted fairly and legally, the Court discharged the rule for the information, with costs. *R.* v. *Young* & *Pitts*, 1 *Burr.* 556. *and see R.* v. *Athay*, 2 *Burr.* 653. *R.* v. *Baylis* & *another*, 3 *Burr.* 1318. And where it appeared that justices had refused such licences to publicans, because at an election for members of parliament they had not voted for the candidate whom the justices had recommended to them, the Court actually granted criminal informations. *R.* v. *Williams*, *R.* v. *Davis*, 3 *Burr.* 1317. *and see R.* v. *Hann* & *Price*, 3 *Burr.* 1716. So, where a licence was refused at a general meeting of the magistrates on account of some misbehaviour in the party applying, and afterwards Forster, one of the magistrates who was present when the licence was refused, prevailed upon a magistrate who had not been there, by a false statement, to join with him in granting the licence: the Court, upon application, granted a criminal information against Forster, but discharged the rule as against the other, upon his paying the costs of the application. *R.* v. *Holland and Forster*, 1 *T. R.* 692. So, where a magistrate convicted a person for vagrancy, and upon his being taken under a warrant, two other magistrates, on the same day, without examining into the facts, discharged him; and in ano-

ther case they discharged another person committed by the same magistrate also for vagrancy: in answer to a rule for a criminal information, these two magistrates denied that they acted from any interested motive in the business; but the Court said that was not sufficient, for if they had acted from passion or from opposition, that was equally corrupt as if they had acted from pecuniary considerations. *R.* v. *Brooke et al.* 2 *T. R.* 190. So, where a justice committed a man, for not paying a fee of 1*s.* upon his discharging a warrant, the Court upon application granted a criminal information against him. *R.* v. *Jones*, 1 *Wils.* 7.

Where a criminal information is applied for against a magistrate for improperly convicting a person of an offence, the Court will not entertain the motion, however bad the conduct of the magistrate may appear, unless the party applying make oath that he is not really guilty of the offence of which he was convicted. *R.* v. *Webster*, 3 *T. R.* 388. In one case the Court granted a rule nisi for an information against two magistrates, for a false return to a mandamus, but intimated their doubts whether an information would lie, unless the return was corruptly and wilfully false. *Anon.* 1 *D. & R.* 485 *n. see R.* v. *JJ. of Lancashire, Id.* 485.

And indeed in all cases of an application for a criminal information against a magistrate, for any thing done by him in the exercise of the duties of his office, "the question has always been, not whether the act done might, upon a full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive or corrupt motive, (under which description fear and favour may generally be included), or from mistake or error: in the former case alone they have become the objects of punishment; to punish as a criminal a person who, in the gratuitous exercise of a public trust, may have fallen into error or mistake, belongs only to the despotic ruler of an enslaved people, and is wholly abhorrent from the jurisprudence of this kingdom." *Per Abbott, C. J. in R.* v. *Borron*, 3 *B. & Ald.* 434, 432. In the case now mentioned, a rule nisi was obtained for a criminal information against a magistrate, for refusing to take the examination of two persons, relative to a charge of felony against a third; but upon shewing cause, it appearing that he had so refused, from a *bonâ fide* belief that he had no jurisdiction, and saying at the time that if the Court of King's Bench should be of opinion that he had, he would most readily act; the Court discharged the rule with costs. *Id.* So, where an application was made for a criminal information against justices, for committing a pauper, who had refused to answer a question put to him by these justices when under examination before them as to his settlement; but it appearing clearly that they had not done so from any corrupt

motive whatever, the Court refused the information; and Ashhurst, J. observed: "Even supposing the defendants have not, strictly speaking, acted legally, we will not grant an information against them, unless they have acted corruptly; when magistrates act uprightly and honestly, even though they mistake the law, no information ought to be granted against them: I will not decide whether magistrates have or have not a power to commit a pauper for refusing to answer proper questions put to him in the course of his examination; they certainly have a power to examine a pauper touching his settlement; and yet that would be only a shadow of a right, unless they had likewise a power of enforcing that examination, by committing the pauper for refusing to be examined: but without determining that question, and supposing they have not that power, if these defendants acted without any corrupt motive, this Court will not interfere by granting an information: now, no corrupt motive is expressly charged by the affidavits, and we cannot infer it." *R.* v. *Jackson et al.* 1 *T. R.* 653. *see also R.* v. *Palmer & Baine*, 2 *Burr.* 1162. *R.* v. *Fielding*, 2 *Burr.* 719. *Ex parte Fentiman*, 2 *Ad. & E.* 127. *R.* v. *Davie et al.* 2 *Doug.* 588. Where a criminal information against a magistrate was applied for, because he had returned to a certiorari a conviction in a more formal shape than when it was first drawn up, but fully warranted by the facts of the case: the Court refused it, holding that it was not only legal but laudable in him to do so. *R.* v. *Baker*, 1 *East*, 186.

The motion for the rule nisi must be made, at the latest, within the second term after the act or neglect complained of. *R.* v. *Harris & Peters*, 13 *East*, 270. *R.* v. *Morrice, St. Aubyn & Williams*, *Id.* 271 *n.* *R.* v. *Taylor*, 1 *Nol. P. L.* 204. And if made in the second term, it must be made sufficiently early in the term to allow of the justice showing cause during the term. *R.* v. *Marshall & Grantham*, 13 *East*, 322. But it may be made at the latter end of the term, where the act or neglect complained of has taken place during the same term. *R.* v. *Carpenter Smith*, 7 *T. R.* 80. Where the application was made in 1822, for alleged corrupt practices, the latest of which was in 1820, the Court refused the information, even although it was sworn by the prosecutor that he had no knowledge of the facts until shortly before the making of the application. *R.* v. *Bishop*, 5 *B. & Ald.* 612. *and see R.* v. *Hartley et al.* 4 *B. & Adolph.* 869 *n.* *S. P. see R.* v. *Jollie & Steel*, *Id.* 867, *semb. cont.*

Before the rule nisi is moved for, the prosecutor must give the justice notice of his intention to move, and of the grounds of the intended motion. Where upon showing cause against such a rule, it was objected that no notice of the motion had been given to the magistrate, the Court discharged the rule, even although the malpractices complained of were committed by the

defendant, partly in his individual capacity, and partly in his character of magistrate. *R.* v. *Heming*, 5 *B.* & *Adolph.* 666. And it must be a six days' notice, one day reckoned exclusive the other inclusive; and therefore, where a notice, stating that the motion would be made on the first day of Michaelmas term, or as soon after as counsel could be heard, was not served until the 31st October, it was holden insufficient, even although the motion was not actually made until the 13th November. *Ex parte Fentiman*, 2 *Ad.* & *E.* 127.

Where a rule nisi is granted, and it appears afterwards that although the magistrates perhaps acted illegally, yet there was no fair ground for imputing to them any corrupt motive, the Court always discharge the rule with costs to be paid by the prosecutor. Where the prosecutor's attorney joined him in the affidavit on which the rule nisi was granted, and was heard to say, that "if it cost him £100 he would lay Fielding (the justice) by the heels:" the Court discharged the rule, with costs to be paid by both the prosecutor and his attorney. *R.* v. *Fielding*, 2 *Burr.* 654.

As to the proceedings upon the information, when granted, that subject belongs to the practice of the Crown side of the Court of King's Bench, and it is not necessary to notice it here.

Action.] Where a justice of the peace acts judicially, in a matter in which by law he has jurisdiction, and his proceedings appear to be good upon the face of them, no action will lie against him; or if an action be brought, the proceedings themselves will be a sufficient justification. Thus, where in an action of trespass against justices, for taking a boat, &c. they gave in evidence, under the general issue, a conviction by them, good upon the face of it, which warranted the seizure; the plaintiff then tendered evidence to shew that the boat was not such as was within the meaning of the statute on which the conviction took place; but it was holden that the evidence was not admissible, as it appeared from the conviction that it was such a boat, and the conviction was conclusive upon the subject; and Dallas, C. J. said that the principle established by all the ancient, and recognized by all the modern decisions, is, "that a conviction by a magistrate, who has jurisdiction over the subject-matter, is, if no defects appear on the face of it, conclusive evidence of the facts stated in it." *Brittain* v. *Kinnaird et al.*, 1 *Brod.* & *B.* 432. So, where a farmer's sheep were seized under a distress warrant, upon a conviction for not performing statute duty, and the farmer brought trespass against the justices; at the trial, the conviction, which appeared good upon the face of it, being given in evidence, it was insisted for the defendants, that as it was unappealed against and unreversed, the action could not be maintained; of this opinion was the judge at the trial, and the plaintiff was

nonsuit: and afterwards, upon a motion to set aside the nonsuit, the Court of King's Bench refused to do so, holding, that as the conviction appeared to be clearly good in substance, and in full force, it was a sufficient answer to the action. *Fawcett* v. *Fowles et al.* 7 *B. & C.* 394. *See Gray* v. *Cookson and Clayton*, 16 *East*, 13. *Lowther* v. *Earl Radnor et al.*, 8 *East*, 113. So, where two justices, upon complaint by a landlord that a farm of his was deserted by the tenant, and that there was no sufficient distress upon the premises to countervail the arrears of rent due, proceeded as directed by stat. 11 G. 2, c. 19, s. 16, and gave him possession of the farm; the tenant thereupon brought an action of trespass against the magistrates, and at the trial the justices gave in evidence a record of their said proceedings, which, being good upon the face of it, the Court held to be conclusive as an answer to the action. *Basten* v. *Carew et al.*, 3 *B. & C.* 649. And in a similar case, such a record was holden to be a conclusive answer to the action, not only as to the justices, but also as to the constables and the landlord himself, even although, after possession had been given to the landlord, the judges of assize, upon appeal to them, held that the justices had been mistaken in point of law, and ordered restitution of the farm, &c. to the tenant. *Ashcroft* v. *Bourne et al.*, 3 *B. & Adolph.* 684. It may be observed, that a conviction may be drawn up in regular form, at any time before it is returned to the Sessions; *see R.* v. *Barker*, 1 *East*, 185. *R.* v. *Allen*, 15 *East*, 332. *Gray* v. *Cookson and Clayton*, *per Ld. Ellenborough*, *C. J.* 16 *East*, 21; but an order, *R.* v. *JJ. of Cheshire*, 5 *B. & Adolph.* 439, or warrant of commitment, *Hutchinson* v. *Lowndes*, 4 *B. & Adolph.* 118, cannot.

But even in cases where the justices have jurisdiction, if their proceedings be bad upon the face of them, they cannot justify under them. *See Cripps* v. *Durdey*, *Cowp.* 640. Therefore, where the conviction and commitment thereon appeared upon the face of them not to be warranted by the act of parliament on which they were framed, they were holden to be no justification for the magistrate, in an action of trespass and false imprisonment against him by the party convicted and committed. *Hardy* v. *Ryle*, 9 *B. & C.* 603. *and see Goss* v. *Jackson et al.*, 3 *Esp.* 198. And the same, where the conviction, &c. is bad in part. *See Groome* v. *Forrester*, 5 *M. & S.* 320. So, where a commitment, &c. is bad on the face of it, it is not aided by a good conviction on which it is founded, *Wickes* v. *Clutterbuck*, 2 *Bing.* 483, unless there be a provision to that effect in the statute on which it is framed. *See* 7 *& 8 G. 4, c.* 29, *s.* 73. 7 *& 8 G. 4, c.* 30, *s.* 39. 9 *G. 4, c.* 31, *s.* 36. 9 *G. 4, c.* 69, *s.* 7. 1 *& 2 W. 4, c.* 32, *s.* 45, *&c. See R.* v. *Mellor*, 2 *Dowl.* 173. *Daniel* v. *Phillips*, 5 *Tyr.* 293. 5 *Burn, D. & W.* 61, 62. So, a commitment, &c. cannot be supported, if it vary in substance from the conviction. *Rogers* v. *Jones*, 3 *B. & C.* 409. Where a conviction however has been

actually quashed, (*vide id.*) then in any action brought against the justice on account of it, or on account of any act, matter, or thing done by him, for the levying of any penalty, apprehending of the party, or otherwise carrying the conviction into effect, the plaintiff shall not recover more than 2*d.* damages, besides the amount of the penalty (if any have been levied), nor any costs of suit, unless the action be an action on the case, and the declarations expressly state that the acts were done maliciously and without reasonable and probable cause. 43 *G.* 3, *c.* 141, *s.* 1. *See Massey* v. *Johnson*, 12 *East*, 67. Nor, even in that case, shall the plaintiff recover the amount of any penalty levied, if the defendant prove him to have been guilty of the offence of which he was convicted, &c. and that he underwent no greater punishment than is assigned by law to such offence. *Id. s.* 2.

If, however, it appear upon the face of the conviction or other proceeding, that the justice had no jurisdiction, in that case, as the proceeding is *coram non judice*, the justice cannot justify under it. *See Lancaster* v. *Greaves*, 9 *B.* & *C.* 628. *Morgan* v. *Hughes*, 2 *T. R.* 225. And the same, if it appear that the justice, in what he has done, has exceeded his jurisdiction. *See Crepps* v. *Durden*, *Cowp.* 640.

What we have hitherto been considering have been actions against justices, for something done by them in their judicial character. In what they do in their ministerial character, without reference to their judicial authority, their power of justifying will depend in a great measure upon the legality of the proceedings upon which these acts are founded. Thus, for instance, where a magistrate granted a warrant of distress to levy the amount of poor rates against a particular person, which were levied accordingly; and it turned out that the party, although rated in respect of land in the parish, had no land in the parish, his land being in an adjoining parish: it was holden, that the party might maintain an action of trespass against the justice. *Weaver* v. *Price et al.*, 3 *B.* & *Adolph.* 409. So if he exceed the authority the law gives him, in his ministerial acts, he thereby subjects himself to an action. As if he commits a prisoner for re-examination for an unreasonable time, he is liable to an action for false imprisonment. *See Davis* v. *Capper*, 10 *B.* & *C.* 28. So, if he commit a man for a supposed crime, where there has in fact been no accusation against him, he is liable to an action for false imprisonment. *See Morgan* v. *Hughes*, 2 *T. R.* 225.

But where a discretion is vested in him by law, no action will lie against him for the manner in which he exercises that discretion, *Basset* v. *Godschall*, 3 *Wils.* 121, unless possibly where it appears that he was actuated by malice, and the malice is very gross and injurious. *Dict. per Ld. Mansfield, C. J., in R.* v. *Young*, 1 *Burr.* 561, 562.

As to the proceedings in actions against magistrates, these are

very often regulated by the particular statutes under which the magistrate has acted upon the occasion; but there are some general regulations upon the subject, which, in the absence of any particular enactments, to which I have now alluded, must be attended to, and which I shall now detail.

By stat. 24 G. 2, c. 24, s. 8, no action shall be brought against a justice of peace, "for any thing done in the execution of his office," unless commenced within six calendar months after the act committed. The day on which the act was done, is not to be included in these six months; and therefore, where a person committed by a justice, was discharged out of custody on the 14th December, and he commenced his action on the 14th June, it was holden that the action was commenced in time. *Hardy* v. *Ryle*, 9 *B. & C.* 603. Where the cause of action is a continuing one, by imprisonment, the action may be brought within six calendar months after the last day of the imprisonment. *Id. Massey* v. *Johnson*, 12 *East*, 67. *and see Weston* v. *Fournier*, 14 *East*, 491.

By stat. 24 G. 2, c. 24, s. 1, no writ shall be sued out against, nor any copy of process served on, any justice of the peace, for any thing by him done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, or left at the usual place of his abode, by the attorney or agent of the party who intends to sue or cause the same to be sued out or served, at least one calendar month before the suing out or serving of the same; in which notice shall be clearly and explicitly contained the cause of action which such party hath or claimeth to have against such justices of the peace; and on the back of which notice shall be indorsed the name of such attorney or agent, together with the place of his abode. And by sect. 3, the plaintiff shall not recover a verdict, unless he prove upon the trial that such notice was given as aforesaid; and in default thereof, such justice shall recover a verdict and costs. And by sect. 5, no evidence shall be given of any cause of action except such as is contained in the notice. In all cases where a magistrate acts bonâ fide in what he conceives to be the execution of his duty as such, however mistaken he may be in the notion he forms of his jurisdiction, he is entitled to this notice, before an action is brought against him. *See Weller* v. *Toke*, 9 *East*, 364. *Prestige* v. *Woodman*, 1 *B. & C.* 12. *Jones* v. *Williams*, 1 *Car. & P.* 459, 669. *Briggs* v. *Evelyn*, 2 *H. Bl.* 114. See the form of the notice, *Arch. Forms*, 516. Formerly it was holden, that the notice must state what kind of writ is intended to be sued out; *Lovelace* v. *Curry*, 7 *T. R.* 631; but it may be doubted whether it would now be so decided, as no other but the writ of summons is applicable to such actions. The notice, however, must describe correctly the cause of action; *supra*; and any material variance may be fatal, as no evidence can be

received at the trial of any cause of action which is not stated in the notice. *Supra, and see Robson* v. *Spearman*, 3 *B. & Ald.* 493. It need not, however, describe the form of action; *Sabin* v. *Deburg*, 2 *Camp.* 196; but if it do, and state it incorrectly, the variance will be fatal. *Strickland* v. *Ward*, 7 *T. R.* 631, *n.* It is not necessary, however, to name all the intended parties to the action. *Bax* v. *Jones*, 5 *Price*, 168. If the name and place of abode of the attorney, instead of being indorsed on the back of the notice, be on the face of it, it will be sufficient; *Crooke* v. *Curry*, 5 *Burn, D. & W.* 70; if he describe his residence as of Birmingham generally, it will be sufficient; *Osborn* v. *Gough*, 3 *B. & P.* 551; but merely "given under my hand at Durham" was holden insufficient, for it is not descriptive at all of the attorney's place of abode. *Taylor* v. *Fenwick*, 7 *T. R.* 635.

By stat. 21 Jac. 1, c. 12, s. 5, if any action "upon the case, trespass, battery, or false imprisonment," be brought against a justice of the peace, for any thing done by him by virtue of his office, the same shall be "laid within the county where the trespass or fact shall be done and committed, and not elsewhere."

The defendant may plead the general issue, "not guilty," and give the special matter in evidence. 7 *Jac.* 1, *c.* 5. 21 *Jac.* 1, *c.* 12, *s.* 5. And this is not affected by the recent rules of the Courts at Westminster, as to pleading. *See* 3 & 4 *Will.* 4, *c.* 42, *s.* 1.

By stat. 24 G. 2, c. 44, s. 2, the defendant, at any time within one calendar month after notice of action given, may tender amends to the party complaining, or to his attorney or agent: if not accepted, he may plead the tender in bar of the action, together with the plea of not guilty; and if the jury at the trial find the amends so tendered to have been sufficient, they shall find a verdict for the defendant. And by sect. 3, if the defendant have neglected to tender amends, he may, by leave of the Court, at any time before issue joined, pay into Court such sum of money as he shall see fit; and thereupon such proceedings, &c. shall be had, as in other actions where money is paid into Court. *See Reg. Gen. H.* 4 *W.* 4, I. *s.* 17, 18, 19. *and see Casbourn* v. *Ball*, 2 *W. Bl.* 859. Even after issue joined, the Court have allowed the defendant to withdraw his plea, pay money into Court, and plead *de novo*. *Nestor* v. *Newcome*, 3 *B. & C.* 159. *Devaynes* v. *Boys*, 7 *Taunt.* 33.

At the trial, the plaintiff must prove that notice of action was given, as directed by statute (*see ante, p.* 74,), or in default thereof the defendant shall be entitled to a verdict. 24 G. 2, c. 44, s. 3. And he shall not be allowed to give evidence of any cause of action, except such as is contained in the notice. *Id. s.* 5. Where, after a conviction quashed, an action on the case (in pursuance of stat. 43 G. 3, c. 141, *see ante, p.* 72,) was brought against the justice, for convicting the party falsely and

maliciously, and without reasonable or probable cause; and at the trial, the plaintiff, after proof of the notice and conviction, proved that he was innocent of the offence imputed to him, and there rested his case: the Court held it not to be sufficient, but that the plaintiff should have given evidence of what passed before the justice at the time of the conviction, to shew whether there was want of probable cause for the conviction or not. *Burley* v. *Bethune*, 5 *Taunt.* 580.

As to the verdict: if the plaintiff shall not prove that the trespass or other act complained of was committed within the county in which the venue is laid, the defendant shall have a verdict. 12 *Jac.* 1, *c.* 12, *s.* 5. So if the plaintiff fail in proving the notice of action, the defendant shall have a verdict. 24 *G.* 2, *c.* 44, *s.* 3. If there had been a tender of amends, and the jury find that the amends tendered were sufficient, the defendant shall have a verdict. *Id. s.* 2. If, after a conviction quashed, an action be brought against the justices for having convicted the party, the plaintiff shall not recover more than two-pence damages (beyond the amount of the penalty levied), nor any costs of suit, unless it be expressly alleged in the declaration that the acts complained of were done maliciously and without reasonable or probable cause; 43 *G.* 3, *c.* 141, *s.* 1; nor shall he recover the penalty levied, or any damages or costs whatever, if the defendant prove that he was actually guilty of the offence of which he was convicted, and had undergone no greater punishment than that assigned by law for the offence. *Id. s.* 2.

As to costs: the plaintiff is of course entitled to his costs, if he have a verdict, excepting in the case just now mentioned, under stat. 43 G. 3, c. 141; and if the judge before whom the cause is tried shall, in open Court, certify on the back of the record that the injury for which the action was brought, was "wilfully and maliciously" committed, the plaintiff shall be entitled to double costs. 24 *G.* 2, *c.* 44, *s.* 7. On the other hand, if the defendant obtain a verdict, or have judgment on demurrer, or if the plaintiff be nonsuit, or discontinue his action, the defendant shall be entitled to double costs. 7 *Jac.* 1, *c.* 5. 21 *Jac.* 1, *c.* 12. *And see* 24 *G.* 2, *c.* 44, *s.* 2. *See Harper* v. *Carr*, 7 *T. R.* 448. *Thomas* v. *Saunders et al.*, 1 *Ad. & E.* 552.

CHAPTER II.

The Practice of the Court of Quarter Sessions, as a Criminal Court.

The practice at Sessions in Criminal Cases, has been incidentally mentioned in a cursory way, *ante, p.* 25. We shall now consider it much more at large. And I propose, therefore,—1. To treat of the persons capable of committing crimes, and of the degree in which they may be guilty;—2. I shall give a List of Offences, punishable upon Indictment, with References to Precedents of the Indictments, and to such text books as treat of the Evidence necessary to support them;—3. I shall treat of the Indictment generally;—4. I shall treat of Evidence generally;—5. I shall give the forms of Indictments, and the Evidence necessary to support them, in all those cases which usually occur at Sessions;—6. I shall treat of the Proceeding and Practice of the Court, as a Criminal Court;—7. Of Pardon;—and 8. Of Fines, and forfeited Recognizances.

Section 1.—*Persons capable of committing Crimes, and the Degree in which they may be guilty.*

1. *What Persons are punishable or excusable for Crimes.*

The general rule upon this subject is, that all persons who wilfully commit offences, are punishable for them. The exceptions are of those persons only, who, in contemplation of law, do not *wilfully* commit the offence, either from not having any will, or not being allowed to exert it. These exceptions shall be treated of, under the following heads:

Infants.] An infant, according to the legal acceptation of the term, is a person under 21 years of age. At and above the age of 14, an infant may be convicted of any offence, excepting those which consist of a non-feazance merely, such as the not apprehending persons committing felonies, or the like. 1 *Hal.* 20, 21, 22, 25. 3 *Bac. Abr.* 581, 591. Under seven years of age he cannot be convicted of a felony; 1 *Hal.* 27, 28; and under 14, he cannot be convicted of rape. 1 *Hal.* 630. Between the ages of 7 and 14, however, although presumed by law not to be *doli capax*, yet that presumption may be rebutted by circumstances, showing clearly that the infant was, at the time of committing the offence,

capable of discerning between good and evil; and in such a case he is as much amenable for offences (excepting rape, and offences of that description, and also offences of omission, as above mentioned), as if he were of full age. Thus a girl of 13 was executed for killing her mistress. 1 *Hal.* 26. A boy of 10, and another of nine, who had killed their companions, have been sentenced to death, and he of 10 years actually hanged; because upon their trials it appeared that the one hid himself, and the other hid the body he had killed; which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil. 1 *Hal.* 26, 27. 4 *Bl. Com.* 23. And there was an instance in the 17th century, where a boy of eight years old was tried at Abingdon for firing two barns; and it appearing that he had malice, revenge and cunning, he was found guilty, and hanged. *Evelyn on* 1 *Hal.* 25. 4 *Bl. Com.* 24. And in 1748, a boy of 10 years old, indicted for the murder of a girl of five, was found guilty and sentenced to be hanged: the girl was found buried in a dung heap, cut and mangled in a most barbarous and horrid manner; as the boy and girl were companions and slept together, he was charged with the offence, but he denied it; afterwards however he confessed it, and, according to his confession, it appeared that he had carried the girl from the bed to the dung heap, there killed her, cutting and mangling her in the manner above mentioned, then dug a pit for the body in the heap, and having placed the dung and straw, which was bloody, under the body, he covered it up with what was clean, and having done so, he got water and washed himself as clean as he could. As the judge who tried him did not wish to leave him actually for execution, before he had consulted the other judges upon the subject, he reprieved him; and a report of the facts being afterwards laid before all the judges, they were unanimously of opinion that there were so many circumstances stated in the report, which were undoubted tokens of what Lord Hale (1 *Hal.* 630,) called a mischievous discretion, that the prisoner was certainly a proper object for capital punishment, and ought to suffer: "for it would be of very dangerous consequence to have it thought that children may commit such atrocious crimes with impunity; there are many crimes of the most heinous nature, such as the murder of young children, poisoning parents or masters, burning houses, or the like, which children are very capable of committing, and which they may in some circumstances be under strong temptations to commit; and therefore, though the taking away of the life of a boy of 10 years old may savour of cruelty, yet as the example of this boy's punishment may be a means of deterring other children from the like offences, and as the sparing this boy merely on account of his age will probably have a quite contrary tendency, in justice to the public the law ought to take its course." *York's Case, Fost.* 70.

Idiots and Lunatics.] Idiots are persons who have been permanently of nonsane memory from their birth; Lunatics, persons who labour at times under temporary insanity, with lucid intervals; and there are others who, born sane, have become permanently insane from disease or other cause: and where, in any of these cases, the degree of insanity is such that the party knows not whether he is doing right or wrong, he is not punishable for any offence he may commit, whilst in that state. *See R. v. Arnold, per Tracy, J.* 16 *How. St. Tr.* 764. *Lord Ferrer's case,* 19 *How. St. Tr.* 947, 948. *R. v. Allen, per Lawrence, J.* 3 *Burn, D. & W.* 526. Even if a man of sound memory commit a capital offence, and before arraignment he become mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought; if after he is tried and found guilty, he lose his senses before judgment, judgment shall not be pronounced; and if after judgment he become insane, judgment shall be stayed. 1 *Hal.* 34. 4 *Bl. Com.* 24.

By stat. 39 & 40 G. 3, c. 94, s. 2, where a person, indicted for any offence, shall be insane, and upon indictment shall be found by a jury impanelled for that purpose to be insane, so that he cannot be tried; or where upon the trial he shall be found to be insane: the Court may record such finding, and order the party to be kept in strict custody until His Majesty's pleasure shall be known. This section applies to all cases, as well misdemeanors as felonies. *R. v. Little, R. & R.* 430.

And if any person charged with any offence shall be brought before any Court to be discharged for want of prosecution, and such person shall appear to be insane, the Court may order a jury to be impanelled to try the sanity of such person; and if the jury find him to be insane, the Court may order him to be kept in strict custody in such place and in such manner as to them shall seem fit, until His Majesty's pleasure shall be known. 39 & 40 *G.* 3, *c.* 94, *s.* 2.

And by the same statute, *s.* 1, where it shall be given in evidence, upon the trial of any person for treason, murder or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of committing such offence, and to declare whether they acquitted him on account of such insanity; and if they do so find, the Court shall order such person to be kept in strict custody, in such place and in such manner as to them shall seem fit, until His Majesty's pleasure shall be known.

It may be necessary to mention that drunkenness is no excuse for crime, but rather an aggravation of it. *Co. Lit.* 247.

Wife.] If the husband be present at the time his wife commits a felony, (except murder and robbery,) the law presumes that the wife acts under the coercion of her husband, excuses

her, and punishes the husband only. 1 *Hawk. c.* 1. *s.* 2. But if she commit it in his absence, even although it be proved that he incited her to it, she is as amenable to punishment as if she were a feme sole. 1 *Hal.* 45. *Staundf.* 26. So, if a wife commit treason, murder, or robbery, even in the company of her husband, the law, on account of the odiousness and dangerous consequences of these crimes, will not excuse her. 1 *Hawk. c.* 1, *s.* 9. 1 *Hal.* 47. So, if a wife commit an offence under felony, even in company with her husband, she is liable to punishment as if she were not married. 1 *Hawk. c.* 1, *s.* 13. *Dalt. c.* 139. *p.* 314. Where the prisoners, husband and wife, were indicted, the wife with forging and uttering an order and certificate for prize money, and the husband as accessory before the fact; it was clear upon the evidence that the husband planned the matter, and urged and insisted on the wife presenting the forged order, &c., and applying for the prize money, but he was not present when she did so; and it was thereupon objected that as it appeared plainly that the wife acted under the compulsion of her husband, she could not be found guilty; and if she as principal were acquitted, he as accessory must necessarily be acquitted also: both however being convicted, the Judges held, that with respect to the wife's guilt as principal, the presumption of coercion by the husband did not arise, as he was not present at the time, and they therefore were clearly of opinion that the wife was guilty of the uttering, and the husband guilty as accessory before the fact. *R.* v. *Sarah & John Morris, R. & Ry.* 270. Where husband and wife were indicted for receiving stolen goods, and both were convicted, the judges held, that, as the charge against the husband and wife was joint, and it had not been left to the jury to say whether she had received the goods in the absence of her husband, the conviction of the wife could not be supported, even although it appeared that she had been more active in the matter than he. *R.* v. *Eliz. Archer, et al. R. & M.* 143. So, where a woman was indicted for the murder of her husband's apprentice, by not furnishing him with proper nourishment, Lawrence, J. held, that as the wife was in that respect the servant of her husband, and as it was not her duty to provide the boy with proper nourishment, she could not be guilty of any breach of duty in neglecting to do so; if indeed the husband had given her food for the boy, and she had wilfully witheld it, it would be otherwise. *R.* v. *Squire & wife*, 1 *Russ. C. L.* 16. So a woman may be convicted of perjury, even although her husband was present at the time of her taking the oath, &c. *R.* v. *Dicks, MS. Bayley, J., cit.* 1 *Russ. C. L.* 16. So, she and her husband or she alone, may be indicted for keeping a disorderly house, 1 *Hawk. c.* 1, *s.* 12, or gaming house, *R.* v. *Dixon and wife*, 10 *Mood.* 335, or for forcible entry, *Dalt.* 126, riot, conspiracy, &c. But a wife cannot be charged with having conspired with her husband alone; for conspiracy must be

between two persons at least, and husband and wife are but one person in law. 1 *Hawk. c.* 72, *s.* 8. Nor is she deemed accessory after the fact, in receiving her husband, although she may know at the time of his having committed a felony; for she is under his power, and is obliged to receive him. 1 *Hal.* 47. So if husband and wife jointly receive a third person, knowing him to be guilty of felony, the husband alone is guilty, the wife not; but if the wife alone receive him, in the absence of her husband, she may be convicted. 1 *Hal.* 621. Also, a woman can never be said to be guilty of larceny of the goods of her husband, or of goods which are the property of her husband and others, unless she steal them from some third person, with intent to make such person chargeable for them; for as husband and wife are one person in law, the wife's possession is deemed the possession of the husband. 1 *Hal.* 514. 1 *Hawk. c.* 33, *s.* 19. Where money belonging to a friendly society was deposited in a box, and placed in the custody of one of the members, and his wife broke open the box and stole the money: the judges held that an indictment against her as for larceny could not be maintained. *R.* v. *Willis, Ry. & M.* 375. If, however, the box at the time were in the hands of any other person than the husband, she might be convicted, although the husband were a part-owner of the money in it; because the taking would have the effect of charging the bailee. 1 *Hal.* 513. *See R.* v. *Phœbe Bramley, R. & Ry.* 478, *and post.* Where the wife of the prosecutor, and a man with whom she afterwards cohabited, jointly took money and goods belonging to the husband; the judges held that an indictment for larceny would lie against the man, although not against the wife; and that notwithstanding the wife's consent, the property must be considered as having been taken *invito domino. R.* v. *Tolfree, Ry. & M.* 243. And where upon an indictment against a woman for setting fire to the house of her husband, it appeared that she had lived separate from him for two years, and had gone by her maiden name; and it also appeared clearly from the evidence, that she had set fire to the house out of malice to her husband, she having declared that she wished to burn him in the house: the judges held that she ought not to be convicted. *R.* v. *Eliza March, Ry. & M.* 182.

That a wife, who has committed a felony, has done so under coercion of her husband, however, is merely a presumption, which, like all other presumptions, may be rebutted by evidence to the contrary; and therefore if it appear clearly upon evidence, that the wife was not drawn into it by the husband, but that she was the principal actor in and inciter to it, she seems to be guilty as well as the husband. 1 *Hal.* 516.

If the woman be indicted as a wife, that being an admission on record that she is so, will be sufficient. *R.* v. *Knight et ux.* 1 *Car. & P.* 116. Otherwise, if she set up her coverture as a

defence, she must prove it. And proof of cohabitation with the man, and passing by his name, does not seem to be sufficient proof of this; *R.* v. *Hassall et al.*, 2 *Car. & P.* 434; although, on the other hand, actual evidence of the marriage would not perhaps be required.

Ambassadors and their Servants.] For offences which are *mala prohibita* merely, and not *mala in se*, ambassadors and their suites are not punishable. But for direct attempts against the life of the king, they are punishable; and if they are not also punishable in the same manner for conspiracies against the king, this arises rather from political reasons than from any rules of law. 1 *Hal.* 96—99. *Fost.* 187, 188. Also for murder, rape, or any other offences of great enormity against nature and the fundamental laws of society, they are punishable by the laws of this country as any other alien. *Id.* And Lord Hale cites, as an instance, the execution of Don Pantaleon Sa, the Portuguese ambassador's brother, and of some of the ambassador's servants, for a murder committed by them in London. See however the case of *R.* v. *Guerchy* (1 *W. Bl.* 545,) where the attorney-general entered a *noli prosequi* to an indictment found against the French ambassador, for hiring a person to assassinate the Chevalier D'Eon.

Persons offending from Chance, Mistake, &c.] Where a man, in the execution of one act, by misfortune or chance, and not designedly, do another act, for which, if he had wilfully committed it, he would be liable to be punished: in that case, if the act he was doing were lawful, or merely *malum prohibitum*, he shall not be punishable for the act arising from misfortune, or chance; but if *malum in se*, it is otherwise. 1 *Hal.* 39. *Fost.* 259. Even the killing another by misfortune, or in any other way not felonious, is not now punishable, nor is any forfeiture thereby incurred. 9 *Geo.* 4, *c.* 31, *s.* 10.

So a person, from ignorance or mistake, not of law but of fact, may commit an offence, and still be dispunishable for it: as if a man, thinking to kill a housebreaker in his house, by mistake kill one of his own family, he is not punishable for it. *Cro. Car.* 538. 4 *Bl. Com.* 27. But if the act he intended doing were unlawful, he may in general be punishable for the act he committed through ignorance or mistake, in the same way as if he wilfully did it: as, for instance, if a man, intending to kill A. by mistake kill B., he will be equally guilty as if in fact he had killed A.

So where a man is forced to commit an offence, by such threats and menaces of personal violence by others, as induced a well-grounded apprehension of death or other bodily harm in case he should refuse to do it: this will in general excuse him. *See* 3 *Inst.* 10. 1 *Hal.* 56. *Fost.* 217. Even if a man be thus com-

pelled to join rebels or foreign enemies in a time of rebellion or war, he will be excused for remaining with them as long as the compulsion lasted. *Fost.* 216, 217. But no threat to burn his house or destroy his property, or the like, will be sufficient for this purpose. *M'Growther's case, Fost.* 13. 9 *St. Tr.* 566.

2. *Degrees of Guilt.*

In felony, the person who actually does the act, is called the principal in the first degree; a person present, who, although he do not with his own hand commit the act, yet is aiding and abetting the person who actually commits it, is called a principal in the second degree; a person not present when a felony is committed, but who has previously ordered, incited or encouraged another to commit it, is called an accessory before the fact: after a felony committed, any person who receives, harbours or assists the principal, knowing him to have committed the felony, is called an accessory after the fact.

The distinction between principals in the first and second degree, is not material; they are equally guilty, and equally punishable. And upon an indictment charging a man as principal in the first degree, evidence that he was present aiding and abetting, whilst another committed the felony, will support the indictment; as for instance, if an indictment against A. and B. charge that A. committed the felony, and B. was present aiding and abetting, proof that B. committed the felony, and that A. was present aiding and abetting, will support the indictment. And a person is said to be present aiding and abetting, who, being engaged in the same design with the person who actually commits the felony, although not actually present at the commission of it, is yet at such a convenient distance as to come to the immediate assistance of his associate if required, or to watch to prevent surprise, or the like. *See Fost.* 350—355.

Accessories before the fact may be tried, either as accessories with or after the principal, or as for a substantive felony. 7 *G.* 4, *c.* 64, *s.* 9. *See the form of an indictment against an accessory before the fact, together with the principal,* 1 Arch. P. A. 202; *the like against the accessory alone, as for a substantive felony,* Id. 203. *As to accessories before the fact in felonies against* 7 & 8 *G.* 4, *c.* 29, see 1 Arch. P. A. 441; *in felonies against* 7 & 8 *G.* 4, *c.* 30, 2 Arch. P. A. 58; *in offences within* 9 *G.* 4, *c.* 31, Id. 186; *in forgery or uttering,* Id. 293; *in offences relating to the coin, &c.,* Id. 410.

As to accessories after the fact, *see* 7 *G.* 4. *c.* 64, *s.* 10, 11. 1 *Arch. P. A.* 203, 204. *As to accessories after the fact in felonies against* 7 & 8 *G.* 4, *c.* 29. see 1 Arch. P. A. 442; *in felonies against* 7 & 8 *G.* 4, *c.* 30, 2 Arch. P. A. 58; *in offences against* 9 *G.* 4, *c.* 31, Id. 186; *in forgery or uttering,* Id. 293; *in offences relating to the coin, &c.,* Id. 410.

In high treason and in misdemeanors, there are no accessories: the same previous procuring or incitement, &c., which would make a man an accessory before the fact in felony, will make him a principal; and the same assistance after the offence committed, as would make a man accessory after the fact in felony, will in treason make him a principal traitor, but in misdemeanors is dispunishable.

As to receivers of stolen goods, we shall have another opportunity of noticing them.

SECTION 2.—*A List of Offences, which are the Subjects of Prosecution by Indictment.*

Abduction. 1. Taking away or detaining a woman, against her will, from motives of lucre, with intent to marry or defile her: *felony*, transportation for life, or for not less than seven years; or imprisonment, with or without hard labour, for not more than four years. 9 *G.* 4, *c.* 31, *s.* 19. Indictment, 2 *Arch. P. A.* 153. Evidence, *Id.* 154.

2. Unlawfully taking an unmarried girl, under the age of 16, out of the possession and against the will of her parent or guardian: *misdemeanor*, fine or imprisonment, or both. 9 *G.* 4, *c.* 31, *s.* 20. Indictment, 2 *Arch. P. A.* 155. Evidence, *Id.* 155, 156.

Abortion. 1. Administering poison or other noxious thing, or using any instrument or other means, to procure the miscarriage of a woman quick with child: *felony*, death. 9 *G.* 4, *c.* 31, *s.* 13. Indictment, 2 *Arch. P. A.* 140, 142. Evidence, *Id.* 141, 142.

2. The like, when the woman is not quick with child: *felony*, transportation for not more than 14, nor less than seven years; or imprisonment, with or without hard labour, for not more than three years, and whipping. 9 *G.* 4, *c.* 31, *s.* 13. Indictment, 2 *Arch. P. A.* 143, 144. Evidence, *Id.* 143, 145.

Abusing a girl. See "*Carnally knowing.*"

Accusing or threatening to accuse a man of a crime punishable with death, transportation or pillory, or of an attempt to commit a rape, or of any infamous crime, with intent to extort money, &c.: *felony*, transportation for life or for not less than seven years; or imprisonment, with or without hard labour, for not more than four years, and whipping. 7 & 8 *G.* 4, *c.* 29, *s.* 8. Indictment, 1 *Arch. P. A.* 301. Evidence, *Id.* 302.

Accusing or threatening to accuse a man of an infamous crime, with intent to extort money, &c., and thereby extorting money, &c., is robbery: *felony*, death. 7 & 8 *G.* 4, *c.* 29, *s.* 7, 9. Indictment, 1 *Arch. P. A.* 291. Evidence, *Id.* 292—295.

Adhering to the King's enemies. See "*Treason.*"

Administering medicine, to procure miscarriage. See "*Abortion.*"

Affray: *misdemeanor*, fine or imprisonment, or both. 1 *Hawk. c.* 63, *s.* 20. Indictment, 3 *Burn, D. & W.* 30. Evidence, *see* 3 *Burn, D. & W.* 26, *&c.*

Agent, banker, merchant, broker or attorney, applying to his own use money or securities entrusted to him, with written directions, for a special purpose: *misdemeanor*, transportation for not more than 14 nor less than seven years; or fine or imprisonment, or both. 7 & 8 *G.* 4, *c.* 29, *s.* 49, 50. Indictment, 1 *Arch. P. A.* 421. Evidence, *Id.* 422.

2. Selling or pledging chattels, securities, power to sell stock, &c., entrusted to them for safe custody or a special purpose: *misdemeanor*, the like punishment. 7 & 8 *G.* 4, *c.* 29, *s.* 49, 50. Indictment, 2 *Arch. P. A.* 423. Evidence, *Id.* 423, 424.

Agent or factor pledging the goods, bill of lading, delivery order, &c., of his principal: *misdemeanor*, transportation for not more than 14, nor less than seven years; or fine or imprisonment, or both. 7 & 8 *G.* 4, *c.* 29, *s.* 51, 52. Indictment, 1 *Arch. P. A.* 426. Evidence, *Id.* 426, 427.

Airway. See "*Malicious Injuries,*" *title* "*Mines.*"

Arms, unlawfully training to the use of, or attending any meeting for that purpose: *misdemeanor*, transportation for not more than seven years, or imprisonment for not more than two years. 60 *G.* 3, & 1 *G.* 4, *c.* 1, *s.* 1. Attending meetings for the purpose of being so trained: *misdemeanor*, imprisonment for not more than two years. *Id.* 1 *Arch. P. A.* 1, 2.

Arson. See "*Burning.*"

Ass. See "*Larceny,*" "*Malicious Injuries,*" *title* "*Animals.*"

Assault and Battery: *misdemeanor*, fine or imprisonment, or both. Indictment, *post.* Evidence, *post.*

Assaulting, striking or wounding a magistrate or officer, &c., on account of the exercise of his duty in preserving wreck: *misdemeanor*, transportation for seven years, or imprisonment with or without hard labour. 9 *G.* 4, *c.* 31, *s.* 24. Indictment, 2 *Arch. P. A.* 167. Evidence, *Id.* 168.

Assaulting a peace officer or revenue officer in the due execution of his duty: *misdemeanor*, imprisonment, with or without hard labour, for not more than two years, with fine or surety for the peace, if the Court think fit. 9 *G.* 4, *c.* 31, *s.* 25. Indictment, 2 *Arch. P. A.* 170. Evidence, *Id.* 170, 171.

Assaulting game-keepers. See "*Game.*"

Assault with intent to commit a felony: *misdemeanor*, imprisonment, with or without hard labour, for not more than two years, with fine or surety for the peace, if the Court think fit. 9 *G.* 4, *c.* 31, *s.* 25. Indictment, 2 *Arch. P. A.* 169. Evidence, *Id.* 169, 170.

Assault with intent to prevent lawful apprehension or detainer: *misdemeanor*, imprisonment, with or without hard labour, for not more than two years, with fine or surety for the peace, if the Court think fit. 9 *G.* 4, *c.* 31, *s.* 25. Indictment, 2 *Arch. P. A.* 171. Evidence, *Id.* 171.

Assault with intent to commit a rape, &c. See "*Rape*," &c.

Assault with intent to rob. See "*Larceny*," *title* "*Larceny from the Person.*"

Assault with intent to spoil the clothes of another: *felony*, transportation for seven years. 6 *G.* 1, *c.* 23, *s.* 11.

Assault in pursuance of a conspiracy to raise the rate of wages: *misdemeanor*, imprisonment, with or without hard labour, for not more than two years, with fine or surety for the peace, if the Court think fit. 9 *G.* 4, *c.* 31, *s.* 25. Indictment, 2 *Arch. P. A.* 172. Evidence, *Id.* 173.

Assembly, unlawful. See "*Arms*," "*Riot.*"

Attempt to poison, murder, &c. See "*Murder.*"

Attorney. See "*Agent.*"

B.

Bail, acknowledging, in the name of another: *felony*, transportation for life or for not less than seven years, or imprisonment for not more than four nor less than two years. 11 *G.* 4, & 1 *W.* 4, *c.* 66, *s.* 11. Indictment, 2 *Arch. P. A.* 276. Evidence, *Id.* 277.

Bank of England. See "*Embezzlement*," "*Forgery.*"

Bank note. See "*Forgery.*" "*Larceny*," *title* "*Securities.*"

Banks of rivers, canals, &c. See "*Malicious Injuries.*"

Banker. See "*Agent.*"

Bankrupt not surrendering: *felony*, transportation for life or for not less than seven years, or imprisonment, with or without hard labour, for not more than seven years. 6 *G.* 4, *c.* 16, *s.* 112. Indictment, 1 *Arch. P. A.* 170. Evidence, *Id.* 171. Bankrupt not discovering his property, upon examination: *felony*, same punishment. 6 *G.* 4, *c.* 16, *s.* 112. Indictment, 1 *Arch. P. A.* 172. Evidence, *Id.* 172, 173. Bankrupt not delivering up his effects, upon examination: *felony*, same punishment. 6 *G.* 4, *c.* 16, *s.* 112. Indictment, 1 *Arch. P. A.* 173. Evidence, *Id.* Bankrupt concealing or embezzling his effects: *felony*, same punishment. 6 *G.* 4, *c.* 16, *s.* 112. Indictment, 1 *Arch. P. A.* 173. Evidence, *Id.* 174.

Barge. See "*Larceny*," *title* "*Ships.*"

Barking trees. See "*Malicious Injuries,*" *title* "*Agriculture,*" *&c.*

Barn. See "*Burning,*" "*Riot.*"

Barratry: *misdemeanor*, fine or imprisonment, or both. 3 *Burn, D. & W.* 77.

Bastard. See "*Concealing.*"

Battery. See "*Assault and Battery.*"

Bawdy-house keeping. See "*Disorderly House.*"

Beast. See "*Larceny,*" "*Malicious Injuries,*" *title* "*Animals.*"

Beastiality: *felony*, death. 9 *G.* 4, *c.* 31, *s.* 15. Indictment, 2 *Arch. P. A.* 149. Evidence, *Id.* 150.

Bigamy: *felony*, transportation for seven years, or imprisonment with or without hard labour for not more than two years. 9 *G.* 4, *c.* 31. *s.* 22. Indictment, 2 *Arch. P. A.* 161. Evidence, *Id.* 162—165.

Bill of Exchange. See "*Forgery.*" "*Larceny,*" *title* "*Securities.*"

Bill of Lading, factor pledging. See "*Agent.*"

Black Cawke. See "*Larceny,*" *title* "*Land.*"

Black lead. See "*Larceny,*" *title* "*Land.*"

Blasphemy. See "*Libel.*"

Bleaching ground. See "*Larceny,*" *title* "*Manufactories.*"

Boat. See "*Larceny,*" *title* "*Ships.*"

Body. See "*Dead body.*"

Bond. See "*Forgery,*" "*Larceny,*" *title* "*Securities.*"

Brass. See "*Larceny,*" *title* "*Land.*"

Breach of prison: *felony* or *misdemeanor*, according to the offence for which the party was in custody. *See* 3 *Burn, D. & W.* 700.

Breaking into a house, church or chapel. See "*Burglary and Housebreaking.*"

Breaking looms, &c. See "*Malicious Injuries,*" *title* "*Manufactories.*"

Bribery of officers: *misdemeanor*, fine or imprisonment, or both. 3 *Burn, D. & W.* 85.

Bridge, not repairing: *misdemeanor*, fine. Indictment, *post.* Evidence, *post.* Pulling down, destroying or injuring a bridge; see "*Malicious Injuries,*" *title* "*Bridges.*"

Broker. See "*Agent.*"

Bull or Bullock. See "*Larceny,*" "*Malicious Injuries,*" *title* "*Animals.*"

Building. See "*Burglary,*" "*Burning,*" "*Malicious Injuries.*"

Burglary and Housebreaking. Burglary, *felony*, death. 7 & 8 *G.* 4, *c.* 29, *s.* 11. Indictment, 1 *Arch. P. A.* 306. Evidence, *Id.* 307—317. Breaking and entering other buildings within the same curtilage with a dwelling-house, (but not being privileged as part thereof) and stealing therein: *felony*, transportation for life or for not less than seven years, or imprisonment, with or without hard labour, for not more than four years, and whipping. 7 & 8 *G.* 4, *c.* 29, *s.* 14.

...

Indictment, 1 *Arch. P. A.* 326. Evidence, *Id.* 327—329. Burglary in breaking out of a dwelling-house: *felony*, death. 7 & 8 *G.* 4, *c.* 29, *s.* 11. Indictment, 1 *Arch. P. A.* 318. Evidence, *Id.* 319. Breaking and entering a dwelling-house and stealing therein: *felony*, transportation for life or for not less than seven years, or imprisonment, with or without hard labour, for not more than four nor less than one year: and if sentenced to be transported, he may also be sentenced to imprisonment, with or without hard labour, previously to his transportation, for not more than four years. 7 & 8 *G.* 4, *c.* 29, *s.* 12, 13. 3 & 4 *W.* 4, *c.* 44, *s.* 2. Indictment, 1 *Arch. P. A.* 321. Evidence, *Id.* 321—323. Breaking and entering a shop, warehouse or counting-house, and stealing therein: *felony*, transportation for life or for not less than seven years, or imprisonment, with or without hard labour, for not more than four years, and whipping. 7 & 8 *G.* 4, *c.* 2[illegible] *s.* 15, 4. Indictment, 1 *Arch. P. A.* 330. Evidence, *Id.* breaking and entering a church or chapel, and stealing therein: *felony*, 7 & 8 *G.* 4, *c.* 29, *s.* 10, transportation for life or not less than seven years, or imprisonment, with or without hard labour, for not more than four years. 5 & 6 *W.* 4, *c.* 81. Indictment, 1 *Arch. P. A.* 303. Evidence, *Id.* 304, 305. Stealing in a church or chapel, and breaking out of the same: *felony*, same punishment. 7 & 8 *G.* 4, *c.* 29, *s.* 10; 5 & 6 *W.* 4, *c.* 81. Indictment, 1 *Arch. P. A.* 305. Evidence, *Id.* 305, 306.

Burning or setting fire to a church or chapel: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 2. Indictment, 2 *Arch. P. A.* 5. Evidence, *Id.* Setting fire to a house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hopoast, barn, granary, or building used in trade or manufactures: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 2. Indictment, 2 *Arch. P. A.* 2. Evidence, *Id.* 2, 5. Setting fire to a mine of coal or cannel coal: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 5. Indictment, 2 *Arch. P. A.* 12. Evidence, *Id.* Setting fire to a stack of corn, grain, pulse, straw, hay, or wood: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 17. Indictment, 2 *Arch. P. A.* 38. Evidence, *Id.* 38, 39. Setting fire to a crop of corn, grain or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorze, furze, or fern growing: *felony*, transportation for seven years, or imprisonment, with or without hard labour, for not more than two years, and whipping. 7 & 8 *G.* 4, *c.* 30, *s.* 17, 27. Indictment, 2 *Arch. P. A.* 39. Evidence, *Id.* Setting fire to a ship; see "*Malicious Injuries,*" *title* "*Ships.*" Setting fire to stores, &c., belonging to the Crown; see "*King's Stores.*"

C.

Calf. See "*Larceny,*" "*Malicious Injuries,*" *title* "*Animals.*"

Canal. See "*Larceny,*" *title* "*Ships.*" "*Malicious Injuries,*" *title* "*Rivers.*"

Cannel coal. See "*Burning.*" "*Larceny,*" *title* "*Land.*"

Carnally knowing a girl under the age of 10 years: *felony*, death. 9 *G.* 4, *c.* 31, *s.* 17. Indictment, 2 *Arch. P. A.* 151. Evidence, *Id.* 152. Carnally knowing a girl above 10 and under 12 years of age: *misdemeanor*, imprisonment with or without hard labour. 9 *G.* 4, *c.* 31, *s.* 17. Indictment, 2 *Arch. P. A.* 152. Evidence, *Id.*

Cattle. See "*Larceny,*" "*Malicious Injuries,*" *title* "*Animals.*"

Cawke. See "*Larceny,*" *title* "*Land.*"

Challenge to fight: *misdemeanor*, fine or imprisonment, or both. Indictment, 4 *Went.* 315. 6 *Went.* 385, 461. See *R.* v. *Rice*, 3 *East*, 581.

Chapel. See "*Burglary,*" "*Burning.*"

Cheating. See "*False Pretences.*"

Check. See "*Forgery;*" "*Larceny,*" *title* "*Securities.*"

Child, stealing, under the age of 10 years: *felony*, transportation for 7 years, or imprisonment, with or without hard labour, for not more than 2 years, and whipping. 9 *G.* 4, *c.* 31, *s.* 21. Indictment, 2 *Arch. P. A.* 157. Evidence, *Id.* 158. Receiving or harbouring such child, knowing it to have been stolen: *felony*, same punishment. 9 *G.* 4, *c.* 31, *s.* 21. Indictment, 2 *Arch. P. A.* 159. Evidence, *Id.* 160.

Church. See "*Burglary,*" "*Burning,*" "*Malicious Injuries.*"

Clergyman, arresting, upon civil process, whilst performing, or going to perform, or returning from performing, divine service: *misdemeanor*, fine or imprisonment, or both. 9 *G.* 4, *c.* 31, *s.* 23. Indictment, 2 *Arch. P. A.* 166. Evidence, *Id.*

Clerks. See "*Embezzlement,*" "*Larceny.*"

Clipping the coin. See "*Coin.*"

Clothes. See "*Assault.*"

Coach-house. See "*Burning,*" "*Malicious Injuries.*"

Coal. See "*Burning,*" "*Larceny,*" *title* "*Land.*"

Coal mines. See "*Burning,*" "*Malicious Injuries,*" *title* "*Mines.*"

Cognovit, giving, in the name of another: *felony*, transportation for life or for not less than 7 years, or imprisonment for not more than 4 nor less than 2 years. 11 *G.* 4, *and* 1 *W.* 4, *c.* 66, *s.* 11. Indictment and evidence, *see* 2 *Arch. P. A.* 276, 277.

Coin: counterfeiting the current gold or silver coin: *felony*, transportation for life or for not less than 7 years, or imprisonment, with or without hard labour, for not more than 4 years. 2 *W.* 4, *c.* 34, *s.* 3, 19. Indictment, 2 *Arch. P. A.* 386. Evidence, *Id.* Gilding or silvering counterfeit coin, to make it resemble the current coin: *felony*, transportation for life or not less than 7 years, or imprisonment, with or

without hard labour, for not more than 4 years. 2 *W.* 4, *c.* 34, *s.* 4, 19. Indictment, 2 *Arch. P. A.* 388. Evidence, *Id.* 389. Gilding or silvering blanks, with intent to make counterfeit coin of them: *felony*, the same punishment. 2 *W.* 4, *c.* 34, *s.* 4, 19. Indictment, 2 *Arch. P. A.* 389. Evidence, *Id.* Gilding silver coin, to make it resemble the gold coin: *felony*, the same punishment. 2 *W.* 4, *c.* 34, *s.* 4, 19. Indictment, 2 *Arch. P. A.* 389. Evidence, *Id.* 390. Gilding or silvering the copper coin, to make it resemble the gold or silver coin: *felony*, the same punishment. 2 *W.* 4, *c.* 34, *s.* 4, 19. Indictment and evidence, 2 *Arch. P. A.* 390. Impairing or diminishing the current gold or silver coin: *felony*, transportation for not more than 14 years and not less than 7, or imprisonment, with or without hard labour, for not more than 3 years. 2 *W.* 4, *c.* 34, *s.* 5, 19. Indictment, 2 *Arch. P. A.* 391. Evidence, *Id.* Selling, buying, putting off, receiving, &c. counterfeit coin at a less value than it imports: *felony*, transportation for life or for not less than 7 years, or imprisonment, with or without hard labour, for not more than 4 years. 2 *W.* 4, *c.* 34, *s.* 6, 19. Indictment, 2 *Arch. P. A.* 392. Evidence, *Id.* 393. Knowingly importing counterfeit coin: *felony*, the same punishment. 2 *W.* 4, *c.* 34, *s.* 6, 19. Indictment, 2 *Arch. P. A.* 393. Evidence, *Id.* Uttering counterfeit gold or silver coin: *misdemeanor*, imprisonment, with or without hard labour, for not more than one year. 2 *W.* 4, *c.* 34, *s.* 7, 19. Indictment, 2 *Arch. P. A.* 395. Evidence, *Id.* 396. Uttering such coin, and knowingly having other counterfeit coin in his possession: *misdemeanor*, imprisonment, with or without hard labour, for not more than 2 years. 2 *W.* 4, *c.* 34, *s.* 7, 19. Indictment, 2 *Arch. P. A.* 396. Evidence, *Id.* 396, 397. Uttering twice within 10 days: *misdemeanor*, same punishment. 2 *W.* 4, *c.* 34, *s.* 7, 19. Indictment, 2 *Arch. P. A.* 397. Evidence, *Id.* Uttering, after a former conviction for the same offence: *felony*, transportation for life or for not less than 7 years, or imprisonment, with or without hard labour, for not more than 4 years. 2 *W.* 4, *c.* 34, *s.* 7, 9, 19. Indictment, 2 *Arch. P. A.* 398. Evidence, *Id.* Knowingly having 3 or more pieces of counterfeit coin, with intent to utter them: *misdemeanor*, imprisonment, with or without hard labour, for not more than 3 years. 2 *W.* 4, *c.* 34, *s.* 8, 19. Indictment, 2 *Arch. P. A.* 399. Evidence, *Id.* 400. Such offence, after a former conviction: *felony*, transportation for life or for not less than 7 years, or imprisonment for not more than 4 years. 2 *W.* 4, *c.* 34, *s.* 8, 9, 19.

Counterfeiting the current copper coin, or buying, selling, receiving, putting off, &c. counterfeit copper money at

a less value than it imports: *felony*, transportation for 7 years, or imprisonment, with or without hard labour, for not more than 2 years. 2 *W.* 4, *c.* 34, *s.* 12, 19. Uttering counterfeit copper coin, or knowingly having 3 or more pieces in his possession with intent to utter them: *misdemeanor*, imprisonment for not more than a year. *Id.*

Making, mending, or having coining tools: *felony*, transportation for life or for not less than 7 years, or imprisonment, with or without hard labour, for not more than 4 years. 2 *W.* 4, *c.* 34, *s.* 10, 19. Indictment, 2 *Arch. P. A.* 403. Evidence, *Id.* Conveying tools, coin or bullion out of the mint: *felony*, transportation for life or for not less than 7 years, or imprisonment, with or without hard labour, for not more than 4 years. 2 *W.* 4, *c.* 34, *s.* 11, 19. Indictment, 2 *Arch. P. A.* 404.

Colliery. See "*Burning*," "*Larceny*," *title* "*Land*."

Compounding felony: *misdemeanor*, fine or imprisonment, or both. 1 *Hawk. c.* 59, *s.* 5.

Concealing the birth of a child, by secret burying or otherwise: *misdemeanor*, imprisonment, with or without hard labour, for not more than 2 years. 9 *G.* 4, *c.* 31, *s.* 14. Indictment, 2 *Arch. P. A.* 146. Evidence, *Id.* 147. Or upon an indictment for the murder of an infant, if the party be acquitted of the murder, the jury may find her guilty of the concealment. 9 *G.* 4, *c.* 31, *s.* 14.

Concealing a will. See "*Larceny*," *title* "*Securities*."

Conies. See "*Larceny*," *title* "*Animals*."

Conspiracy: *misdemeanor*, fine or imprisonment, or both. Indictment, *post*. Evidence, *post*.

Conspiracy to raise wages, assault in pursuance of. See "*Assault*."

Copper. See "*Larceny*," *title* "*Land*."

Copper coin. See "*Coin*."

Coppice, setting fire to. See "*Burning*."

Corn. See "*Burning*."

Cotton goods or yarn. See "*Larceny*," *title* "*Manufactories*." "*Malicious Injuries*," *title* "*Manufactures*."

Counterfeit. See "*Coin*."

Counterfeit letter. See "*False Pretence*."

Counting-house. See "*Burglary*."

Coursing deer. See "*Larceny*," *title* "*Animals*."

Court rolls. See "*Forgery*."

Cow. See "*Larceny*," "*Malicious Injuries*," *title* "*Animals*."

Cutting. See "*Murder*."

D.

Dam of a pond, breaking down. See "*Malicious Injuries*."

Damaging machinery, goods, &c. See "*Malicious Injuries*."

Dead body, disinterring: *misdemeanor*, fine or imprisonment, or both.

Debenture. See "*Larceny*," *title* "*Securities*."
Deed. See "*Forgery*." "*Larceny*," *title* "*Securities*."
Deed enrolled. See "*Fine*."
Deer stealing. See "*Larceny*," *title* "*Animals*."
Deer keepers, beating or wounding, in the execution of their duty: *felony*, same punishment as simple larceny. 7 & 8 *G.* 4, *c.* 29, *s.* 29. Indictment, 1 *Arch. P. A.* 363. Evidence, *Id.* 365.
Demanding money or goods with menaces or force, with intent to steal: *felony*, transportation for life or for not less than 7 years, or imprisonment, with or without hard labour, for not more than 4 years, and whipping. 7 & 8 *G.* 4, *c.* 29, *s.* 6, 4. Indictment, 1 *Arch. P. A.* 297. Evidence, *Id.* 298. Sending a threatening letter to that effect: *felony*, transportation for life or for not less than 7 years, or imprisonment, with or without hard labour, for not more than 4 years, and whipping. 7 & 8 *G.* 4, *c.* 29, *s.* 8. Indictment, 1 *Arch. P. A.* 300. Evidence, *Id.* 300, 301.
Destroying goods, machinery, trees, &c. &c. See "*Malicious Injuries*."
Destroying a will. See "*Larceny*," *title* "*Securities*."
Disorderly house, keeping: *misdemeanor*, fine or imprisonment, or both. Indictment, *post*. Evidence, *post*.
Dissenters' chapel. See "*Burning*." "*Public Worship*." It is not within 7 & 8 G. 4, c. 29, s. 10, against breaking into a chapel. *R.* v. *Warren and Spencer*, 6 *Car.* & *P.* 335, *n.*
Dividend warrant. See "*Forgery*," "*Larceny*," *title* "*Securities*."
Dock. See "*Larceny*," *title* "*Ships, &c.*"
Dredging for oysters. See "*Larceny*."
Drowning. See "*Murder*."
Drowning a mine. See "*Malicious Injuries*," *title* "*Mines*."
Duelling. See "*Murder*."
Dwelling-house. See "*Burning*," "*Larceny*."

E.

Embezzlement by clerks or servants: deemed a felonious stealing, transportation for not more than 14 nor less than 7 years, or imprisonment with or without hard labour for not more than 3 years, and whipping. 7 & 8 *G.* 4, *c.* 29, *s.* 47, 4. Indictment, 1 *Arch. P. A.* 410. Evidence, *Id.* 413.
Embezzlement by persons employed in the service of his Majesty: *felony*, transportation for not more than 14 nor less than 7 years, or imprisonment, with or without hard labour, for not more than 3 years. 2 *W.* 4, *c.* 4, *s.* 1. *See* 2 *Arch. P. A.* 374, *n.*
Embezzlement by clerks of the Bank of England: *felony*, death. 15 *G.* 2, *c.* 13, *s.* 12.

Embezzlement by clerks of the Post Office: Embezzling letters containing bank notes, &c.; *felony*, 52 *G.* 3, *c.* 143, *s.* 2, transportation for life or not less than 7 years, or imprisonment, with or without hard labour, for not more than 4 years. 5 & 6 *W.* 4, *c.* 81. Embezzling money received for postage: *felony*. 5 *G.* 3, *c.* 25, *s.* 19.

Embezzlement of the King's stores. See "*King's Stores.*"

Embracery: *misdemeanor*, fine or imprisonment. See *stat.* 6 *G.* 4, *c.* 50, *s.* 61.

Engine. See "*Malicious Injuries.*"

Engrossing: *misdemeanor*, fine or imprisonment, or both. See 3 *Burn, D. & W.* 246. *R.* v. *Waddington*, 1 *East*, 143. *R.* v. *Gilbert*, *Id.* 583.

Entry. See "*Forcible Entry.*"

Escape: if negligent, *misdemeanor*, fine or imprisonment, or both. *See* 2 *Hawk. c.* 19, *s.* 31, *c.* 20, *s.* 6, 3 *Burn, D. & W.* 186. *and see Indictment*, *Id.* 195. If voluntary, after conviction of the party, it is *felony* or *misdemeanor*, and punishable in the same way as the offence of which the prisoner was convicted: 2 *Hawk. c.* 19, *s.* 22: before conviction, *misdemeanor*, fine or imprisonment, or both; or, if the prisoner be afterwards taken, tried and convicted, the officer may be indicted for the previous voluntary escape, as for a felony or misdemeanor, and punished in the same way as the prisoner. Aiding in the escape of prisoners of war: *felony*, transportation for 7 or 14 years or for life. 52 *G.* 3, *c.* 156. Aiding in an attempt to escape by a prisoner in custody of a constable, under a warrant for treason or felony: *felony*, transportation for 7 years. 16 *G.* 2, *c.* 31, *s.* 3. Aiding a prisoner to escape, or to attempt to escape from prison, whether the escape be effected or not: *felony*, transportation for not more than 14 years. 4 *G.* 4, *c.* 64, *s.* 43, 44. Conveying into a prison any disguise, instrument or arms, to facilitate the escape of prisoners: to be deemed an aiding of the prisoner to escape. *Id.* Aiding convicts ordered for transportation to escape from the custody of the superintendant: same offence as if the convict were in prison. 5 *G.* 4, *c.* 84, *s.* 22; *and see* Indictment, 1 *Arch. P. A.* 156. Evidence, *Id.* 157.

Ewe. See "*Larceny*," "*Malicious Injuries*," *title* "*Animals.*"

Exchequer bills. See "*Forgery*," "*Larceny*," *title* "*Securities.*"

Excusable homicide. See "*Murder.*"

Extortion: *misdemeanor*, fine or imprisonment, or both. *See* 3 *Burn, D. & W.* 211. Indictment, *Id.* 213, 214.

F.

Factor. See "*Agent.*"

False imprisonment: *misdemeanor*, fine or imprisonment, or both.

False pretences, obtaining money, &c. by: *misdemeanor*, transportation for 7 years; or fine, or imprisonment with or without hard labour, or both. 7 & 8 G. 4, c. 29, s. 53, 4. Indictment, *post*. Evidence, *post*. No acquittal, on the ground of the offence amounting to larceny. 7 & 8 G. 4, c. 29, s. 53.

Felony, compounding. See "*Compounding Felony*."

Fern, setting fire to. See "*Burning*."

Fine, recovery, or deed enrolled, acknowledging, in the name of another person, transportation for life or for not less than 7 years, or imprisonment for not more than 4 nor less than 2 years. 11 G. 4, & 1 W. 4, c. 66, s. 11. As to the indictment and evidence, see 2 *Arch. P. A.* 276, 277.

Fish. See "*Larceny*," and "*Animals*."

Fishery, Fish-pond. See "*Larceny*."

Fixtures. See "*Larceny*," and "*Land*."

Floodgates. See "*Malicious Injuries*," title "*Rivers*."

Forcible entry and detainer: *misdemeanor*, fine, imprisonment, or both. See 5 R. 2, c. 8, 8 H. 6, c. 9, 21 J. 1, c. 15, and *post*. Indictment, *post*. Evidence, *post*.

Forestalling: *misdemeanor*, fine or imprisonment, or both. 3 Burn, *D.* & *H.* 245. *R. v. Waddington*, 1 *East*, 143.

Forgery.—Forging the great seal, privy seal, privy signet, sign manual, &c.: *felony*, transportation for life, and (if the Court think fit) imprisonment, with or without hard labour, for not more than 4 nor less than 1 year, previously to transportation. 11 G. 4, & 1 W. 4, c. 66, s. 2. 2 & 3 W. 4, c. 123, s. 1. 3 & 4 W. 4, c. 44, s. 3. See 2 *Arch. P. A.* 226, n. Indictment, 2 *Arch. P. A.* 227. Evidence, *Id.* 228, 230.

Forging or uttering Exchequer bills or debentures, East India bonds, Bank of England notes, bills, or bank post bills, bills of exchange, promissory notes, or any undertakings, warrants, or orders for payment of money: *felony*, transportation for life, and if the Court think fit imprisonment, with or without hard labour, for not more than 4 nor less than 1 year, previously to transportation. 11 G. 4, & 1 W. 4, c. 66, s. 3. 1 & 2 W. 4, c. 123, 3 & 4 W. 4, c. 44, s. 3. See 2 *Arch. P. A.* 231, n. Indictment for forging and uttering a bill of exchange, 2 *Arch. P. A.* 231. Evidence of the forgery. *Id.* 235—245; of the uttering, *Id.* 246—249. Indictment for forging and uttering a check upon a banker, or other order for the payment of money, *Id.* 249. Evidence, &c., *Id.* 250, 251. Indictment for forging or uttering bank notes, &c., *Id.* 251. Evidence of the forging, *Id.* 252, 253; of the uttering or disposing of them, *Id.* 253, 254. Forging or uttering a deed, bond, court roll, or copy of court roll, acquittance or receipt for money or goods, accountable re-

ceipt for money, goods, &c., warrant, order, or request for the delivery or transfer of goods, securities, &c.: *felony*, transportation for life, or for not less than 7 years, or imprisonment for not more than 4 nor less than 2 years. 11 *G.* 4, & 1 *W.* 4, *c.* 66, *s.* 10. Indictment for forging and uttering a deed or bond, 2 *Arch. P. A.* 269. Evidence, *Id.* 270. Indictment for forging and uttering a receipt, *Id.* 270. Evidence, *Id.* 272. 273. Indictment for forging an order for the delivery of goods, *Id.* 273. Evidence, *Id.* 275. Knowingly purchasing, receiving, or having forged bank notes: *felony*, transportation for 14 years. 11 *G.* 4, & 1 *W.* 4, *c.* 66, *s.* 12. Indictment, 2 *Arch. P. A.* 277. Evidence, *Id.* 278.

Forging or uttering any will, codicil, or testamentary writing: *felony*, death. 11 *G.* 4, & 1 *W.* 4, *c.* 66, *s.* 3. Indictment, 2 *Arch. P. A.* 255. Evidence, *Id.* 256.

Making false entries in the books of the Bank of England, or South Sea Company, relating to stock: *felony*, transportation for life, and (if the court think fit) imprisonment, with or without hard labour, for not more than 4 nor less than 1 year, previously to transportation. 11 *G.* 4, & 1 *W.* 4, *c.* 66, *s.* 5. 2 & 3 *W.* 4, *c.* 123, *s.* 12. 3 & 4 *W.* 4, *c.* 44, *s.* 3. *See* 2 *Arch. P. A.* 258, *n.* Indictment, 2 *Arch. P. A.* 258. Evidence, *Id.* Making a transfer of stock at the Bank of England, or South Sea House, in the name of a person who is not the owner: *felony*, the same punishment. *See the statutes last cited.* Indictment, 2 *Arch. P. A.* 259. Evidence, *Id.* Forging or uttering a transfer of stock at the Bank of England, or South Sea House, or of any company established by charter or act of parliament; knowingly demanding a transfer or dividend, under a forged power of attorney; or falsely personating the owner, and thereby transferring stock or receiving dividends: *felony*, transportation for life, and (if the court think fit) imprisonment, with or without hard labour, for not more than 4 years, nor less than 1, previously to transportation. 11 *G.* 4, & 1 *W.* 4, *c.* 66, *s.* 6. 2 & 3 *W.* 4, *c.* 123, *s.* 1, 2. 3 & 4 *W.* 4, *c.* 44, *s.* 3. *See* 2 *Arch. P. A.* 260, *n.* Indictment for forging and uttering a transfer of stock, 2 *Arch. P. A.* 261. Evidence, *Id.* Indictment for personating the owners of stock, *Id.* 264. Evidence, *Id.* Personating the owner of stock, and endeavouring to transfer it, or receive the dividends: *felony*, transportation for life, or for not less than 7 years, or imprisonment for not more than 4 nor less than 2 years. 11 *G.* 4, & 1 *W.* 4, *c.* 66, *s.* 7. Forging or uttering a power of attorney to transfer stock, or receive dividends: *felony*, death. 11 *G.* 4, & 1 *W.* 4, *c.* 66, *s.* 6. Indictment, 2 *Arch. P. A.* 262. Evidence, *Id.* 263, 264. Forging the attestation to such power of attorney, or knowingly uttering such

power of attorney, with a forged attestation: *felony*, transportation for 7 years, or imprisonment for not more than 2 years, nor less than 1 year. 11 *G.* 4, & 1 *W.* 4, *c.* 66, *s.* 8. Indictment, 2 *Arch. P. A.* 266. Evidence, *Id.* 267. Clerks of the Bank, or South Sea Company, making out dividend warrants for a greater or less sum than is due: *felony*, transportation for 7 years, or imprisonment for not more than 2 nor less than 1 year. 11 *G.* 4, & 1 *W.* 4, *c.* 66, *s.* 9. Indictment, 2 *Arch. P. A.* 268. Evidence, *Id.*

Acknowledging any recognizance or bail, in the name of another; or acknowledging any fine, recovery, cognovit, or judgment, or any deed enrolled, in the name of another: *felony*, transportation for life, or for not less than 7 years, or imprisonment for not more than 4, nor less than 2 years. 11 *G.* 4, & 1 *W.* 4, *c.* 66, *s.* 11. Indictment, 2 *Arch. P. A.* 276. Evidence, *Id.* 277.

Making or having, without authority from the Bank of England, any mould, &c. for the making of paper, with the words "Bank of England" visible in the substance of it, or with the curved bar lines, &c.; or selling such paper, &c.: *felony*, transportation for 14 years. 11 *G.* 4, & 1 *W.* 4, *c.* 66, *s.* 13. *See* 2 *Arch. P. A.* 279, 280. Engraving a bank note or bill on a plate, without such authority; or using such plate for the printing of any such note or bill; or having such plate in his custody; or uttering or having any paper on which such note or bill is printed: *felony*, transportation for 14 years. 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 15; *and see* 1 *G.* 4, *c.* 92. Engraving on any plate, &c. any word, number, figure, character, or ornament, resembling any part of a bank note, without such authority; or using or having such plate, or uttering or having paper, on which there shall be such an impression: *felony*, transportation for 14 years. 11 *G.* 4, & 1 *W.* 4, *c.* 66, *s.* 16. Making or having any mould, &c. for paper, with the names of any other bankers visible in the substance of it, without authority; or making or having such paper; or causing the names of bankers to appear in the substance of any paper: *felony*, transportation for not more than 14, nor less than 7 years, or imprisonment for not more than 3 years, nor less than one. 11 *G.* 4, & 1 *W.* 4, *c.* 66, *s.* 17. Engraving a note or bill of a banker, or any part thereof, on a plate, &c. without authority; or having such plates; or uttering or having paper on which the same is printed: *felony*, transportation for not more than 14 nor less than 7 years, or imprisonment for not more than 3 years nor less than 1. 11 *G.* 4, & 1 *W.* 4, *c.* 66, *s.* 18. Engraving on any plate, &c. a bill, note, order, &c. of any foreign prince, body corporate, &c., without authority; or using or having such plates; or utter-

ing or having paper on which the same is printed: *felony*, transportation for not more than 14, nor less than 7 years, or imprisonment for not more than 3 years, nor less than one. 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 19.

Making a false entry, or forging or altering an entry, in any parish register, relating to a baptism, marriage, or burial; or uttering the same; or uttering a false or forged copy of an entry; or destroying or defacing any entry; or forging or uttering a marriage licence: *felony*, transportation for life, or for not less than 7 years, or imprisonment for not more than 4 years, nor less than two. 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 20. Indictment, 2 *Arch. P. A.* 288. Evidence, *Id.* 289. Inserting a false entry in any copy of a registry transmitted to the registrar of the diocese, or forging such copy, or uttering or verifying such forged copy: *felony*, transportation for 7 years, or imprisonment for not more than 2 years, nor less than one. 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 22.

Forging franks of members of parliament: *felony*, transportation for seven years. 24 *G.* 3, *sess.* 2, *c.* 37, *s.* 9.

Forging quarantine certificates: *felony*, 6 *G.* 4, *c.* 78, *s.* 25, transportation for 7 years, or imprisonment, with or without hard labour, for not more than two years, and whipping. 7 & 8 *G.* 4, *c.* 28, *s.* 8, 9. See 1 *Arch. P. A.* 185, *and note.*

Forging stamps. See "*Stamps.*"

Frame work knitted piece. See "*Malicious Injuries.*"

Fruit. See "*Larceny,*" "*Malicious Injuries.*"

Furnished lodgings. See "*Larceny.*"

Furze. See "*Burning.*"

G.

Game: Persons by night unlawfully taking game or rabbits in land, open or inclosed, or entering land in the night time with gun, net, or engine, &c. for the purpose of taking or destroying game, third offence: *misdemeanor*, transportation for 7 years, or imprisonment and hard labour, for not more than 2 years. 9 *G.* 4, *c.* 69, *s.* 1. Indictment, 2 *Arch. P. A.* 198. Evidence, *Id.* 200. Persons committing such offence the first, second, or third time, and assaulting or offering violence to gamekeepers, &c. with fire-arms, bludgeons, &c.: *misdemeanor*, transportation for 7 years, or imprisonment and hard labour, for not more than 2 years. 9 *G.* 4, *c.* 69, *s.* 2. Indictment, 2 *Arch. P. A.* 202. Evidence, *Id.* 203. Persons to the number of three, with fire arms or bludgeons, &c., unlawfully entering land in the night time, for the purpose of taking or destroying game or rabbits: *misdemeanor*, transportation for not more than 14, nor less than 7 years, or imprisonment and hard labour for not more

than 3 years. 9 *G.* 4, *c.* 69, *s.* 9. Indictment, 2 *Arch. P. A.* 209. Evidence, *Id.* 211—213.

Gaming-house, keeping: *misdemeanor*, fine or imprisonment, or both, and, by 3 *G.* 4, *c.* 114, hard labour. Indictment, *see R. v. Rogier et al.* 1 *B. & C.* 272. *and see* 25 *G.* 2, *c.* 36, *s.* 8, 10.

Girl. See "*Abduction*," "*Carnally knowing*."

Glass. See "*Larceny*."

Gorze. See "*Burning*."

Grain. See "*Burning*."

Granary. See "*Burning*," "*Malicious Injuries*."

Great seal. See "*Forgery*."

Greenwich pensioner. See "*Personating*."

H.

Hares. See "*Game*," "*Larceny*."

Hay. See "*Burning*."

Heath. See "*Burning*."

Highway, not repairing: *misdemeanor*, fine. Indictment, *post*. Pleadings, *post*. Evidence, *post*.

Highway, obstructing: *misdemeanor*, fine or imprisonment, or both. Indictment, *post*. Evidence, *post*.

Homicide. See "*Murder*."

Hopbinds. See "*Malicious Injuries*."

Hopoast. See "*Burning*."

Horse-stealing. See "*Larceny*."

Horse wounding, &c. See "*Malicious Injuries*."

House. See "*Burglary*," "*Burning*," "*Larceny*."

Housebreaking. See "*Burglary*."

I.

Inciting or soliciting a person to commit an offence, not afterwards committed: *misdemeanor*, fine or imprisonment, or both. See *R.* v. *Higgins*, 2 *East*, 5.

Indecency, public: *misdemeanor*, fine or imprisonment, or both. See *R.* v. *Sir C. Sidley*, 10 *St. Tr. Ap.* 93. *R.* v. *Rosinski*, *Ry. & M.* 19. And as to indecent assaults upon females, *see R.* v. *John Nichol*, *R. & Ry.* 130. 2 *Arch. P. A.* 170. *R.* v. *Butler*, 6 *Car. & P.* 368.

Justices, order of, disobeying: *misdemeanor*, fine or imprisonment, or both. Indictment, *post*. Evidence, *post*.

K.

Killing. See "*Murder*."

Killing cattle or sheep. See "*Larceny*," "*Malicious Injuries*."

Killing deer. See "*Larceny*."

Killing hares or rabbits. See "*Larceny*."

King's stores, embezzling: *felony*, 31 *El. c.* 4, *s.* 1, 22 *C.* 2, *c.* 5, transportation for life, or not less than 7 years, or imprisonment and hard labour for not more than 7 years. 4 *G.* 4, *c.* 53. *and see* 1 *Arch. P. A.* 100 n.

L.

Lace. See "*Malicious Injuries.*"
Lamb. See "*Larceny.*"
Lapis Calaminaris. See "*Larceny,*" *title* "*Land.*"
Larceny.

I. *Simple Larceny:*

Of goods and chattels: Stealing goods or chattels to any amount: *felony*, transportation for 7 years, or imprisonment, with or without hard labour, for not more than 2 years, and whipping. 7 & 8 *G.* 4, *c.* 29, *s.* 3, 4. Indictment, *post.* Evidence, *post.*

Of valuable securities: Stealing promissory notes, bills of exchange, debentures, deeds, bonds, warrant or order for money, warrant or order for the delivery or transfer of goods, tally order or other security for any share in a public fund, or deposit in a Savings' Bank, &c.: *felony*, punishable as for stealing goods of the like value. 7 & 8 *G.* 4, *c.* 29, *s.* 5, *vid. supra.* Indictment, 1 *Arch. P. A.* 288, *and post.* Evidence, 1 *Arch. P. A.* 288, *and post.* Stealing deeds or writings, being evidence of the title to real estate: *misdemeanor*, transportation for 7 years, or fine or imprisonment, with or without hard labour, or both. 7 & 8 *G.* 4, *c.* 29, *s.* 23, 24. Indictment, 1 *Arch. P. A.* 348. Evidence, *Id.* 348, 349. Stealing or fraudulently destroying or concealing a will or codicil: *misdemeanor*, transportation for 7 years, or fine or imprisonment, with or without hard labour, or both. 7 & 8 *G.* 4, *c.* 29, *s.* 22. Indictment, 1 *Arch. P. A.* 345, 346. Evidence, *Id.* Stealing any record, writ, affidavit, warrant of attorney or document, &c. belonging to a court of record, or any bill, answer, &c. in a court of equity: *misdemeanor*, transportation for 7 years, or fine or imprisonment, with or without hard labour, or both. 7 & 8 *G.* 4, *c.* 29, *s.* 21. Indictment, 1 *Arch. P. A.* 342. Evidence, *Id.* 343. Taking them from their place of deposit or from the person having the lawful custody of them, for a fraudulent purpose: *misdemeanor*, the like punishment. 7 & 8 *G.* 4, *c.* 29, *s.* 21. Indictment, 1 *Arch. P. A.* 343. Evidence, *Id.* 344. Unlawfully and maliciously obliterating, injuring, or destroying such records, &c.: *misdemeanor*, the like punishment. 7 & 8 *G.* 4, *c.* 29, *s.* 21. Indictment, 1 *Arch. P. A.* 344. Evidence, *Id.*

Of animals: Stealing any horse, mare, gelding, colt or filly, or any bull, cow, ox, heifer or calf, or any ram, ewe, sheep or lamb; or killing them with an intent to steal any part of them: *felony*, 7 & 8 *G.* 4, *c.* 29, *s.* 25, transportation for life, 2 & 3 *W.* 4, *c.* 62, *s.* 1, and (if the Court think fit) imprisonment, with or without hard labour, for not more than 4 years, nor less than one, previously to

Larceny—(*continued.*)
transportation. 3 & 4 *W.* 4, *c.* 44, *s.* 3. Indictment for stealing, 1 *Arch. P. A.* 330; evidence, *Id.* Indictment for killing with intent to steal, *Id.* 351. Evidence, *Id.* 352. Unlawfully killing, wounding, coursing, snaring, &c. deer in any inclosed land, &c.: *felony*, punishable as simple larceny for goods, &c. 7 & 8 *G.* 4, *c.* 29, *s.* 26. Indictment, 1 *Arch. P. A.* 354. Evidence, *Id.* The like in any uninclosed land, second offence: *felony*, punishable as simple larceny. 7 & 8 *G.* 4, *c.* 29, *s.* 26. Indictment, 1 *Arch. P. A.* 355. Evidence, *Id.* 356. Beating or wounding deer keepers in the execution of their duty under this Act: *felony*, punishable in the same manner as simple larceny. 7 & 8 *G.* 4, *c.* 29, *s.* 29. Indictment, 1 *Arch. P. A.* 363. Evidence, *Id.* 365. Taking or killing hares or conies at night, in a warren or ground used for the breeding or keeping of them: *misdemeanor*, and punishable accordingly. 7 & 8 *G.* 4, *c.* 29, *s.* 30, with fine or imprisonment, or both. Indictment, 1 *Arch. P. A.* 366. Evidence, *Id.* Taking or destroying fish in water running through or being in land adjoining or belonging to the dwelling-house of a person who is the owner of the water, or having a right of fishery therein: *misdemeanor*, and punishable accordingly. 7 & 8 *G.* 4, *c.* 29, *s.* 34, with fine or imprisonment, or both. Indictment, 1 *Arch. P. A.* 375. Evidence, *Id.* Stealing oysters, or oyster brood from an oyster bed, laying or fishery, the property of another: *larceny*, and punishable accordingly. 7 & 8 *G.* 4, *c.* 29, *s.* 36. Indictment, 1 *Arch. P. A.* 379. Evidence, *Id.* Unlawfully dredging for oysters in such oyster fishery: *misdemeanor*, fine, not exceeding 20*l.*, or imprisonment, not exceeding 3 calendar months, with or without hard labour, or both. 7 & 8 *G.* 4, *c.* 29, *s.* 36. Indictment, 1 *Arch. P. A.* 380. Evidence, *Id.*

Of Land, or things growing on or attached to it: Stealing, or severing with intent to steal, the ore of any metal, or any lapis calaminaris, manganese or mundick, or any wad, black cawke or black lead, or any coal or cannel coal, from mines, &c.: *felony*, punishable in same manner as simple larceny. 7 & 8 *G.* 4, *c.* 29, *s.* 37. Indictment, 1 *Arch. P. A.* 381. Evidence, *Id.* 382. Stealing, or damaging with intent to steal, any tree, sappling, shrub or underwood, growing in garden, pleasure ground, &c.: *felony*, same punishment as for simple larceny. 7 & 8 *G.* 4, *c.* 29, *s.* 38. Indictment, 1 *Arch. P. A.* 383, 384. Evidence, *Id.* Stealing, &c. trees, &c. growing elsewhere, where the tree, &c. stolen or injury done amounts to 5*l.*; *felony*, same punishment as simple larceny. 7 & 8 *G.* 4, *c.* 29, *s.* 38. Indictment, 1 *Arch. P. A.* 383, 385. Evidence, *Id.* 384,

Larceny—(*continued.*)

385. The like, to the amount of 1*s.*, third offence: *felony*, same punishment as simple larceny. 7 & 8 *G.* 4, *c.* 29, *s.* 39. Indictment, 1 *Arch. P. A.* 389. Evidence, *Id.* 390. Stealing, &c. any plant, root, fruit or vegetable, growing in any garden, orchard, nursery ground, hothouse, greenhouse or conservatory, second offence: *felony*, same punishment as simple larceny. 7 & 8 *G.* 4, *c.* 29, *s.* 42. Indictment, 1 *Arch. P. A.* 397. Evidence, *Id.* 398. Stealing, or ripping, cutting or breaking with intent to steal, any glass or wood work belonging to a building, or any lead, iron, &c. or utensil or fixture fixed in or to any building: *felony*, same punishment as simple larceny. 7 & 8 *G.* 4, *c.* 29, *s.* 44. Indictment, 1 *Arch. P. A.* 403. Evidence, *Id.* 403, 404. Stealing, &c.: any thing made of metal, fixed in any land being private property, or as a fence to a dwelling-house, area, &c., or in any street, &c. for public use or ornament: *felony*, same punishment as simple larceny. 7 & 8 *G.* 4, *c.* 29, *s.* 44. Indictment, 1 *Arch. P. A.* 404, 405. Evidence, *Id.*

II. *Compound Larceny:*

From the person: Robbery: *felony*, death. 7 & 8 *G.* 4, *c.* 29, *s.* 6, 7. Indictment, 1 *Arch. P. A.* 291. Evidence, *Id.* 292, 295. Assault with intent to rob: *felony*, transportation for life or not less than 7 years, or imprisonment for not more than 4 years, and whipping. 7 & 8 *G.* 4, *c.* 29, *s.* 6. Indictment, 1 *Arch. P. A.* 296. Evidence, *Id.* 297. Stealing from the person: *felony*, same punishment. 7 & 8 *G.* 4, *c.* 29, *s.* 6. Indictment, 1 *Arch. P. A.* 295. Evidence, *Id.* Demanding property with menaces or by force, with intent to steal it: *felony*, same punishment. 7 & 8 *G.* 4, *c.* 29, *s.* 6. Indictment, 1 *Arch. P. A.* 297. Evidence, *Id.* 298.

From church or chapel: Breaking and entering a church or chapel, and stealing therein: *felony*, 7 & 8 *G.* 4, *c.* 29, *s.* 10; transportation for life or not less than 7 years, or imprisonment, with or without hard labour, for not less than 4 years, 5 & 6 *W.* 4, *c.* 81. Indictment, 1 *Arch. P. A.* 303. Evidence, *Id.* 304. Stealing in a church or chapel, and then breaking out of the same: *felony*, 7 & 8 *G.* 4, *c.* 29, *s.* 10; same punishment, 5 & 6 *W.* 4, *c.* 81. Indictment, 1 *Arch. P. A.* 305. Evidence, *Id.* 305.

From a house, &c.: Breaking and entering a dwelling-house, and stealing therein: *felony*, 7 & 8 *G.* 4, *c.* 29, *s.* 12, 13, transportation for life or not less than 7 years, and imprisonment, with or without hard labour, for not more than 4 years, previously to transportation, if the Court think fit; 3 & 4 *W.* 4, *c.* 44, *s.* 2; or imprisonment, with or without hard labour, for not more than 4 years nor less than one. *Id.* see "*Burglary.*" Indictment, 1 *Arch. P. A.* 321. Evidence, *Id.* Stealing property to any amount in a dwelling-house, any person therein being put in fear:

...

Larceny—(*continued.*)

felony, death. 7 & 8 *G.* 4, *c.* 29, *s.* 12, 13. Indictment, 1 *Arch. P. A.* 323. Evidence, *Id.* Stealing in a dwelling-house to the value of 5*l.*: *felony*, 7 & 8 *G.* 4, *c.* 29, *s.* 12, 13, transportation for life, 2 & 3 *W.* 4, *c.* 62, *s.* 1; and, if the Court think fit, imprisonment, with or without hard labour, for not more than 4 years nor less than one, previously to transportation. 3 & 4 *W.* 4, *c.* 44, *s.* 3. Indictment, 1 *Arch. P. A.* 324. Evidence, *Id.* Breaking and entering a shop, warehouse or counting-house, and stealing therein: *felony*, transportation for life or not less than 7 years, or imprisonment, with or without hard labour, for not more than 4 years, and whipping. 7 & 8 *G.* 4, *c.* 29, *s.* 15. Indictment, 1 *Arch. P. A.* 330. Evidence, *Id.*

From manufactories: Stealing any article of silk, woollen, linen or cotton, &c., whilst in any stage, process, or progress of manufacture: *felony*, transportation for life or not less than 7 years, or imprisonment, with or without hard labour, for not more than 4 years, and whipping. 7 & 8 *G.* 4, *c.* 29, *s.* 16. Indictment, 1 *Arch. P. A.* 331. Evidence, *Id.*

From ships, &c.: Stealing from a vessel, barge, or boat in port, or on a navigable river or canal: *felony*, transportation for life or not less than 7 years, or imprisonment, with or without hard labour, for not more than 4 years, and whipping. 7 & 8 *G.* 4, *c.* 29, *s.* 17. Indictment, 1 *Arch. P. A.* 332. Evidence, *Id.* 333. Stealing from any dock, wharf, or quay, adjacent to such port, river or canal: *felony*, the like punishment. 7 & 8 *G.* 4, *c.* 29, *s.* 17. Indictment, 1 *Arch. P. A.* 333. Evidence, *Id.* 334. Plundering or stealing any part of a vessel in distress or wrecked, &c. or any goods, &c. belonging to it: *felony*, death; or if without cruelty or violence, the party may be indicted as for simple larceny. 7 & 8 *G.* 4, *c.* 29, *s.* 18. Indictment, 1 *Arch. P. A.* 335. Evidence, 336.

III. *Larceny by particular persons:*

By tenants and lodgers: Tenant or lodger stealing any chattel or fixture let to him to be used with the house or lodging: *felony*, same punishment as simple larceny. 7 & 8 *G.* 4, *c.* 29, *s.* 45. Indictment may be in the common form as for larceny, *Id.*

By clerks and servants: Clerk or servant stealing the property of his master: *felony*, transportation for not more than 14 nor less than 7 years, or imprisonment, with or without hard labour, for not more than 3 years, and whipping. 7 & 8 *G.* 4, *c.* 29, *s.* 46; see "*Embezzlement.*" Indictment, 1 *Arch. P. A.* 407. Evidence, *Id.* 408.

Lead. See "*Larceny.*"

Letter, threatening to kill or murder, or to burn or to destroy houses, outhouses, barns, stacks of corn or grain, hay or straw, sending or delivering: *felony*, transportation for life

Larceny—(*continued.*)
or not less than 7 years, or imprisonment, with or without hard labour, for not more than 7 years. 4 *G.* 4, *c.* 54, *s.* 3; see 1 *Arch. P. A.* 105 n. Indictment, 1 *Arch. P. A.* 105. Evidence, *Id.* Sending or delivering a letter demanding money, &c. with menaces and without reasonable or probable cause: *felony*, transportation for life or not less than 7 years, or imprisonment, with or without hard labour, for not more than 4 years, and whipping. 7 & 8 *G.* 4, *c.* 29, *s.* 8. Indictment, 1 *Arch. P. A.* 300. Evidence, *Id.* Sending or delivering a letter or writing accusing or threatening to accuse the party of certain crimes, with intent to extort money from him: *felony*, the like punishment. 7 & 8 *G.* 4, *c.* 29, *s.* 8. Indictment, 1 *Arch. P. A.* 302. Evidence, *Id.* 303. See "*Accusing.*"

Lewdness, open and notorious. See "*Indecency.*"

Libel: blasphemous libel: *misdemeanor*, fine or imprisonment, or both. See 60 *G.* 3 & 1 *G.* 4. *c.* 8, *s.* 4; 11 *G.* 4 & 1 *W.* 4, *c.* 73, *s.* 1; 9 & 10 *W.* 3, *c.* 32, *s.* 1; 3 *Burn, D. & W.* 79; *R.* v. *Carlile*, 3 *B. & Ald.* 161; *R.* v. *Waddington*, 1 *B. & C.* 26. Seditious libel: *misdemeanor*, fine or imprisonment, or both. See 60 *G.* 3 & 1 *G.* 4, *c.* 8; 1 *W.* 4, *c.* 73, *s.* 1; *R.* v. *Burdett*, 4 *B. & Ald.* 314. Libel on an individual: *misdemeanor*, fine or imprisonment, or both.

Licence for marriage, forging. See "*Forgery.*"

Lighter. See "*Larceny.*"

Light, false, exhibiting, to bring a ship into danger. See "*Malicious Injuries.*"

Lime, putting into fish ponds, &c. See "*Malicious Injuries.*"

Linen. See "*Larceny,*" "*Malicious Injuries.*"

Lock. See "*Malicious Injuries.*"

Lodgers. See "*Larceny.*"

Loom. See "*Malicious Injuries.*"

M.

Maintenance: *misdemeanor*, fine or imprisonment, or both. See 3 *Burn, D. & W.* 530.

Malicious Injuries:

To houses, &c.: Setting fire to a church, chapel, house, &c. see "*Burning.*" Persons, riotously assembled, unlawfully and with force pulling down or beginning to pull down or destroy any church, chapel, house, outhouse, &c.: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 8. Indictment, 2 *Arch. P. A.* 16. Evidence, *Id.* 17.

To manufactures and machinery: Setting fire to any building or erection used in carrying on any branch of trade or manufacture: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 2.

Malicious Injuries—(*continued.*)

Indictment, 2 *Arch. P. A.* 2. Evidence, *Id.* Persons riotously assembled, beginning to pull down or demolish any building or machinery used in any branch of trade or manufacture, or any steam engine used to carry on the business of a mine, &c.: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 8. Indictment, 2 *Arch. P. A.* 16. Evidence, *Id.* 17. Maliciously cutting, breaking or destroying, or damaging with intent to destroy or render useless, any articles of silk, woollen, linen or cotton, or any frame-work knitted piece, stocking, hose or lace, in any loom or frame, or in any stage of manufacture, &c.: *felony*, transportation for life or not less than 7 years, or imprisonment, with or without hard labour, for not more than 4 years, and whipping. 7 & 8 *G.* 4, *c.* 30, *s.* 3. Indictment, 2 *Arch. P. A.* 7. Evidence, *Id.* Maliciously cutting, breaking, or destroying, or damaging with intent to destroy or render useless, any warp or shute of silk, wollen, linen, or cotton; or any loom, engine, machine, &c., for spinning, weaving or otherwise manufacturing the same: *felony*, same punishment. 7 & 8 *G.* 4, *c.* 30, *s.* 6. Indictment, 2 *Arch. P. A.* 8. Evidence, *Id.* Forcibly entering a building, &c., with intent to commit either of the two last-mentioned offences: *felony*, same punishment. 7 & 8 *G.* 4, *c.* 30, *s.* 3. Indictment, 2 *Arch. P. A.* 9. Evidence, *Id.* Maliciously cutting, breaking or destroying, or damaging with intent to destroy or render useless, any machine or engine employed in any other manufacture: *felony*, transportation for seven years, or imprisonment, with or without hard labour, for not more than two years. 7 & 8 *G.* 4, *c.* 30, *s.* 4. Indictment, 2 *Arch. P. A.* 10. Evidence, *Id.*

To agriculture, &c: Maliciously setting fire to any hop-oast, barn or granary: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 2. See "*Burning.*" Maliciously setting fire to any stack of corn, grain, pulse, straw, hay, or wood: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 17. Indictment, 2 *Arch. P. A.* 38. Evidence, *Id.* Maliciously setting fire to any crop of corn, grain or pulse, or to any wood, coppice or plantation, or to any heath, gorze, furze, or fern: *felony*, transportation for seven years, or imprisonment, with or without hard labour, for not more than two years, and whipping. 7 & 8 *G.* 4, *c.* 30, *s.* 17. Indictment, 2 *Arch. P. A.* 39. Evidence, *Id.* Maliciously cutting or destroying hop binds: *felony*, transportation for life or not less than seven years, or imprisonment, with or without hard labour, for not more than four years, and whipping. 7 & 8 *G.* 4, *c.* 30, *s.* 18. Indictment, 2 *Arch. P. A.* 40. Evidence, *Id.* Maliciously cutting, breaking, barking, rooting up, or otherwise destroying or damaging, any tree, sapling, shrub or underwood, growing in any

Malicious Injuries—(*continued.*)

park, garden, pleasure ground, &c.: if the amount of injury exceed £1, *felony*, transportation for seven years, or imprisonment for not more than two years, and whipping. 7 & 8 *G.* 4, *c.* 30, *s.* 19. Indictment, 2 *Arch. P. A.* 42. Evidence, *Id.* The like offence, if the tree &c. be growing elsewhere, and the amount of injury exceed £5: *felony*, same punishment. 7 & 8 *G.* 4, *c.* 30, *s.* 19. Indictment, 2 *Arch. P. C.* 43. Evidence, *Id.* The like, for a third offence, where the amount of injury shall be 1*s.* at least: *felony*, same punishment. 7 & 8 *G.* 4, *c.* 30, *s.* 20. Indictment, 2 *Arch. P. A.* 46. Evidence, *Id.* 47. Maliciously destroying, or damaging with intent to destroy, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory, second offence: *felony*, same punishment. 7 & 8 *G.* 4, *c.* 30, *s.* 21. Indictment, 2 *Arch. P. A.* 49. Evidence, *Id.* 50. Maliciously cutting, breaking or destroying, or damaging with intent to destroy or render useless, any threshing machine: *felony*, transportation for seven years, or imprisonment, with or without hard labour, for not more than two years. 7 & 8 *G.* 4, *c.* 30, *s.* 4. Indictment, 2 *Arch. P. A.* 10. Evidence, *Id.*

To mines: Maliciously setting fire to a mine of coal or cannel coal: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 50. Indictment, 2 *Arch. P. A.* 12. Evidence, *Id.* Maliciously causing water to be conveyed into a mine, with intent to damage it or hinder the working of it: *felony*, transportation for seven years, or imprisonment, with or without hard labour, for not more than two years. 7 & 8 *G.* 4, *c.* 30. *s.* 6. Indictment, 2 *Arch. P. A.* 13. Evidence, *Id.* Maliciously pulling down, filling up or obstructing any airway, waterway, drain, pit, level or shaft, belonging to a mine, with like intent: *felony*, same punishment. 7 & 8 *G.* 4, *c.* 30, *s.* 6. Indictment, 2 *Arch. P. A.* 14. Evidence, *Id.* Maliciously pulling down or destroying, or damaging with intent to destroy or render useless, any steam engine or other engine for sinking, draining or working a mine, or any staith, building or erection used in the business of a mine, or any bridge, waggonway, or trunk for conveying minerals from a mine: *felony*, same punishment. 7 & 8 *G.* 4, *c.* 30, *s.* 7. Indictment, 2 *Arch. P. A.* 15. Evidence, *Id.* Persons, riotously assembled, beginning forcibly to demolish any such engine, staith, &c.: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 8. Indictment, 2 *Arch. P. A.* 16. Evidence, *Id.* 17.

To mills: Maliciously setting fire to a mill: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 2. See "*Burning.*" Persons, riotously assembled, beginning forcibly to demolish a mill,

Malicious Injuries—(*continued.*)

felony, death. 7 & 8 *G.* 4, *c.* 30, *s.* 8. Indictment, 2 *Arch. P. A.* 16. Evidence, *Id.* 17. Maliciously breaking down or destroying the dam of a mill-pond: *misdemeanor*, transportation for seven years, or imprisonment, with or without hard labour, for not more than two years, and whipping. 7 & 8 *G.* 4, *c.* 30, *s.* 15. Indictment, 2 *Arch. P. A.* 35. Evidence, *Id.*

To rivers, canals, &c.: Maliciously breaking or cutting down any sea bank or sea wall, or the bank of any river, canal, or marsh, whereby lands are overflowed or in danger of being so: *felony*, transportation for life or not less than seven years, or imprisonment, with or without hard labour, for not more than four years, and whipping. 7 & 8 *G.* 4, *c.* 30, *s.* 12. Indictment, 2 *Arch. P. A.* 28. Evidence, *Id.* Maliciously throwing down, levelling or destroying any lock, sluice, floodgate, &c. on any navigable river or canal: *felony*, same punishment. 7 & 8 *G.* 4, *c.* 30, *s.* 12. Indictment, 2 *Arch. P. A.* 28. Evidence, *Id.* 29. Maliciously drawing up or removing piles, chalk or materials for securing a sea bank &c. or the bank of any river, canal or marsh: *felony*, transportation for seven years, or imprisonment, with or without hard labour, for not more than two years, and whipping. 7 & 8 *G.* 4, *c.* 30, *s.* 12. Indictment, 2 *Arch. P. A.* 29. Evidence, *Id.* Maliciously drawing up or opening any floodgate or doing other injury to a navigable river or canal, with intent to hinder the navigation: *felony*, same punishment. 7 & 8 *G.* 4, *c.* 30, *s.* 12. Indictment, 2 *Arch. P. A.* 29. Evidence, *Id.* 30.

To bridges: Maliciously pulling down or destroying a bridge: *felony*, transportation for life or not less than seven years, or imprisonment, with or without hard labour, for not more than four years, and whipping. 7 & 8 *G.* 4, *c.* 30, *s.* 13. Indictment, 2 *Arch. P. A.* 31. Evidence, *Id.* Maliciously doing any injury to it, with intent to render it dangerous or impassable: *felony*, same punishment. 7 & 8 *G.* 4, *c.* 30, *s.* 13. Indictment, 2 *Arch. P. A.* 31. Evidence, *Id.* 32.

To turnpike gates, &c.: Maliciously throwing down or destroying any turnpike gate, or any chain, rail or post belonging thereto, or any building, weighing engine, &c.: *misdemeanor*, punishment accordingly. 7 & 8 *G.* 4. *c.* 30, *s.* 14. Indictment, 2 *Arch. P. A.* 32. Evidence, *Id.* 33.

To animals: Maliciously killing, wounding or maiming cattle: *felony*, transportation for life or not less than seven years, or imprisonment, with or without hard labour, for not more than four years, and whipping. 7 & 8 *G.* 4, *c.* 30, *s.* 16. Indictment, 2 *Arch. P. A.* 36. Evidence, *Id.* Maliciously breaking down or destroying the dam of a fish-pond, &c., with intent to take or destroy the fish, or so as

Malicious Injuries—(*continued.*)
thereby to cause the loss or destruction of any fish: *misdemeanor*, transportation for seven years, or imprisonment, with or without hard labour, for not more than two years. 7 & 8 *G.* 4, *c.* 30. *s.* 15. Indictment, 2 *Arch. P. A.* 34. Evidence, *Id.* Maliciously putting lime or other noxious material in any such pond, &c. with intent to destroy the fish: *misdemeanor*, same punishment. 7 & 8 *G.* 4, *c.* 30, *s.* 15. Indictment, 2 *Arch. P. A.* 34. Evidence, *Id.* 35.

To ships, &c.: Maliciously setting fire to or otherwise destroying a ship or vessel: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 9. Indictment, 2 *Arch. P. A.* 19. Evidence, *Id.* Maliciously setting fire to, casting away, or otherwise destroying a ship or vessel, with intent to prejudice the owner of the ship or goods, or the underwriters: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 9. Indictment, 2 *Arch. P. A.* 20. Evidence, *Id.* 21. Maliciously damaging a ship or vessel, otherwise than by fire, with intent to destroy it or render it useless: *felony*, transportation for seven years, or imprisonment, with or without hard labour, for not more than two years, and whipping. 7 & 8 *G.* 4, *c.* 30, *s.* 10. Indictment, 2 *Arch. P. A.* 22. Evidence, *Id.* 23. Exhibiting a false light or signal, with intent to bring a ship or vessel into danger: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 11. Indictment, 2 *Arch. P. A.* 23. Evidence, *Id.* 24. Maliciously doing any thing tending to the immediate loss or destruction of a ship or vessel in distress: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 11. Indictment, 2 *Arch. P. A.* 24. Evidence, *Id.* 25. Maliciously destroying any part of a ship in distress or stranded, &c., or any goods belonging to it: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 11. Indictment, 2 *Arch. P. A.* 25. Evidence, *Id.* Forcibly preventing or impeding a person endeavouring to save his life from such ship or vessel: *felony*, death. 7 & 8 *G.* 4, *c.* 30, *s.* 11. Indictment, 2 *Arch. P. A.* 26. Evidence, *Id.*

Malthouse. See "*Burning*," "*Malicious Injuries.*"
Manslaughter. See "*Murder.*"
Manufacture. See "*Larceny*," "*Malicious Injuries.*"
Marriage Licence and Register. See "*Forgery.*"
Mayhem. See "*Murder.*"
Merchant. See "*Agent.*"
Mill. See "*Malicious Injuries.*"
Millpond. See "*Malicious Injuries.*"
Mine. See "*Larceny*," "*Malicious Injuries.*"
Miscarriage. See "*Abortion.*"
Misfortune, homicide by. See "*Murder.*"
Misprision of felony: fine or imprisonment, or both. See 3 *Burn, D. & W.* 216.

Misprision of treason: imprisonment for life, forfeiture of goods, and forfeiture of the profits of land during life. 3 *Inst.* 36.

Money. See "*Coin.*"

Mundick. See "*Larceny,*" *title* "*Land.*"

Murder, Manslaughter, and attempts to Murder:

Murder: *felony*, death. 9 *G.* 4, *c.* 31, *s.* 3. And the same, as to accessories before the fact; but accessories after the fact to be transported for life, or imprisoned, with or without hard labour, for not more than four years. *Id.* Indictment for murder, by shooting, 2 *Arch. P. A.* 89. Evidence, *Id.* 90. Indictment for murder, by stabbing, *Id.* 98. Indictment against a man for murdering his wife with a poker, *Id.* 99. Indictment for murder, by casting a stone, *Id.* 100. Indictment for murder, by riding over a person with a horse, *Id.* 101. Indictment for murder at sea, by striking with a bucket, *Id.* 101. Indictment for murder, by boxing, *Id.* 102. Indictment for murder, by striking, kicking and casting on the ground, where the strokes were given in one county, and the party died in another, *Id.* 104. Indictment for murder, as well by striking with a stick, as by choking, squeezing, pressing &c. *Id.* 105. Indictment for murder, by strangling, *Id.* 106. Indictment against a woman for drowning her child, *Id.* 107. Indictment for murder, by placing poison so as to be mistaken for medicine, *Id.* 108. Indictment for murder by starving, *Id.* 109.

Manslaughter: *felony*, transportation for life or not less than seven years, or imprisonment, with or without hard labour, for not more than four years, or fine. 9 *G.* 4, *c.* 31, *s.* 9. Indictment, 2 *Arch. P. A.* 110. Evidence, *Id.* 111.

Homicide by misfortune, or in self-defence, or in any other manner not felonious: no punishment or forfeiture. 9 *G.* 4, *c.* 31, *s.* 10.

Attempts to murder: maliciously administering or attempting to administer poison or other destructive thing, with intent to murder: *felony*, death. 9 *G.* 4, *c.* 31, *s.* 11. Indictment, 2 *Arch. P. A.* 115. Evidence, *Id.* 116. Attempting to drown, suffocate or strangle, with the like intent: *felony*, death. 9 *G.* 4, *c.* 31, *s.* 11. Indictments, 2 *Arch. P. A.* 117, 118, 119. Evidence, *Id.* 118, 119. Maliciously shooting at a person, with the like intent: *felony*, death. 9 *G.* 4, *c.* 31, *s.* 11. Indictment, 2 *Arch. P. A.* 119. Evidence, *Id.* 120. Attempting to shoot, by drawing a trigger or otherwise, with the like intent: *felony*, death. 9 *G.* 4, *c.* 31, *s.* 11. Indictment, 2 *Arch. P. A.* 120. Evidence, *Id.* 121. Stabbing, cutting or wounding, with the like intent: *felony*, death. 9 *G.* 4, *c.* 31, *s.* 11. Indictment, 2 *Arch. P. A.* 121. Evidence, *Id.* 122.

Maliciously shooting, with intent to maim, disfigure or

disable a person, or to do him some grievous bodily harm; or with intent to resist or prevent apprehension or detainer for an offence: *felony*, death. 9 *G.* 4, *c.* 31, *s.* 12. Indictment, 2 *Arch. P. A.* 123. Evidence, *Id.* 125. Attempting to shoot, by drawing a trigger or otherwise, with the like intent: *felony*, death. 9 *G.* 4, *c.* 31, *s.* 12. Indictment, 2 *Arch. P. A.* 136. Evidence, *Id.* 137. Maliciously stabbing, cutting or wounding, with the like intent: *felony*, death. 9 *G.* 4, *c.* 31, *s.* 12. Indictment, 2 *Arch. P. A.* 137. Evidence, *Id.*

Mutiny, inciting to: *felony*, death. 37 *G.* 3, *c.* 70. See *R.* v. *Fuller*, 1 *Bos. & P.* 180.

N.

Naval stores, having in possession, with the king's mark, without authority: Fine £200, 9 & 10 *W.* 3, *c.* 41, *s.* 2, and whipping or imprisonment, 39 & 40 *G.* 3, *c.* 89, *s.* 2; but the judge may mitigate the fine. *Id.* Second offence, transportation for fourteen years. *Id. s.* 5.

Navigable river. See "*Larceny*," "*Malicious Injuries.*"

Note. See "*Forgery*," "*Larceny.*"

Nuisance; *misdemeanor*, fine or imprisonment, or both, and the nuisance may be abated. See 3 *Burn, D. & W.* 567, &c.; and see *ante*, "*Disorderly House*," "*Highway.*" As to nuisances by steam engines, *see* 1 & 2 *G.* 4, *c.* 41.

O.

Oath, unlawful, administering: *felony*, transportation for seven years. 37 *G.* 3, *c.* 123, *s.* 1.

Obliterating records. See "*Larceny.*"

Obscene books or prints, selling &c.: *misdemeanor*, fine or imprisonment, or both. *See R.* v. *Curl*, 2 *Str.* 788; *R.* v. *Wilkes*, 4 *Burr.* 2527, 2574.

Obtaining money &c. by false pretences. See "*False Pretences.*"

Office, refusing to execute: *misdemeanor*, fine or imprisonment, or both. Indictment, *post.* Evidence, *post.*

Officer, assaulting. See "*Assault.*"

Orchard, robbing &c. See "*Larceny.*" And see "*Malicious Injuries.*"

Order for payment of money or delivery of goods. See "*Forgery*," "*Larceny.*"

Order of justices, disobeying: *misdemeanor*, fine or imprisonment, or both. Indictment, *post.* Evidence, *post.*

Ore. See "*Larceny.*"

Outhouse. See "*Burglary*," "*Burning.*"

Oysters. See "*Larceny.*"

P.

Parliament, elections for members of, voters giving false answers to the questions put to them by the returning officer or his

deputy: *misdemeanor*, and punishable accordingly. 2 *W* 4, *c.* 45, *s.* 58. Indictment, 2 *Arch. P. A.* 476. Evidence, *Id.* 477.

Peace officer, assaulting. See "*Assault.*"

Perjury at common law: *misdemeanor*, fine or imprisonment, (without or without hard labour, 3 Geo. 4, c. 114,) & both, and pillory. Indictment, 4 *Wentworth*, 230, 300. *See* 23 *Geo.* 2, *c.* 11. Subornation of perjury: *misdemeanor*, same punishment. Indictment, 4 *Went.* 234, 250. Perjury on stat. 5 Eliz. c. 9: fine £20, and imprisonment for six months, (with or without hard labour, 3 G. 4, c. 114,) or if he have not goods to the value of £20, then the pillory. 5 *El. c.* 9, *s.* 6, 7. Subornation on stat. 5 El. c. 9: fine £40; or if he have not goods to the value of £40, imprisonment (with or without hard labour, 3 G. 4, c. 114,) for half a year, and pillory. 5 *Eliz. c.* 9, *s.* 3, 4.

Person, stealing from the. See "*Larceny.*"

Personating any officer, soldier, seaman or marine, entitled to wages, pay, pension, prize-money or allowance for service in the army or navy, or the executor, &c. of such: *felony*, transportation for life or not less than seven years, or imprisonment, with or without hard labour, for not more than seven years. 5 *G.* 4, *c.* 107, *s.* 5. *and see* 4 *G.* 4, *c.* 46, *s.* 1. Indictments, 1 *Arch. P. A.* 164, 167. Evidence, *Id.* 165, 168.

Personating bail: Acknowledging a recognizance of bail, in the name of another not privy or consenting to it: *felony*, transportation for life or not less than seven years, or imprisonment for not more than four nor less than two years. 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 11. Indictment, 2 *Arch. P. A.* 276. Evidence, *Id.* 277.

Personating a proprietor of stock, &c. See "*Forgery.*"

Piles for securing canal or river banks, destroying, &c. See "*Malicious Injuries.*"

Piracy, death. 28 *H.* 8, *c.* 15, *s.* 3. Piracy, robbery, or any other act of hostility by subjects of the King against others of his subjects, under colour of a commission from the King's enemies, declared to be piracy and felony, and punishable with death. 11 & 12 *W.* 3, *c.* 7, *s.* 8. 18 *G.* 2, *c.* 30, *s.* 1. Forcibly boarding a ship or vessel, and throwing overboard or destroying goods belonging to it: *piracy*, death. 8 *G.* 1, *c.* 24, *s.* 1. Master or seamen of a ship turning pirates, and running away with the ship, or any boat, goods, &c.; or yielding them up voluntarily to a pirate; or inciting a master or seamen to turn pirate, or to go over to pirates; or laying violent hands on his commander, to prevent him from defending his ship or goods; or confining the master; or endeavouring to make a revolt in the ship: *piracy*, death. 11 & 12 *W.* 3, *c.* 7, *s.* 9. Accessories to piracy, before or after the fact: *death*. 11

& 12 *W.* 3, *c.* 7, *s.* 10. Trading with pirates, or furnishing them with provisions, ammunition, &c., or fitting out a ship for that purpose: *piracy*, death. 8 *G.* 1, *c.* 24, *s.* 1. *See also* 22 & 23 *C.* 2, *c.* 11.

Plantation. See "*Burning.*"

Plants. See "*Larceny,*" "*Malicious Injuries.*"

Pledging goods by a factor. See "*Agent.*"

Plundering wreck. See "*Larceny,*" "*Malicious Injuries.*"

Poaching. See "*Game.*"

Poison. See "*Murder.*"

Polygamy. See "*Bigamy.*"

Pond. See "*Malicious Injuries.*"

Post-office, servants of. See "*Embezzlement.*"

Prison. See "*Breach of Prison.*"

Privy seal. See "*Forgery.*"

Promissory note. See "*Forgery,*" "*Larceny.*"

Provoking to fight. See "*Challenge.*"

Public worship of Catholics or Dissenters, disturbing: *misdemeanor*, fine £40. 31 *G.* 3, *c.* 33, *s.* 10. 52 *G.* 3, *c.* 155, *s.* 12.

Pulse, setting fire to a stack of. See "*Burning.*"

Q.

Quarantine certificate, forgery: *felony*, 6 *G.* 4, *c.* 78, *s.* 25, transportation for seven years, or imprisonment, with or without hard labour, for not more than two years, and whipping. 7 & 8 *G.* 4, *c.* 28, *s.* 8. *See* 1 *Arch. P. A.* 185 n.

Quay, stealing from. See "*Larceny.*"

R.

Rape: *felony*, death. 9 *G.* 4, c. 31, *s.* 16. Indictment, 2 *Arch. P. A.* 150. Evidence, *Id. See* "*Carnally knowing,*" &c. Assault with intent to commit a rape: *misdemeanor*, imprisonment, with or without hard labour, for not more than two years, and fine, and sureties for the peace. 9 *G.* 4, *c.* 31, *s.* 25. Indictment, 2 *Arch. P. A.* 169. Evidence, *Id.* 169.

Receipt. See "*Forgery.*"

Receiving stolen goods, knowing them to have been stolen: *felony*, transportation for not more than fourteen nor less than seven years, or imprisonment, with or without hard labour, for not more than three years, and whipping. 7 & 8 *G.* 4, *c.* 29, *s.* 54. Indictments, *post.* Evidence, *post.*

Receiving or harbouring a stolen child, knowing it to have been stolen: *felony*, transportation for seven years, or imprisonment, with or without hard labour, for not more than two

years, and whipping. 9 *G.* 4, *c.* 31, *s.* 21. Indictment, 2 *Arch. P. A.* 159. Evidence, *Id.* 160.

Recognizance of bail. See "*Personating Bail.*"

Record, stealing, &c. See "*Larceny.*"

Recovery. See "*Fine,*" "*Forgery.*"

Register of baptism, marriage or burial. See "*Forgery.*"

Regrating: *misdemeanor*, fine or imprisonment, or both. *See* 3 *Burn, D. & W.* 247.

Rescue: before the party rescued is tried, the rescuer may be indicted as for a misdemeanor, and punished with fine or imprisonment, or both: after the party rescued is tried, if he be acquitted, still the rescuer may be indicted as for a misdemeanor; 1 *Hal.* 598, 599; but if convicted, then if convicted of felony, the rescuer may be indicted for felony, *Hal. Sum.* 116, and transported for seven years, or imprisoned, with or without hard labour, for not less than one nor more than three years. 1 & 2 *G.* 4, *c.* 88. Indictment, 1 *Arch. P. A.* 73. Evidence, *Id.* 74. If convicted of high treason, the rescuer may be indicted for high treason; or if convicted of a misdemeanor, the rescuer may be indicted for a misdemeanor. *Hal. Sum.* 116. Rescuing a person committed to prison for or convicted of murder, or rescuing a person convicted of murder going to or during execution: *felony*, death. 25 *G.* 2, *c.* 37, *s.* 9.

Rescuing convicts from the superintendant, sheriff or gaoler, removing them: punishable in the same manner as if the convict were in prison. 5 *G.* 4, *c.* 84, *s.* 22. Indictment, 1 *Arch. P. A.* 156. Evidence, *Id.* 157.

Rescuing goods distrained, with force, or rescuing a distress by breaking the pound: *misdemeanor*, fine or imprisonment, or both. *See* 3 *Burn, D. & W.* 729, 730.

Returning from transportation. See "*Transportation.*"

Revenue officers. See "*Assault.*"

Reward, taking, under pretence or on account of helping to stolen goods: *felony*, transportation for life, or not less than seven years, or imprisonment for not more than four years, and whipping. 7 & 8 *G.* 4, *c.* 29, *s.* 58. Indictment, 1 *Arch. P. A.* 439. Evidence, *Id.*

Riot: *misdemeanor*, fine or imprisonment, (with or without hard labour, 3 G. 4, c. 114,) or both. Indictment, *post.* Evidence, *post.*

Rioters remaining assembled one hour after proclamation: *felony*, death. 1 *G.* 1, *st.* 2, *c.* 5, *s.* 1. Opposing the making of such proclamation: *felony*, death. *Id. s.* 5.

Riotously beginning to demolish any church, chapel, house, warehouse, malthouse, granary, building used in carrying on any trade or manufacture, steam or other engine for mines, staith, waggonway, &c.: *felony*, death. 7 & 8

G. 4, *c.* 30, *s.* 8. Indictment, 2 *Arch. P. A.* 16. Evidence, *Id.* 17.

River. See "*Larceny*," "*Malicious Injuries.*"

Robbery. See "*Larceny.*" Assault with intent to rob; see "*Larceny.*"

Roots. See "*Larceny*," "*Malicious Injuries.*"

S.

Sacrilege. See "*Burglary.*"

Sapling. See "*Larceny*," "*Malicious Injuries.*"

Saving bank. See "*Larceny.*"

Sea bank. See "*Malicious Injuries.*"

Seal. See "*Forgery.*"

Seaman: seducing him or inciting him to mutiny, when in the King's service: *felony*, death. 37 *G.* 3, *c.* 70. Master of merchant ship, when abroad, forcing a seaman on shore, leaving him abroad, or refusing to bring him home: *misdemeanor*, imprisonment for such time as the Court shall award. 9 *G.* 4, *c.* 31, *s.* 30. Indictment and information, 2 *Arch. P. A.* 184, 185. Evidence, *Id.* 185.

Seamens' wills or powers of attorney. See "*Personating.*"

Second or subsequent felony: persons convicted of felony, afterwards committing another felony not punishable with death: transportation for life or not less than seven years, or imprisonment for not more than four years, and whipping. 7 & 8 *G.* 4, *c.* 28, *s.* 11. Indictment, 1 *Arch. P. A.* 265. Evidence, *Id.*

Securities for money, stealing. See "*Larceny.*"

Sedition. See "*Libel.*"

Self-defence, homicide in. See "*Murder.*"

Sending a challenge. See "*Challenge.*"

Servants, larceny by. See "*Larceny.*"

Shaft of a mine. See "*Malicious Injuries.*"

Sheep. See "*Larceny*," "*Malicious Injuries.*"

Ship. See "*Larceny*" "*Malicious Injuries.*"

Shipwrecked goods. See "*Larceny*," "*Malicious Injuries.*"

Shop, breaking and entering; see "*Larceny.*" Setting fire to; see "*Burning.*"

Sign manual. See "*Forgery.*"

Silk goods. See "*Larceny*," "*Malicious Injuries.*"

Sluice. See "*Malicious Injuries.*"

Smuggling: three or more persons, armed with fire arms or other offensive weapons, assembling, in order to be aiding in the illegal running of prohibited or uncustomed goods, or in rescuing such goods after seizure, or in rescuing or preventing the apprehension of persons for felonies under this act: *felony*, death. 3 & 4 *W.* 4, *c.* 53, *s.* 58. In-

Smuggling—(*continued.*)
dictment, 2 *Arch. P. A.* 428. Evidence, *Id.* 429. Three or more persons, so armed, aiding as aforesaid: *felony*, death. 3 & 4 *W.* 4, *c.* 53, *s.* 58. Indictment, 2 *Arch. P. A.* 429. Evidence, *Id.* 430. Being in company with four others, and found with goods liable to forfeiture by the revenue laws: *felony*, transportation for seven years. 3 & 4 *W.* 4, *c.* 53, *s.* 60. Indictment, 2 *Arch. P. A.* 434. Evidence, *Id.* Being in company with one other, with such goods, within five miles of the coast, &c., and being armed or disguised: *felony*, transportation for seven years. 3 & 4 *W.* 4, *c.* 53, *s.* 60. Indictment, 2 *Arch. P. A.* 435. Evidence, *Id.* Maliciously shooting at any vessel or boat belonging to the navy or revenue, within 100 leagues of the coast: *felony*, death. 3 & 4 *W.* 4, *c.* 53, *s.* 59. Indictment, 2 *Arch. P. A.* 431. Evidence, *Id.* Maliciously shooting at, maiming, or dangerously wounding an officer of the army, navy or marines, on full pay, employed in the prevention of smuggling, or any officer of customs or excise in the execution of his duty: *felony*, death. 3 & 4 *W.* 4, *c.* 53, *s.* 59. Indictments, 2 *Arch. P. A.* 432, 433. Evidence, *Id.* 432, 433. Assaulting or obstructing such officers in the execution of their duty: *misdemeanor*, transportation for seven years, or imprisonment and hard labour for not more than three years. 3 & 4 *W.* 4, *c.* 53, *s.* 61. Indictment, 2 *Arch. P. A.* 436. Evidence, *Id.* *See also* 2 *Arch. P. A.* 437—439.

Sodomy: *felony*, death. 9 *G.* 4, *c.* 31, *s.* 15. Indictment, 2 *Arch. P. A.* 148. Evidence, *Id.* 149.

Soldiers, seducing, from their allegiance. See "*Mutiny.*"

Soliciting a person to commit a crime. See "*Inciting.*"

Spring guns: setting a spring gun, man trap, or other engine calculated to destroy human life, with intent to inflict grievous bodily harm upon a trespasser: *misdemeanor*, 7 & 8 *G.* 4, *c.* 18, *s.* 1, *and see* 2, 4. Indictment, 1 *Arch. P. A.* 228. Evidence, *Id.* 229.

Stabbing. See "*Murder.*"

Stable. See "*Burning.*"

Stack of corn, &c. See "*Burning.*"

Staith. See "*Malicious Injuries.*"

Stamps, forging: *felony*, death, 55 *G.* 3, *c.* 184, *s.* 7. Knowingly having false dies, &c. resembling those used by the commissioners of stamps; or knowingly having vellum, &c. impressed with forged stamps; or using on parchment or paper stamps which have been cut from other parchment, &c.: *felony*, transportation for life or not less than seven years, or imprisonment for not more than four nor less than two years. 3 & 4 *W.* 4, *c.* 97, *s.* 12.

Stealing Children. See "*Child Stealing.*"

Steam engine. See "*Malicious Injuries.*"
Stock, public. See "*Agent,*" "*Forgery,*" "*Larceny.*"
Stores. See "*Embezzling Naval Stores.*"
Strangling. See "*Murder.*"
Straw. See "*Burning.*"
Subornation. See "*Perjury.*"
Subsequent felony. See "*Second Felony.*"
Suffocation. See "*Murder.*"

T.

Tenants, larceny by. See "*Larceny.*"
Threats, obtaining money by. See "*Larceny,*" *tit.* "*Robbery.*"
Threatening letters. See "*Letters.*"
Threatening verbally to accuse. See "*Accusing.*"
Toll-house. See "*Malicious Injuries.*"
Training. See "*Arms.*"
Transportation, returning from, or convict being at large before the expiration of the term for which he was sentenced to be transported: *felony*, 5 *G.* 4, *c.* 84, *s.* 22, transportation for life, and imprisonment, with or without hard labour, for not more than four years, previously to transportation. 4 & 5 *W.* 4, *c.* 67. Indictment, 1 *Arch. P. A.* 155. Evidence, *Id.* 156. See "*Escape,*" "*Rescue.*"
Treason, death, &c. Treason relating to the seals, sign manual, &c. See "*Forgery.*"
Trees. See "*Larceny,*" "*Malicious Injuries.*"
Turnpike gate. See "*Malicious Injuries.*"

U.

Underwood. See "*Larceny,*" "*Malicious Injuries.*"
Unlawful assembly. See "*Assembly.*"
Unlawful oaths. See "*Oath.*"
Uttering. See "*Coin,*" "*Forgery.*"

V.

Valuable securities. See "*Larceny.*"
Vegetables. See "*Larceny,*" "*Malicious Injuries.*"

W.

Wad. See "*Larceny,*" *tit.* "*Land.*"
Waggon way. See "*Malicious Injuries,*" *tit.* "*Mines.*"
Warehouse. See "*Burglary,*" "*Burning.*"
Warren. See "*Larceny,*" *tit.* "*Animals.*"
Wharf, stealing from. See "*Larceny.*"
Will. See "*Forgery,*" "*Larceny.*"
Woman. See "*Abduction,*" "*Abortion,*" "*Concealing.*"
Wood. See "*Burning.*"

Woodwork. See "*Larceny.*"
Woollen goods. See "*Larceny,*" "*Malicious Injuries.*"
Wounding. See "*Assault,*" "*Malicious Injuries,*" "*Murder.*"
Wreck. See "*Larceny,*" "*Malicious Injuries.*"

SECTION 3.

Indictment, generally.

An indictment is an accusation at the suit of the crown, found to be true by the oaths of a grand jury. 2 *Hawk. c.* 25. We shall notice the law relating to it, shortly, under three heads: the Commencement, the Body of the Indictment, and the Conclusion.

The Commencement.

The following is the form of the commencement of an indictment:—

Middlesex to wit: The jurors for our Lord the King upon their oath present, that ["J. S. late of the parish of B. in the county aforesaid, labourer," &c., stating the facts constituting the offence. The county or other place in the margin must be descriptive of the district within which the Court can exercise jurisdiction, and within which the offence was committed: as for instance, at the sessions for Middlesex, the venue in the margin must be "Middlesex;" at the sessions for the East Riding of the county of York, "East Riding of the county of York;" at the sessions for Hull, "Town of Kingston upon Hull and county of the same town;" and the like in other cases. But for felonies or misdemeanors committed on the boundary or boundaries of two or more counties, or within 500 yards of the boundary, or begun in one county and completed in another, the indictment may charge it to have been committed in either county. *See* 7 *G.* 4, *c.* 64, *s.* 12. This however extends only to a case where the trial is in a county, and not in a borough or other place of limited jurisdiction. *R.* v. *Welsh, R. & M.* 175. Also, where a felony or misdemeanor is committed on any person, or on or in respect of property, in or upon any coach, waggon, cart, or other carriage whatsoever employed in any journey, or on board any vessel in a voyage or journey on any navigable river or canal: the indictment may charge it to have been committed in any county through which the coach or vessel, &c. shall have passed in its journey or voyage. *See* 7 *G.* 4, *c.* 64, *s.* 13. As to prosecutions in an adjoining county, for offences committed in cities and towns corporate, *see stat.* 38 *G.* 3, *c.* 52; 51 *G.* 3, *c.* 100; 5 & 6 *W.* 4, *c.* 76, *s.* 109; *R. & Ry.* 179, 481. And as to murder or manslaughter committed by a British subject abroad, *see* 9 *G.* 4, *c.* 31, *s.* 7; *and* 2 *Arch. P. A.* 86, *n.* And as to offences committed abroad by persons holding public employments, *see* 42 *G.* 3, *c.* 85; 11 & 12 *W.* 3, *c.* 12; *R.* v.

Shawe, 5 *M. & S.* 403. By stat. 7 G 4, c. 64, s. 20, no judgment upon an indictment for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed "for want of a proper or perfect venue, where the Court shall appear by the indictment to have jurisdiction over the offence." As to the caption of an indictment, see *ante*, *p.* 31.

Body of the Indictment.

Description of the Defendant.] The person charged by the indictment, must be described by his Christian or first name, his surname, his addition of place or late residence, and his addition of degree or mystery: as for instance, "John William Smith, late of the parish of the Holy Trinity, in the county aforesaid, labourer; James Perry, late of the same place, gentleman; Ann the wife of George Jones, of the same place, yeoman; Jane Golding of the same place single woman," and the like. Whether the description be a correct one, is now immaterial; for by stat. 7 Geo. 4, c. 64, s. 19, if any objection be made to the indictment on that ground, "the Court shall forthwith cause the indictment to be amended according to the truth, and shall call upon the party to plead thereto." In indictments against a parish or township for the non-repair of a highway, 2 *Hawk. c.* 25, *s.* 68, or the inhabitants of a county for not repairing a bridge, the indictment may be against the inhabitants of the parish, township, or county generally, without naming any individual.

But when it is necessary to describe the party charged, in any particular way, to bring him within the purview of any statute on which the indictment is framed, such statute extending only to such persons as are specially mentioned in it: the indictment must so describe the party, as to bring him within the words and meaning of the statute, and the evidence must support the description. 2 *Hawk. c.* 25, *s.* 112.

Description of the Indictor or Party injured &c.] The indictor or party injured, if known, must be described with certainty; 2 *Hawk. c.* 25, *s.* 71; if an individual, he must be described by his christian and surname; if a corporation, by their name of incorporation. But if the party be described by the name by which he is usually known, it will be sufficient; and therefore where the prosecutor was named in the indictment John Hancox, his real name being John Walter Hancox, but he was usually called and known by the name of John Hancox, Park, J. held it to be sufficient. *R. v. Berriman*, 5 *Car. & P.* 601. So, where the real name was Richard Jeremiah Pratt, but he was named in the indictment Richard Pratt, the name by which he was generally

known, it was holden sufficient. *Anon.* 6 *Car. & P.* 408. Where the name was spelt Whyneard, the real manner of spelling it was Winyard, and it was pronounced Winnyard, the judges held it to be sufficient. *R.* v. *Foster, R. & Ry.* 412. And where the prosecutrix was named in the indictment by a name which she had assumed, but by which alone she was known in the neighbourhood, the judges held it sufficient. *R.* v. *Norton, R. & Ry.* 510. It is not necessary to give the party any addition of degree or mystery, &c.; 2 *Hal.* 182. *and see R.* v. *Peace,* 3 *B. & Ald.* 579; nor is it safe to do so; for where, in bigamy, the second wife was described as Elizabeth Chant widow, and it appeared in evidence that Elizabeth Chant was at the time in fact and by reputation a single woman, the judges held the misdescription to be fatal, although it was not necessary to have stated more than the name of the party. *R.* v. *Deeley, R. & Ry.* 303. 4 *Car. & P.* 579. By stat. 7 G. 4, c. 64, s. 20, no judgment upon an indictment shall be stayed or reversed, because "any person or persons mentioned in the indictment is or are designated by a name of office or other descriptive appellation, instead of his or her proper name or names." If the names of the party be unknown, he should be described as "a person to the jurors aforesaid unknown;" but if at the trial afterwards it appear that the party was known, the defendant cannot be convicted. *See R.* v. *Robinson, per Richards, C. B.,* 1 *Holt,* 595. And where an indictment against an accessory before the fact to a larceny, stated the larceny to have been committed by a person unknown, and the grand jury found the bill upon the evidence of a person who acknowledged that he had committed the larceny: Le Blanc, J. ordered the defendant to be acquitted. *R.* v. *Walker,* 3 *Camp.* 264.

Where, in an indictment for felony or misdemeanor, it becomes necessary to state the ownership of any property, real or personal, belonging to partners in trade, joint tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named and another or others, as the case may be; and whenever in any indictment for any felony or misdemeanor, it shall be necessary to mention, for any purpose whatsoever, any partners, joint-tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision shall be construed to extend to all joint stock companies and trustees. 7 *G.* 4, *c.* 64, *s.* 14. *see R.* v. *Boulton,* 5 *Car. & P.* 537. 1 *Arch. P. A.* 207, *n.* So, by 7 *G.* 4, *c.* 64, *s.* 15, in any indictment for any felony or misdemeanor respecting any "bridge, court, gaol, house of correction, infirmary, asylum or other building, erected or maintained in whole or in part at the expense of any county, riding or division; or on or with respect to any goods or chattels whatsoever, provided for or at the expense of any county, riding or division, to be used for making, altering or repairing any bridge,

or any highway at the ends thereof, or any court or other such building as aforesaid, or to be used in or with any such court or other building: it shall be sufficient to state any such property, real or personal, to belong to the inhabitants of such county, riding or division; and it shall not be necessary to specify the names of any such inhabitants." So, goods provided for the use of the poor of any parish or township, &c., may be stated to belong to the overseers of the poor of such parish &c., for the time being. 7 *G.* 4, *c.* 64, *s.* 16. *See R.* v. *Went. R. & Ry.* 359, *post.* So, tools and materials for repairing highways, not under trustees or commissioners, may be described as belonging to the surveyor of the highway for the time being, without specifying his name. 7 *G.* 4, *c.* 64, *s.* 16. So, buildings, gates &c., erected in pursuance of any Act for making a turnpike road, or any tools, materials &c., may be described as belonging to the trustees or commissioners of the road, without naming them. 7 *G.* 4, *c.* 64, *s.* 17. So, property under the commissioners of sewers, may be described as belonging to such commissioners, without naming them. 7 *G.* 4, *c.* 64, *s.* 18.

The facts &c., constituting the Offence.] Every offence must of course consist of certain facts and circumstances: in the case of an offence at common law, these facts &c., are defined by the rule of the common law upon the subject; in offences against statutes, by the statute creating the offence. And the general rule of pleading, with respect to this part of an indictment, is, that all the material facts and circumstances comprised in the definition of the offence, whether by a rule of the common law or a statute, must be stated; if any one material fact or circumstance be omitted, the indictment will be bad. If, for instance, in larceny, the indictment were merely to state that the defendant feloniously took the goods in question, without stating also that he carried them away, the indictment would be bad; as the carrying of them away is a material part of the definition of larceny. So, an indictment for murder, omitting the words *ex malitiâ præcogitatâ*, would be bad, even although it charged that the defendant *felonice murdravit*, &c., which implies malice. 2 *Hawk. c.* 25, *s.* 60. And the same in other cases. See several similar cases of indictments on statutes, deemed bad on this ground, 2 *Hawk. c.* 25, *s.* 110.

Time and Place.] The indictment must state, either expressly or by way of reference, when and where each fact stated in the indictment took place; otherwise the indictment will be bad. 2 *Hawk. c.* 25, *s.* 77, 83. This is usually done, in the first instance, by stating that the defendant "*on the first day of August, in the seventh year of the reign of our Sovereign Lord William the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, at the parish of*

A. *in the county aforesaid*," did so and so, stating the act done; and the facts subsequently mentioned may be stated to have been done "*then and there*," referring to the time and place before specifically stated. *See* 2 *Hawk. c.* 25, *s.* 78.

In the first place, in indictments for felony, time must be laid to every material fact, otherwise the indictment will be bad. 2 *Hawk. c.* 25, *s.* 77. 2 *Hal.* 177, 178. As for instance, in an indictment for murder, time must be stated, not only to the assault, but to the stroke also, and the death. *Id.* But in misdemeanors, it is said not to be necessary to lay a time to every fact, as the time first laid is deemed to be connected with all the facts subsequently stated; 2 *Hal.* 178; but the omission of time, even in those cases, if not objectionable in point of law, is at least not very indicative of good or careful pleading. *See R.* v. *Holland*, 5 *T. R.* 607, 625. And the time so stated must not be repugnant, uncertain, or impossible; and therefore, if an indictment state a fact to have occurred on a day subsequent to the finding of the bill, it will be bad. 2 *Hawk. c.* 25, *s.* 77. And formerly a defect in this respect was not cured even by verdict; *Id.* But now, by stat. 7 G. 4, c. 64, s. 20, judgment upon an indictment for felony or misdemeanor, whether after verdict or confession, &c., shall not be stayed or reversed for "omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or an impossible day, or on a day that never happened."

It is only, however, in cases where a fact of commission is charged, that time must be stated; where the offence consists altogether of omission, it is not necessary to allege any time to it. 2 *Hawk. c.* 25, *s.* 79. And in cases where it must be stated, it is sufficient to state the day and year, without giving the hour &c., *Id. s.* 76, except perhaps in burglary, and night poaching, and the like, where the offence must appear to have been committed in the night time. The true time, however, need not be stated in any instance, unless made necessary in some particular case by statute; but a fact stated to have occurred on one day, may be proved to have occurred upon another. 2 *Hawk. c.* 25, *s.* 81. 2 *Hale*, 179. Yet it is in general prudent to state the day correctly; for the grand jury, from their ignorance of the rule of law upon the subject, often make a difficulty in finding a bill, when there is a variance between the time laid and that proved by the witnesses before them.

So a place must be laid to every material fact, otherwise the indictment will be bad; and the place stated must appear to be within the jurisdiction of the Court in which the indictment is found. 2 *Hawk. c.* 25, *s.* 83. Formerly, not only the county, but the parish or other place within the county, in which the fact was supposed to have been committed, must have been stated.

But as by the late Jury Act, 6 G. 4, c. 50, s. 13, the jury, in criminal cases as well as civil, are now returned of the body of the county generally, and not *de vicineto*, as formerly, it is no longer necessary to state the parish or place, &c.; it will be sufficient to state the county. *See* 1 *Arch. P. A.* 181, *n.* But if the offence be local, the indictment must still shew the locality with sufficient certainty; as for instance, an indictment against a parish for not repairing a highway, must state it to be within the parish, and it must be proved to be so. In burglary, housebreaking, stealing in a dwelling house and the like, the indictment must state the parish, by way of local description. In all other cases, however, even if the parish be stated as special venue, it is not necessary it should be proved as laid; proof that the fact occurred at any other place within the county, will sufficiently support the statement. 2 *Hawk. c.* 25, *s.* 84.

It must be positive.] The charge must be laid positively, and not inferentially or by way of recital merely. 2 *Hawk. c.* 25, *s.* 60. Therefore a material fact laid in an indictment after a "whereas," would render the indictment bad. *Id.* So the want of a direct allegation of any thing material in the description of the substance, nature, or manner of the offence, cannot be supplied by any intendment or implication whatsoever; and therefore, in an indictment for murder, the omission of the words "*ex malitiâ præcogitatâ*," is not supplied by the words "*felonice murdravit*," although the latter words imply them. *Id.* And the like in other cases.

It must be certain.] It has been already mentioned (*ante, p.* 119.) that the indictment must state all the facts and circumstances, comprised in the definition of the offence, by the rule of the common law or statute, on which the indictment is founded. And these must be stated with sufficient certainty, otherwise the indictment will be bad. The principal rule as to the certainty required in an indictment, may, I think, be correctly laid down thus: that where the definition of an offence, whether by a rule of the common law or a statute, includes generic terms (as it necessarily must), it is not sufficient that the indictment should charge the offence in the same generic terms as in the definition, but it must state the species. Therefore an indictment for stealing "*bona et catalla*" of J. S., without further describing them, by stating what goods or chattels were intended, would be bad. 2 *Hawk. c.* 25, *s.* 74. *R.* v. *Powell*, 1 *Str.* 8. So, where a prisoner was convicted of stealing "ten pounds in monies numbered," the judges held the conviction to be wrong, because the indictment did not specify the species of coin stolen. *R.* v. *Fry*, *R. & Ry.* 482. So it has been holden bad, to charge a man with speaking "divers false and scandalous words" of the mayor of a town, without setting out the words. 2 *Hawk.*

c. 25, *s.* 59. So, where an indictment, at the instance of a justice of the peace, charged a defendant that "*per diversa scandalosa, minacia et contemptuosa verba abusus fuit, et ipsum in executione officii sui prædicti vi et armis illicite retardavit,*" and it was demurred to as being too general; on the part of the prosecutor it was admitted that the indictment was bad as to the words, but it was argued that it was sufficiently certain as to the obstruction: the Court, however, held it bad as to that also, for it was not sufficient to say generally "*retardavit,*" but the act done should be specially set out. *R.* v. *How*, 2 *Str.* 699. So, where a defendant was convicted on an indictment charging him with having obtained a certain promissory note by false tokens, the Court upon motion arrested the judgment, because the false tokens were not specified in the indictment. *R.* v. *Munot*, 2 *Str.* 1127. So, an indictment against a constable, charging that "*male et negligenter se gessit*" in the execution of his office, was quashed by the Court of King's Bench upon motion, as being too general. *R.* v. *Winteringham*, 1 *Str.* 2. *see also R.* v. *Robe*, 2 *Str.* 999. So, an indictment charging a man with being a common defamer, vexer and oppressor; or a common disturber of the peace; or a common deceiver of the king's people, or the like: would be bad. 2 *Hawk. c.* 25, *s.* 59. 2 *Hal.* 182. *see R.* v. *Brian et al.*, 1 *Ad. & E.* 436, *n.* The only exceptions to this rule are, in the cases of common barrators, and common scolds, in which the particular acts of barratry or scolding need not be stated. 2 *Hawk. c.* 25, *s.* 59. And by stat. 7 G. 4, c. 64, s. 21, where the offence charged has been created by any statute, or subjected to a greater degree of punishment by any statute, the indictment shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.

In the time laid to each material fact, also, uncertainty will be as fatal as in the statement of the facts themselves: and therefore an indictment, charging the owner of a ferry with extorting several sums of money from several persons, between such a day and such a day, was holden void. 2 *Hawk. c.* 25, *s.* 82.

Besides uncertainty arising from too great generality of statement, an indictment may be uncertain in other respects, and therefore bad. As for instance, where an indictment charged a miller, in the same count, with having received two separate parcels of barley, of four bushels each, to be ground at his mill, and that he delivered three bushels of oat and barley meal, other and different from the produce of the said four bushels: the indictment was holden bad for uncertainty, as not shewing as to which of the parcels of barley the offence was committed. *R.* v. *Haynes*, 4 *M. & S.* 214.

A charge also in the alternative, charging a defendant with having done so *or* so, as that he murdered *or* caused to be murdered, is bad for uncertainty. 2 *Hawk. c.* 25, *s.* 58.

It must not be repugnant.] One material part of an indictment must not be repugnant to another, otherwise the indictment will be void. 2 *Hawk. c.* 25, *s.* 62. Therefore if an indictment charge a man with forging an instrument by which A. was bound to B., it is bad, for A. could not be bound by the instrument if it were forged. *Id.* So, if an indictment for forcible entry charge that A. disseised B., and it appear on the face of the indictment that B. was not seised in fee: it is bad. *Id.* So, an indictment for selling iron by false weights and measures, has been holden bad for repugnancy, for it was absurd to say that it could be sold both by weight and by measure at the same time. *Id.* 2 *R. Abr.* 18.

Technical Words.] In some cases, certain technical words are required, such as "ravish" in indictments for rape, 2 *Hawk. c.* 25, *s.* 110, "murder" and "of his malice aforethought" in indictments for murder, 2 *Hawk. c.* 25, *s.* 60, "burglariously" in an indictment for burglary, "feloniously" in an indictment for felony, 2 *Hal.* 184, and the like: in these cases, no other words, nor any periphrasis whatever, would be deemed equivalent to them; and an indictment omitting them would be bad. So in indictments upon statutes, where the definition of the offence contained in them, includes such adverbs as "unlawfully," "wilfully," "maliciously," or the like, the offence must be charged to have been committed "unlawfully," "wilfully," "maliciously," &c., accordingly; otherwise the indictment would be bad. The word "unlawfully," is not essentially necessary in indictments at common law, 2 *Hawk. c.* 25, *s.* 96, although very generally used. The words "with force and arms" were formerly necessary, and are now generally used, in all indictments for offences with force; but they have been rendered unnecessary, by stat. 37 H. 8, c. 8. *See* 2 *Hawk. c.* 25, *s.* 90, 91. And by stat. 7 Geo. 4, c. 64, s. 20, no judgment on any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default or otherwise, shall be stayed or reversed, for the omission of the words "as appears by the record," or of the words "with force and arms."

Conclusion.] The conclusion of an indictment at common law is, "Against the peace of our Lord the King, his crown and dignity." In misdemeanors, to the person or property of an individual, it is very usual to conclude, "*To the great damage of the said J. S., to the evil example of all others in the like case offending,* and against the peace of our Lord the King, his crown and dignity;" but the above words in italics are unnecessary. The conclusion of indictments for offences against statutes, is, "*Against the form of the statute* [or '*statutes*'] *in such case made and provided, and against the peace of our*

Lord the King, his crown and dignity." If the offence be committed in the reign of one King, and the offender be indicted in the reign of his successor, the indictment should conclude, against the peace of the late King; *R. v. Lovina*, 3 *Burr.* 1901; or if commenced in the reign of one King, and continued into the reign of another, it seems that a conclusion against the peace of both Kings would be good. 2 *Hawk. c.* 29, *s.* 93. But if an indictment for an offence committed in the present reign, conclude against the peace of the late King, the word "late" may be rejected as surplusage. *R. v. Scott, R. & Ry.* 415. Since the many alterations in the crown law, introduced in the late and present reign, it often is a matter of some doubt whether indictments for offences, formerly punishable at common law, and now by statute, should conclude as at common law, or *contra formam statuti*. But as it has been holden that a conclusion *contra formam statuti*, to an indictment for an offence at common law, does not affect the validity of the indictment, *R. v. Matthews*, 5 *T. R.* 162, the judges have, I understand, intimated to the clerks of the indictments on the different circuits, that it may be advisable to conclude their indictments, generally, as for offences against a statute. This is prudent and safe pleading, where a doubt exists as to its necessity; but where there is no doubt, and the offence is defined and punishable at common law only, a conclusion *contra formam statuti* would appear absurdly pleading. Formerly, concluding as at common law, instead of *contra formam statuti*, 2 *Hawk. c.* 25, *s.* 116, or concluding *contra formam statutorum* for *statuti*, or *statuti* for *statutorum*, *Id. s.* 117, or omitting the *contra pacem*, *Id. s.* 92, was bad, even in arrest of judgment, *R. v. Thomas Cook, R. & Ry.* 176, or upon writ of error. But now, by stat. 7 G. 4, c. 64, *s.* 20, no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default or otherwise, shall be stayed or reversed for the omission of the words "against the peace," nor for the insertion of the words "against the form of the statute" instead of "against the form of the statutes," or *vice versa*. And where an indictment preferred in the reign of the present King, for an offence committed in the reign of George IV., concluded against the peace of our Lord the King, &c., the judges held the defect to be cured by this statute; *R. v. Chalmers, Ry. & M.* 352; on the principle, no doubt, that a bad conclusion was the same as none.

Number of Offences.] There is no objection to stating the same offence, in different ways, in as many different counts of the same indictment as you may think necessary, even although the judge should think you may [illegible] *R. v. Gallagher*, 1 *Ry. & M.* 236. *See R. v. [illegible]*, *R. v. Richmond*, 75, provided all the counts be for felo[illegible] & 8 *statutes*. [illegible] will be misdemeanors. And even if different felonies or

misdemeanors be stated in several counts of an indictment, no objection can be made to the indictment in point of law upon this ground. In the case of felony, indeed, the judge in his discretion may require the counsel for the prosecution to select one of the felonies, and confine himself to that; but this practice has never been extended to misdemeanors. *Per Ld. Ellenborough, C. J., Young* v. *Rex in error*, 3 *T. R.* 98. The clerks of the indictments on the different circuits, however, have directions not to charge the same party with larceny and receiving the same goods, in the same indictment. *See R.* v. *Galloway*, 1 *Ry. & M.* 234. *R.* v. *Madden, Id.* 277. And the judges have, upon more than one occasion, censured the practice of sending two bills before the grand jury, at the same time, against the same person, the one for stealing and the other for receiving the same goods. So where an indictment was preferred for cutting with intent to murder, and another for a common assault, for the same offence, Vaughan, B. censured the practice, and put the prosecutor to his election. *R.* v. *John Smith*, 3 *Car. & P.* 412. *See also R.* v. *Doran*, 1 *Leach*, 538.

Where in one count of an indictment on stat. 37 G. 3, c. 70, the defendant was charged with endeavouring to incite a soldier "to commit an act of mutiny, *and* to commit traitorous and mutinous practices," it was objected in arrest of judgment, that the count was bad, as charging two offences; but the judges seemed to think it good, for there might be only one endeavour to incite to the two offences; the point, however, was not decided, as there were other counts which were unobjectionable. *R.* v. *Fuller*, 1 *Bos. & P.* 180. There is no objection, however, in charging a defendant, in one count, with assaulting two persons, where the whole forms one transaction. *See R.* v. *Benfield and Saunders*, 2 *Burr.* 984, *per Ld. Mansfield, C. J.*

Joinder of Defendants.] If several be engaged in the commission of the same offence, they may be joined in the same indictment; or each may be indicted separately. 2 *Hawk. c.* 25, *s.* 89. *See R.* v. *Kingston*, 8 *East*, 41. *R.* v. *Benfield and Saunders*, 2 *Burr.* 984. And where three were indicted for burglary and stealing in a dwelling-house, and one pleaded guilty, and the others were convicted of the larceny in the dwelling-house only, the judges held that judgment should be entered against the three accordingly. *R.* v. *Butterworth, et al., R. & Ry.* 520. Also the principal and accessory, or the principal and receiver, may be joined in the same indictment; or they may be indicted separately.

Indictment, how found.] The grand jury may find as to one count a true bill, and as to another not a true bill. *R.* v. *Fieldhouse, Cowp.* 325. And where a bill for murder is presented, they may find it a true bill for manslaughter only. But

the usual practice in this latter case is, for the grand jury to bring the bill back into Court, and upon their informing the judge of their intention, he will order the bill to be altered into one for manslaughter, and to be again laid before them. In other cases, however, the grand jury cannot find a true bill as to part of a count, and reject the remainder. 2 *Hawk. c.* 25, *s.* 2.

SECTION 5.—*Evidence generally.*

1. *What must be proved, and by whom.*

Where the defendant pleads not guilty, the prosecutor always begins to give evidence, and must prove the defendant to be guilty of the offence charged against him, before the latter can be called upon for his defence. Even where the offence consists wholly or partly of an omission or negative, the prosecutor must prove the negative. And therefore, where upon an indictment for coursing deer in inclosed ground, without the consent of the owner, the question was, whether the onus lay upon the prisoner to prove that he had the consent of the owner: Lawrence, J. held that it did not, but that it was incumbent on the owner to prove the negative; and the owner not being in attendance, the prisoner was acquitted. *R.* v. *Thomas Rogers*, 2 *Camp.* 654. So, where upon an indictment for lopping and topping trees in the night time, without the consent of the owner, it was proved that the prisoners had committed the offence in the night time, and when detected had run away; that the owner, after the offence was committed, had given orders for the apprehension of the prisoners, but died before the trial; and the land-steward proved that he himself never gave consent, and he believed his master never did: Bayley, J. told the jury that they must be satisfied that the prisoners did not obtain the consent of the owner, but left it to them to say whether the facts proved did not furnish reasonable evidence of want of consent; and the jury found the prisoners guilty. *R.* v. *Hazy and Collins*, 2 *Car. & P.* 458. But where an offence is created by statute, and an exception is made either by another statute, or by another and substantive clause of the same statute, it is not necessary for the prosecutor, either in the indictment or by evidence, to shew that the defendant does not come within the exception; but it is for the defendant to prove the affirmative, and which he may do under the plea of not guilty. *See R.* v. *Pemberton*, 1 *W. Bl.* 230.

If the defendant plead specially, as where he pleads *autrefois acquit*, &c. or upon an indictment against a parish for non-repair of a highway, where the defendants plead that others and not the parish are bound to repair, the rule is the same as

in civil actions, that is to say, the party who adds the similiter begins.

As to the facts, &c. to be proved: it is a general rule, that all the facts and circumstances stated in the indictment or other pleading, which cannot be rejected as surplusage, must be proved; as to what facts, &c. must be stated, see *ante*, p. 119. But where a felony is made additionally penal, if committed at a particular time or place, or under particular circumstances, then if the time or place or circumstances be not proved, the offender may still be convicted of the simple felony: as for instance, if upon an indictment for stealing from a dwelling-house, the prosecutor prove a larceny, but fail in proving the goods to have been stolen from the dwelling-house, the defendant may be found guilty of the simple larceny. So, if upon an indictment for house-breaking, you fail to prove the breaking and entering, the prisoner may still be convicted of stealing in the dwelling-house, if the goods be of the value of 5*l.*; or if the goods be of a less value, or you fail in proving that the goods were stolen from the dwelling-house, he may be convicted of the simple larceny. So, upon an indictment for burglary and larceny in a dwelling-house, if the prosecutor fail in proving the offence to have been committed in the night-time, the defendant may be convicted of house-breaking; or if that be not proved, he may be convicted of stealing in the dwelling-house, or of the simple larceny, as in the instance last mentioned.

And the facts, &c. must be proved in substance as laid; a variance in substance will be fatal. As to statements of matter of record, if the statement purport to be descriptive of the record, any the slightest variance between it, and the record given in evidence to prove it, will be fatal; but if the statement be not descriptive of the record itself, but merely of some fact which is to be proved by a record, there a literal variance will be immaterial, if the record prove the allegation in substance. *Purcell* v. *Macnamara*, 9 *East*, 157. *and see the cases collected upon this subject*, 1 *Arch. Pl. and Ev. civ. act.* 336, *et seq.* So, if a deed, bill of exchange, or other written instrument, be set out *in hæc verba*, or by a *fac simile*, the slightest variance will be fatal; but if it be described generally, as in larceny, evidence of a written instrument substantially answering the description, will sustain the allegation. It has been decided, however, that a mere literal variance, as "*undertood*" for "*understood*," (*R.* v. *Beach*, *Cowp.* 229. 1 *Doug.* 194.) or "*reicevd*" for "*received*," (*R.* v. *Hart*, 2 *East's P. C.* 977), is in all cases immaterial. *See R.* v. *Dudman*, 4 *B. & C.* 850. And by stat. 9 Geo. 4, c. 15, it shall be lawful for any Court of oyer and terminer and gaol delivery, or any judge sitting at *nisi prius*, if such court or judge shall see fit so to do, to cause the record, on which any trial may be pending before them, in any indict-

ment or information for any misdemeanor, to be amended, where any variance shall appear between a matter in writing or print produced in evidence, and the statement thereof upon the record; and thereupon the trial shall proceed, as if no such variance had appeared. *See* 2 *Arch. P. A.* 72, 73. But a variance between the indictment and proof in the number or quantity of goods alleged to be stolen, or their value, or the like, is not material; if a larceny of any one article, mentioned in the indictment, be proved, it will be sufficient.

The time laid in the indictment, unless it be of the essence of the offence, need not be proved as laid; and a variance, in that respect, will not be material.

So, if any parish or place be laid as special venue merely, and not as necessary local description, a variance between the indictment and proof, in that respect, will not be material. *See ante*, *p.* 121.

As to the admissibility of evidence of acts not charged in an indictment: if they tend to prove acts, &c. which are charged, of course they may be admitted. Thus, if a guilty knowledge form an ingredient in the offence charged, the prosecutor may give in evidence any facts from which the jury may infer it: as, for instance, upon an indictment for knowingly uttering a forged bill of exchange, evidence that the defendant gave a false account of the parties to it, and, when he was apprehended, had other forged bills of exchange upon his person, was holden to be properly received, in proof of his guilty knowledge. *R. v. Hough*, *R. & Ry.* 120. *See other cases upon this subject*, 2 *Arch. P. A.* 248, 249. So, where the intent, with which an act is done, forms an ingredient in an offence, the prosecutor may give evidence of any acts, from which the jury may infer it. With these exceptions, however, a prosecutor will not be permitted to prove a prisoner guilty of one felony, by proving him guilty of another unconnected with it. And so far is this principle carried in favour of prisoners, that, if a prisoner be charged in different counts of an indictment with distinct felonies, the Court will not in general allow him to be prosecuted for more than one; but will put the prosecutor to his election for which felony he will prosecute. *See ante*, *p.* 124. So, upon an indictment for stealing several articles, if it appear in evidence that they were stolen at different times, the prosecutor will, in like manner, be put to his election. *See post*, *title* "*Larceny.*" But, where several offences of the same nature form parts of one entire transaction, it is in the discretion of the judge to confine the prosecutor to the proof of one, or to allow him to give evidence of the others: as, for instance, where a shopman being suspected of stealing from his employer's till, marked money was put into the till, and, being watched, he was observed going to the till, immediately after which some of the money was missed; at this part of the evidence at the trial,

it was objected, for the prisoner, that the prosecutor should be confined to this instance, but the judge overruled the objection; it was then proved, that, shortly after, he was observed to go again to the till—that he took his hand out of it, clenched, and put it into his waistcoat pocket, and that the till, being immediately examined, it was found that more of the money was gone from it; the prisoner was therefore apprehended and searched, and six shillings of the marked money found upon him: upon motion to stay the judgment, on the ground of evidence of another offence being received, the Court held, that it was in the discretion of the judge to allow it: the two felonies were so connected, as to form parts of one entire transaction, and the one was evidence to show the character of the other. *R.* v. *Ellis*, 6 *B. & C.* 145. So, there can be no objection that the evidence of one offence, proves the defendant to have been guilty of another offence also. *R.* v. *Theodore Moore*, 2 *Car. & P.* 235.

If the indictment contain any facts or circumstances not included in the definition of the offence, and which, therefore, need not to have been stated, they may be rejected as surplusage, and need not be proved; and this, as well in an indictment on a statute, as in an indictment for an offence at common law. *R.* v. *Wm. Jones*, 2 *B. & Adolph.* 611.

2. *The manner of proving the matter in issue.*

Confessions.] A confession by the defendant, if obtained fairly, and without holding out any inducement to him to make it, is nearly the strongest evidence that can be given of the facts stated in it, as against the party making it. But if any inducement, by promise of favour or threat, be held out to the prisoner, as by telling him he had better tell all he knew, *R.* v. *Kingston*, 4 *Car. & P.* 387, or that he had better tell where he had got the property, *R.* v. *Dunn*, 4 *Car. & P.* 543; "you had better split, and not suffer for all of them," *R.* v. *Thomas*, 6 *Car. & P.* 353; "it would have been better if you had told at first," *R.* v. *Walkley & Clifford*, 6 *Car. & P.* 175; "that unfortunate watch has been found, and, if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle," *R.* v. *Parratt*, 4 *Car. & P.* 570, or the like: any confession the prisoner may have thereby been induced to make, cannot be given in evidence against him.

But nothing short of a threat, or of a promise of favour with respect to the offence charged against the prisoner, will have this effect. Where a confession was obtained from a boy of fourteen years of age, by questions put to him by the constable who apprehended him, and at a time when the boy had not had food for nearly a day, a majority of the judges held, that the confession was receivable in evidence. *R.* v. *Thornton*, *Ry. & M.* 27. Where a man, committed for murder, was visited by the chaplain

of the gaol, who, in long and very earnest discourse with him upon the necessity of repentance, and of confessing his sins, wrought so much upon the man's mind, that, in a subsequent interview with the gaoler, the prisoner said that he would tell him all about it; the gaoler told him not to say any thing which he wished the magistrates not to know, as it would be his duty immediately to tell them of it; the prisoner said that he wished it, and then gave the details of the murder: the judges were unanimously of opinion, that this confession was receivable in evidence. *R.* v. *Gilham, Ry. & M.* 186. Where a constable told a prisoner, "if you will tell where the property is, you shall see your wife," Patteson, J. held, that this was not such an inducement as to exclude evidence of what the prisoner said. *R.* v. *Lloyd*, 6 *Car. & P.* 393. So, where it appeared that the statement of the prisoner was obtained from him, in answer to questions put to him by the magistrate, Littledale, J. allowed it to be read. *R.* v. *Ellis, Ry. & M. N. P. C.* 432. So a statement made by a person as a witness before a Committee of the House of Commons, and under compulsory process, was received in evidence by Abbott, C. J. upon an indictment afterwards preferred against the witness. *R.* v. *Merceron*, 2 *Stark.* 366. So, where a prisoner in gaol, on a charge of felony, asked the turnkey of the gaol to put a letter in the post for him, directed to his father, and the turnkey, instead of putting it into the post, sent it to the prosecutor: Garrow, B. held, that the letter was admissible in evidence against the prisoner, notwithstanding the manner in which it was obtained. *R.* v. *Derrington*, 2 *Car. & P.* 418.

And, where a threat or promise is used, it must appear to have been holden out by some person concerned in apprehending, examining, or prosecuting the prisoner, or by the person to whom the confession is made. Thus, where, upon a man being apprehended for larceny, several of his neighbours admonished him to tell the truth and consider his family, and he thereupon made a confession to the constable: the judges held this confession to be receivable in evidence, because the inducement to confess was not holden out or sanctioned by any person who had any concern in the business. *R.* v. *Row, R. & Ry.* 153. Upon the trial of a girl for the murder of a bastard child, it appeared that a woman, who was present when the surgeon was attending her, mentioned that she had advised her to confess, and the girl then made a confession to the surgeon: Park, J. and Hullock, B. held, that the confession was receivable in evidence, because the inducement to confess was holden out by a person who had no authority whatever to do so; if it had been by the constable, prosecutor, or the like, it would have been otherwise. *R.* v. *Gibbons*, 1 *Car. & P.* 97. *And see R.* v. *Tyler, Id.* 129. But where a girl, being apprehended for the murder of her child, was left by the

constable in the custody of a woman, who told her she had better tell the truth, otherwise it would lie upon her, and the man would go free; upon which she made a confession to the woman: J. Parke and Taunton, JJ. held this confession not receivable, as it was made in consequence of an inducement held out to the prisoner by a person who had her in custody. *R.* v. *Enoch*, 5 *Car. & P.* 539. And, where the committing magistrate told the prisoner, that, if he would make a disclosure, he would do all he could for him, and the prisoner afterwards made a disclosure to the turnkey of the gaol: J. Parke, J. held, that it was not receivable in evidence after the promise holden out by a magistrate, more especially as the turnkey had not given any previous caution to the prisoner. *R.* v. *Cooper*, 5 *Car. & P.* 535.

If, however, after an inducement by threat or promise has been holden out to a prisoner to confess, and, before any confession actually made, the prisoner be undeceived as to the promise or threat, and assured that he has nothing to hope from the one or fear from the other, any confession he makes afterwards will be receivable in evidence. Where a man, committed for murder, was told by a magistrate, that, provided he was not the person who struck the fatal blow, he would use all his endeavours and influence to prevent any ill-consequences to him, if he would disclose all he knew of the murder; and the magistrate wrote upon the subject to the Secretary of State; but, upon learning from him that mercy could not be extended to the prisoner, he informed the prisoner of it; afterwards the prisoner made a confession before the coroner, but he was previously told by him that any confession or admission he should make would be given in evidence against him at the trial, and that no hope or promise of pardon could be held out to him: Littledale, J. held, clearly, that this confession was receivable in evidence. *R.* v. *Cleeves*, 4 *Car. & P.* 221. So, upon the trial of a girl for administering poison, it appeared that she was threatened by her mistress, that, if she did not tell all about it that night, a constable should be sent for the next morning, to take her before the magistrates; and she made a statement accordingly, which the judge refused to receive in evidence; but it appeared, also, that the constable was actually sent for the next morning, and took her into custody, and that whilst on the way to the magistrates, in his custody, she made another confession to him: Bosanquet, J. held this latter confession to be admissible in evidence, for, at the time the prisoner made it, the inducement was at an end. *R.* v. *Richards*, 5 *Car. & P.* 318. So, where constables had induced a prisoner to confess, by telling him that his companions had "split," and he might as well do so; but afterwards, upon this appearing before the magistrate who took the examination, he informed the prisoner that his confessing would do him no good, but that he would be committed to prison to take his trial; Denman, C. J.

held, that a confession by the prisoner to the magistrate, after this caution, was receivable in evidence. *R.* v. *Howes*, 6 *Car. & P.* 404.

But even in cases where the confession of a prisoner is not receivable in evidence, on account of its having been obtained by means of some threat or promise, any discovery made in consequence of it may be proved; and in such a case, the counsel for the prosecution is merely allowed to ask the witness, whether, in consequence of something he heard from the prisoner, he found any thing, and where, &c., and the witness in answer can only give evidence of the fact of the discovery. In one case, indeed, the judges are reported to have gone further. The case was thus:—the prisoner was indicted for stealing a guinea and two bank notes for £5 each; the prosecutor in his evidence was about to state a confession of the prisoner, but admitting that he had previously told the prisoner that it would be better for him to confess, Chambre, J., who tried the case, would not allow the confession to be given in evidence; but he allowed the prosecutor to prove, "that the prisoner brought him a guinea and a £5 bank note, which he gave up to the prosecutor as the guinea and one of the notes that had been stolen from him;" and a majority of the judges (Lord Ellenborough, Mansfield, Macdonald, Heath, Grose, Chambre and Wood,) held that this evidence was properly receivable. *R.* v. *Griffin*, *R. & Ry.* 150. On the very same day the judges appear to have decided another case, which was thus: the prisoner was indicted for stealing money to the amount of 1*l.* 8*s.*; when he was apprehended, the prosecutor went to him, and asked him what he had done with his money which he had taken out of his pack, saying at the same time that "he only wanted his money, and if the prisoner gave him that, he might go to the devil, if he pleased;" the prisoner therefore took 11*s.* 6½*d.* out of his pocket, and said it was all he had left of it: a majority of the judges (Macdonald, Chambre, Lawrence, Le Blanc and Heath,) held, that this was not receivable in evidence; Wood, Grose, and Mansfield, were of a different opinion, Ld. Ellenborough *dubitante*. *R.* v. *Jones*, *R. & Ry.* 151; *and see observations on these cases*, 1 *Arch. P. A.* 195. There is also another case upon the same subject, decided at a later period; the former cases were in 1809, the following case in 1822: the prisoner was indicted for stealing several gowns and other articles; he was induced, by promises of the prosecutor, to confess his guilt, and after that confession he took the officer to a particular house, as the house where he had disposed of the property, and pointed out the person there to whom he had delivered it; that person denied having received it, and the property was never found; the confession was not admitted in evidence, but the taking of the officer to the house above mentioned was, and the prisoner

was convicted; Bayley, J., who tried the prisoner, entertaining a doubt whether the latter evidence was properly receivable, submitted the matter to the judges, who held that it was not, and that the conviction therefore was wrong: that "the confession was excluded, because being made under the influence of a promise, it could not be relied on; and the acts of the prisoner, under the same influence, not being confirmed by the finding of the property, were open to the same objection; the influence which produced a groundless confession might also produce groundless conduct. *R.* v. *Jenkins*, *R.* & *Ry.* 492. The above case of *R.* v. *Jones*, however, shews that the finding of the property makes no difference. There is no doubt that if the goods in Jenkins's case had been found at the house, the officer might prove that he found them there in consequence of something he learned from the prisoner; but whether that would also let in evidence of the prisoner's act in accompanying the officer to the house, and of what he said upon that occasion, is another question.

If upon taking the examination of a prisoner before a magistrate, the prisoner be examined upon oath, his examination cannot afterwards at the trial be read against him. But where a prisoner was thus sworn by mistake, it being supposed that he was a witness, and, upon the mistake being discovered, the magistrate ordered the deposition to be destroyed, cautioned the party, and then took his examination: Garrow, B. held this latter examination to be receivable in evidence. *R.* v. *Webb*, 4 *Car.* & *P.* 564. Where a statement made by a prisoner upon oath, at a time when he was not under any suspicion, was tendered in evidence, Vaughan, B. held it to be admissible. *R.* v. *Tubby*, 5 *Car.* & *P.* 530. But in another case, upon a trial for administering poison, where it appeared that the prisoner and several other persons were examined upon oath before a magistrate upon the subject, no specific charge being at that time made against any person, but in the result the prisoner was committed for the offence: Gurney B. refused to receive in evidence what the prisoner stated upon that occasion; the above case of *R.* v. *Tubby* was cited, and he admitted he was disposed to agree with that decision, and mentioned a case of *R.* v. *Walker*, for forgery of a will, tried at the Old Bailey, where the prisoner's affidavit in the Ecclesiastical Court was read in evidence against him; but he distinguished *R.* v. *Tubby*, from the present case, the examination in this case being taken at the time the prisoner was committed. *R.* v. *Lewis*, 6 *Car.* & *P.* 161. Another distinction perhaps might with propriety be taken, namely, between a case where the oath is merely voluntary, as the affidavit in Walker's case above mentioned, and where the party is in strictness bound by his oath to speak the whole truth, as in an examination before a magistrate, or the like. If the examination has

been taken in writing, the writing must be produced, and must be proved either by the magistrate or his clerk, or by the constable or some other person who was present at the time, who can swear to its being read over to the prisoner, and that he signed it or otherwise admitted it to be true, and who can also prove the magistrate's signature to it. It is not essential that the prisoner should have signed the examination: it still can be given in evidence against the prisoner, even although upon his being asked to sign it, he refused to do so. *R.* v. *Lamb*, 2 *Leach*, 625. Where upon an indictment for murder, it appeared that the prisoner having given the deceased the blow, of which he afterwards died, the deceased summoned him before two magistrates, who convicted him as for an assault: what was said by the parties on that occasion was not taken down in writing; but Tindal, C. J. allowed one of the magistrates to be examined as to what the deceased then stated, (not as evidence of the fact he stated, but merely as eliciting certain answers from the prisoner,) and also what the prisoner stated in answer. *R.* v. *Edmunds*, 6 *Car. & P.* 164.

We have hitherto been considering the admissibility of confessions in evidence against the party who made them. And they are evidence only as against them, and not as against others; excepting perhaps in treason and conspiracy, in cases where the confession or declaration of one of the conspirators may amount to an overt act. See *R.* v. *Watson*, 2 *Stark.* 140, 141. Even where one of three prisoners, on examination before the magistrate, stated that he and another of the prisoners committed the felony, and the other who was present did not deny it: Holroyd, J. held that this confession could not be given in evidence against the other prisoner, and he said that it had so been decided. *R.* v. *Appleby et al.* 3 *Stark.* 33. Where on the trial of two, a confession of one of them, affecting also the other, is to be given in evidence, the judge, if the confession be in writing, usually orders the officer, whose duty it is to read it, to read it in such a way as not to disclose the name of the other defendant; or if the confession be not in writing, many of the judges give a similar caution to the witness who proves it. This, however, is entirely discretionary. Where upon an indictment against a receiver of stolen goods, it appeared in evidence that the principal felon made a confession before the magistrate, in the presence of the prisoner, not only of his own guilt, but also of matters affecting the prisoner as receiver, the judge at the trial received evidence of the confession, as to the principal's guilt, in proof of the larceny, but not what was said with respect to the prisoner: the prisoner being convicted, the judges held the conviction to be wrong, as the confession of the principal was not admissible against the receiver for any purpose; and many of the judges held, that even if the principal were convicted, and

the indictment against the receiver stated merely the guilt of the principal and not the conviction, the conviction could not be received in evidence to prove it, but it must be proved by other means. *R.* v. *Turner, Ry. & M.* 347. But if the indictment state the conviction of the principal, the record of the conviction, or an examined copy of it, is clearly evidence to prove it; see *R.* v. *Baldwin, R. & Ry.* 241; and in *R.* v. *Blick*, 4 *Car. & P.* 377, this was allowed by Bosanquet, J. even although it appeared to be a conviction upon a plea of guilty.

But in cases where the inhabitants of a parish or township are deemed parties, the admission of one is deemed evidence against the parish or township generally. And therefore where, upon the trial of an appeal against an order of removal, the respondents proposed to give in evidence the declaration of the master of the pauper's husband, as to a hiring, the master being a rated inhabitant of the appellant parish; this the Sessions refused to allow, as the respondents might call the master and examine him: the Court of King's Bench, however, held that the evidence ought to have been admitted, as rated parishioners are deemed parties to the appeal; if what they have said be mere idle conversation, it will have little weight: the Court therefore sent the case back to be reheard. *It.* v. *Whitby Lower*, 1 *M. & S.* 636. So where the respondents, in order to prove the settlement of the pauper's father in the appellant parish, called the father himself as a witness, who refused to give evidence, on the ground of his being a rated inhabitant of that parish; they then examined the pauper, as to declarations made by his father, in his presence, with respect to the value, &c. of land which he occupied: and the Court of King's Bench held the evidence to be admissible. *R.* v. *Hardwick*, 11 *East*, 578.

And lastly, confessions, to be given in evidence, must be of the offence charged in the indictment, or of some matter relating to it: upon an indictment for a specific crime, you cannot give in evidence any confession or declaration of the prisoner of his having committed similar crimes upon other occasions, or of his general disposition to commit them. *R.* v. *Cole*, 1 *Ph. Ev.* 170.

Presumptions.] A presumption is, where some facts being proved, another follows as a natural or very probable conclusion from them, so as readily to gain assent from the mere probability of its having occurred, without further proof. 1 *Arch. Pl. & Ev. civ. act.* 362, 363. The fact there assented to, is said to be presumed; that is, taken for granted, until the contrary be proved by the opposite party: *stabitur præsumptioni donec probetur in contrarium. Co. Lit.* 373. And it is adopted the more readily, in proportion to the difficulty of proving the fact by positive evidence, and to the obvious facility of disproving it, or of proving facts inconsistent with it, if it really never occurred. These pre-

sumptions are of three kinds: *Violent* presumptions, where the facts and circumstances proved, *necessarily* attend the fact presumed; *Gilb. Ev.* 157; *Probable* presumptions, where the facts and circumstances proved, *usually* attend the fact presumed; 3 *Bl. Com.* 372; and light or rash presumptions, which however have no weight or validity at all. *Id. Gilb. Ev.* 157. *Co. Lit.* 6 *b.* *See* 1 *Arch. Pl. & Ev. civ. act.* 363, *and the cases and other authorities there collected.*

Under this head is classed that very usual mode of proving offences, adopted from necessity, called circumstantial evidence: direct and positive evidence of the commission of offences cannot in all cases be procured; they are often committed in secret, and if circumstantial evidence were excluded by our law, all secret offences might be committed with impunity. Circumstantial, or (as it is frequently termed) presumptive evidence, therefore, is allowed in all cases where direct and positive evidence of the defendant's having committed the offence cannot be procured; and it is often as satisfactory as direct and positive evidence. It is also adopted as confirmatory evidence, even where there is direct and positive evidence of the offence committed, in order to induce the jury to yield a more ready credence to the direct and positive evidence. In larceny, for instance, after proving that the goods were taken or stolen, proof that they were found in the possession of the prisoner shortly afterwards, and that he did not give any satisfactory account of the manner in which he came by them, is deemed good presumptive evidence of the prisoner having stolen them; *see post*, title "*Larceny*;" and if to this be added evidence that the goods, when found, were concealed or disguised, or that the prisoner when charged with the offence absconded, it will very much strengthen the presumption. On the other hand, if the goods be not found for a considerable time after they were stolen, the presumption is proportionably weakened. And in larceny, even where there is direct and positive evidence of the prisoner's guilt, if at the same time there be any doubt whatever of the jury believing the witnesses, it is usual in practice to add evidence of all circumstances the case furnishes, from which the jury may infer the guilt of the prisoner, and that the witnesses are speaking the truth; as for instance, that the prisoner was seen in the neighbourhood of the place from whence the goods were stolen, shortly before they were missed, or about the time when it is probable they were stolen; that shortly afterwards they were found in his possession, or that he pawned or sold them; that he gave a false name in doing so; that he gave a false or unsatisfactory account of the manner in which he came by them, or the like.

Upon an indictment against any person exercising any office, profession, or employment, for a criminal act done by him as such officer, &c., proof that he acted as such officer, &c. will

raise the presumption that he was duly appointed, and his appointment therefore need not be proved. *See* 6 *T. R.* 535, *n.*; 4 *T. R.* 366, *per Buller, J.* 1 *Stark.* 405. *Peake*, 236. And as to offences against officers: by stat. 3 & 4 *Wm.* 4, *c.* 53, (for the prevention of smuggling), it is enacted by sect. 118, that "if upon any trial a question shall arise whether any person is an officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or an officer of customs or excise, evidence of his having acted as such shall be deemed sufficient, and such person shall not be required to produce his commission or deputation, unless sufficient proof shall be given to the contrary." So in the case of peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters, without producing their appointment; and that even in the case of murder. *Per Buller, J. Berryman* v. *Wise*, 4 *T. R.* 366. And the same, in other cases, where it becomes a question whether a person acting as a public officer, was so at the time. Therefore where, upon an indictment against an officer under government for malversation in his office, a letter of instructions, signed by three of the lords of the treasury, was allowed to be read in evidence, without producing the commission by which they were appointed; *R.* v. *Jones*, 2 *Camp.* 131; for it is a general presumption of law, that a person acting in a public capacity, is duly authorized so to do. *Per Ld. Ellenborough, C. J.*, 3 *Camp.* 433, 432. For the same reason, upon an indictment for perjury in an oath taken before a surrogate in the Ecclesiastical Court, the fact of the person who administered the oath, having acted as a surrogate, is sufficient evidence of his being so, without producing his appointment. *R.* v. *Verelst*, 3 *Camp.* 432.

The intention with which an act is done, must also necessarily be the subject of presumption. It can never be the subject of direct and positive proof; and therefore if not confessed, it must be presumed either from the nature of the act itself, or from other facts and circumstances connected with it. Proof that a person, at the time that he uttered a forged instrument, knew that it was forged, is good evidence of his intention to defraud; and the intent may be laid in the indictment, to defraud either the person to whom it was uttered or attempted to be passed, *R.* v. *Sheppard, R. & Ry.* 169. *R.* v. *Wicks, Id.* 149, or the person whose name is forged. *R.* v. *Mazagora, R. & Ry.* 291. So in prosecutions for libel, the malice may be presumed from the nature of the libel itself, or from other acts having immediate relationship to it, or even from other libels which directly refer to it. *See Tate* v. *Humphrey*, 2 *Camp.* 73, *n. Rustel* v. *M'Quister*, 1 *Camp.* 49. In murder, the law presumes the malice from the fact of the homicide, unless the circumstances attending it rebut the presumption.

So a guilty knowledge may be proved, either by direct and positive evidence or admissions, or by the proof of facts from which the jury may fairly infer it. To prove a guilty knowledge of a bill or note being forged at the time the party uttered it, proof that he gave a false account of the parties to it, *R.* v. *Hough*, *R. & Ry.* 120, or that he had previously uttered other forged notes of the same description, *R.* v. *Edward Ball*, *R. & Ry.* 132, or the like, would be sufficient evidence from which the jury might infer it. And the like in other cases.

Proofs.] Whatever is not confessed, and cannot be presumed, must be proved by direct and positive evidence. This evidence is of two kinds: written evidence, and the parol testimony of witnesses; both of which shall be treated of shortly, in the next part of this section. We shall in this place merely notice the general rule, which is applicable as well to criminal cases as to civil actions, namely, that the best evidence the nature of the case will admit of must be produced, if it be possible to be had; but if not possible, then the next best evidence that can be had shall be allowed. 1 *Arch. Pl. & Ev. civ. act.* 372. For if it be found that there is any better evidence existing than that which is produced, the very non-production of it creates a presumption that it would have detected some falsehood, which at present is concealed. 3 *Bl. Com.* 368. *Gilb. Ev.* 16. 1 *Show.* 397. *Carth.* 220. 3 *East*, 192. Thus, in order to prove any part of the terms on which lands are leased, if the lease be in writing, nothing else shall be admitted as evidence of it but the lease itself, if in being, and within the control of the party who has to prove it; *Gilb. Ev.* 93. 10 *Co.* 92 *b.* 93. *R.* v. *Merthyr Tidvil*, 1 *B. & Adolph.* 29; and it is deemed to be within his control, if it be in the hands of any third person whom he may compel by *subpœna duces tecum* to produce it. And the same, with respect to all deeds, agreements, bills of exchange, promissory notes, and the like.

If, however, such deed or other written instrument have been destroyed or lost, then, upon proof of that fact, the judge will allow secondary evidence to be given of it; that is to say, proof by an examined copy, or even parol evidence of its contents. If it be proved to have been destroyed, then the party is entitled, as of course, to prove its contents by secondary evidence. But if that cannot be proved, then, in order to let in secondary evidence, the Court must be satisfied by evidence that the original is lost, or that, after diligent search for it, it cannot be found; and parol evidence to this effect must be given by the person or persons who actually at one time had the custody of the original, or those legally entitled to the custody of it. Where, upon the trial of an appeal against an order of removal, the question was whether the respondents had sufficiently accounted for the non-

production of an indenture of apprenticeship, so as to let in parol evidence of its contents; it was proved that there had been two parts of it, one given to the parish officers (which was proved to have been destroyed) and the other given to the master, who afterwards, upon his assigning the apprentice to a Miss Taylor, gave it to her; and that upon application to Miss Taylor for it, she said she could not find it, and did not know where it was; but she was not at the trial, nor had she been subpœnaed: the Court of King's Bench held, that as Miss Taylor was not called as a witness, there was no evidence that the part of the indenture she had was lost or destroyed, and that therefore parol evidence of the contents of the indenture could not be received. *R.* v. *Castleton*, 6 *T. R.* 236. But where, in such an appeal, in order to account for the non-production of an indenture of apprenticeship, it was proved by the pauper's mother, that, about 24 years before, she received money from the parish officers of Stourbridge to put her son out apprentice, and that she accordingly bound him by indenture to one Clay; that she gave the indenture to the wife of one W. Badger, a market gardener, who was in the habit of attending the market at Stourbridge, to give to the overseers there, but that Badger and his wife had since died, the wife last; evidence was then given that the parish chest had been searched, but no such indenture had been found; and that Badger's executor, upon being applied to, stated that no such indenture was in his possession, or in the possession of Badger at the time of his death: the Court of King's Bench held that this was sufficient evidence of the destruction or loss of the indenture, to let in secondary evidence of its contents; as it was the duty of the parish officers, upon the delivery of the indenture to them, to place it in the parish chest, and as upon search it was not found there, the presumption was that it was lost or destroyed. *R.* v. *Stourbridge*, 8 *B. & C.* 96. So, in a similar case, where a witness proved that, hearing that the indenture was in the possession of the pauper, (who was then very ill and shortly afterwards died), he called upon him to make inquiry about it, and he told him that when the indenture expired it was given to him and he burnt it; it was proved also that inquiry was also made of the executrix of the master, who said she knew nothing about it; but it did not appear that any search had been made for it among the papers of the master or the pauper: the Court held this to be sufficient; it was not perhaps sufficient as proof of the actual destruction of the indenture by the pauper, but it was sufficient to discharge the party of laches in not making further inquiry. *R.* v. *Morton*, 4 *M. & S.* 48. So, in a settlement case, where, to prove an apprenticeship 37 years before, it was proved that there were two parts of it, one given to the master, one to the father of the apprentice; that the father gave his to one Buckley to get enrolled, and had not seen

it since; that the master gave his to one Standen, to whom he assigned the apprentice, and Standen gave it either to A. and B. his attornies, or to Buckley; Buckley's executrix proved that she had searched among his papers, but could not find either part of the indenture; A. proved that he had searched among his papers, and no such indenture was found; B. was dead, but a clerk of his executor proved that two boxes of his papers came to the hands of the executor, and that he had searched in these boxes, but the indenture was not there: it was objected that this was not sufficient, without calling B.'s executor; but the Court held that, considering the length of time that had elapsed since the indenture was executed, sufficient diligence seemed to have been used to obtain the primary evidence, in all quarters where it might reasonably be expected to be found, so as to let in secondary evidence of the indenture. *R.* v. *East Farleigh*, 6 *D. & R.* 147. So, where the pauper had been apprenticed to one Fowle, who kept the indenture; Fowle failed in business, and an attorney got possession of his papers: upon the trial of an appeal, in order to lay a foundation for secondary evidence of the indenture, Fowle being dead, a search for the original among his papers by the attorney, without success, was proved, but no inquiry had been made for it of Fowle's widow, who was still living: the Court held this to be sufficient, as the widow was not executrix or administratrix to her husband. *R.* v. *Piddlehinton*, 3 *B. & Adolph.* 460.

What has now been said upon this subject, must be understood as having reference only to cases where the actual custody of the original instrument, or the legal right to the custody of it, has been or is in the party desiring to prove it, or in some person whom he may compel to produce it upon a *subpœna duces tecum*. But where the opposite party has it in his possession, or has the legal right to the custody of it, then instead of a *subpœna duces tecum*, (which would be inapplicable to such a case,) a notice to produce the original instrument upon the trial is served upon him or his attorney in the cause; and if at the trial, upon the service of the notice being proved, he do not produce the instrument, when called upon to do so, the opposite party will then be allowed to give secondary evidence of its contents. 1 *Arch. Pl. & Ev. civ. act.* 382—387. And the same, if it be in the hands of his attorney, banker or other agent. 2 *Car. & P.* 520. 1 *Id.* 582. There are some exceptions, however, to this: first, a notice to produce a notice is not necessary in any case; *see* 1 *Arch. Pl. & Ev. civ. act.* 383; secondly, in larceny of a written instrument, secondary evidence of it may be given at the trial, without giving the prisoner a notice to produce the original. *R.* v. *Aickles*, 1 *Leach*, 330. And the like in similar cases. There are other exceptions also, which however have reference only to civil actions. *See* 1 *Arch. Pl. & Ev. civ. act.* 383, *&c.* Where upon a bill of indictment

for the forgery of a deed being preferred, the grand jury stated to the judge that they were informed that the deed alleged to be forged was in the possession of the defendant, and asked whether they could return a true bill, if the deed were not produced before them; the judge (Park J.) told them that if the deed, from being in the possession of the prisoner, or from any other sufficient cause, could not be produced before them, they might receive secondary evidence of its contents. *R.* v. *Hunter*, 3 *Car. & P.* 591. The case was tried at the following assizes, and upon that occasion due notice was given to the prisoner to produce the deed; it was proved that his attorney had given it in evidence in an ejectment, as part of the prisoner's title, and had afterwards received it back; and Vaughan, B. held, that on the prisoner's counsel refusing to produce the deed, this was sufficient to let in secondary evidence of its contents. *R.* v. *Hunter*, 4 *Car. & P.* 128. Where, upon an indictment for forging a deed, it was proposed to give secondary evidence of it, upon the ground that it was in the possession of the prisoner, and that he had notice to produce it; but it appearing that the notice was given since the commencement of the assizes, Parke J. held that the notice was not sufficient, as it ought to have been given a reasonable time before the assizes: it was then proved that the prisoner, on an examination on oath upon another occasion as a witness before a magistrate, stated that he had the deed in question, and that thinking it of no value he burnt it; the admission of this examination as evidence was objected to, on the ground of its being on oath; but as the prisoner at the time was not charged with this offence, Parke J. admitted it, and held that the prosecutor was entitled to give secondary evidence of the deed: the secondary evidence offered was a copy of the deed; but as the person who made this copy said that he had never examined it with the original, Parke J. said, that under these circumstances there could hardly be a satisfactory conviction; and the prisoner was accordingly acquitted. *R.* v. *Haworth*, 4 *Car. & P.* 254. In a case in a note in East's Reports, (*How* v. *Hall*, 14 *East*, 276 *n.*) Lord Ellenborough, C. J. said, "I remember an indictment tried before the late Mr. Justice Buller, against a man, I think, of the name of Spragge, for forging a note, which he afterwards got possession of and swallowed: and parol evidence was permitted to be given of the contents of the note, though no notice to produce it had been given; but then, indeed, it might be said that such a notice would be nugatory, as the thing itself was destroyed."

In order to sustain the objection that the evidence given is not the best evidence that can be adduced, the matter of the objection must appear from the case itself, or from the examination or cross-examination of the party giving the evidence; the opposite party is not allowed to call witnesses, to shew that the evidence

given by his opponent is not the best that the case will admit of. Thus, where upon the trial of an appeal against an order of removal, the respondents proved by parol evidence the taking of a tenement in 1828, at a yearly rent exceeding 10*l.* by the husband of the pauper (who had since gone to America), and the occupying of and payment of rent for the same for two years; the appellants then proved by a witness, that the taking in question was by agreement in writing; and it was contended before the Court of King's Bench for the appellants, that as the respondents had not produced and proved the written agreement, the order of removal ought to be quashed: but the Court held, that as the objection appeared from the appellant's evidence only, and not from that of the respondents, it was for the appellants to produce and prove the agreement, if they intended to found any defence upon it; and the Court stated the rule to be, that if, after a party has proved a contract by parol, it appear from that party's witnesses, either upon examination or cross-examination, that the contract was in writing, he must then produce and prove it; but if this appear, not from the evidence of his witnesses, but from the witnesses called by the opposite party, then the latter must produce and prove the written agreement, if he would derive any advantage from it. *R.* v. *Padstow*, 4 *B.* & *Adolph.* 208.

See upon the whole of this subject, 1 *Arch. Pl.* & *Ev. civ. act.* 372—387.

3. *Written Evidence.*

Acts of Parliament.] Public Acts of Parliament are never proved, as all judges are bound judicially to take notice of them; and therefore where we see a copy of a public Act, printed by the King's Printer, used on a trial, we must consider it, not as evidence, but used merely to aid the judge's recollection. And the same of all local Acts, containing a clause, either making them public Acts, or directing the judges to notice them judicially. But private Acts, not containing any such clause, must be proved as any other record, namely, by an examined copy of the enrolment. And the statutes of Ireland, previous to the Union, may be proved in the Courts in this country by the copies printed and published by the King's Printer. 41 *G.* 3, *U. K.*, *c.* 90, *s.* 9.

Other Records.] The records of any of the King's Courts of Common Law at Westminster, may be proved by an examined copy. So, the record of an indictment at the assizes or sessions, may be proved by an examined copy; or the record itself may be produced. And for this purpose the record must be made up; for the indictment itself cannot be given in evidence. *R.* v. *Smith et al.* 8 *B.* & *C.* 341. *R.* v. *Thring*, *Ry.* & *M.* 171, 5

Car. & P. 507. A conviction before a magistrate is proved by an examined copy; *see* 5 *Car. & P.* 38. 1 *Arch. P. A.* 456. 2 *Id.* 70; or the conviction may be produced. And if it recite the information, such original copy will be evidence of that also. 5 *Car. & P.* 38.

Matters quasi of Record.] Entries in the Journals of the Houses of Lords and Commons, may be proved by examined copies. *Comp.* 17. *Doug.* 594. Bill, answer, depositions, and decree in a court of equity, are also proved by examined copies. *Gilb. Ev.* 49, 50, 56. So, libel, answer, depositions and sentence in the Ecclesiastical Courts, are proved by examined copies. *Gilb. Ev.* 66, 67. And the same, as to proceedings in the Admiralty Court. *Com. Dig. Evidence, C.* 1. The proceedings in inferior courts not of record, such as the county court, court baron, or the like, are usually proved by producing the books in which they are entered, and proving them by the clerk of the court; or, it seems, they may be proved by examined copies. *See Gilb. Ev.* 74. 20. *Com. Dig. Evidence, C.* 1. As to the proof of proceedings in bankruptcy, *see stat.* 4 *G.* 4, *c.* 16, *s.* 96. 2 & 3 *W.* 4, *c.* 114, *s.* 5—9. And as to the proof of proceedings in the Insolvent Court, *see stat.* 7 *G.* 4, *c.* 57, *s.* 76.

Depositions of deceased Witnesses.] The depositions of a witness taken before a magistrate or coroner, in pursuance of stat. 7 G. 4, c. 64, s. 2, 3, 4, in the presence of the prisoner, so that the prisoner had an opportunity of cross-examining the witness if he thought fit, may be given in evidence against the prisoner after the witness's death. And where, upon an indictment for murder, it appeared that the prisoner had been brought before magistrates, for an assault upon the deceased, and for robbing a manufactory which the deceased had been employed to watch; the deceased upon that occasion was examined on oath before the magistrates, but the prisoner was not present until the examination was nearly closed, when the deceased was again sworn, the examination read over slowly in the presence and hearing of the prisoner, and the deceased said it was correct: this deposition was afterwards received upon the trial, and ten of the judges held that it was properly received. *R.* v. *Charles Smith, R. & Ry.* 339. 2 *Stark.* 208. But where an examination before magistrates is *ex parte*, and the party to be affected by it is not present, and has no opportunity of examining the witness, the deposition in such a case cannot be given in evidence against the party after the death of a witness. Therefore the examination of a pauper as to his settlement, cannot after his death be read in evidence against the appellants, on the trial of an appeal against an order for his removal; *R.* v. *Ferry Frystone*, 2 *East*, 54. *R.* v. *Abergwilly*, 2 *East*, 63; and the same, where the

pauper has absconded, *R.* v. *Nuneham Courtney*, 1 *East*, 373, or has become insane. *R.* v. *Eriswell*, 3 *T. R.* 707. There are two exceptions however to this, created by statute, namely, one with respect to soldiers, by the Mutiny Act, which makes their deposition as to their settlement evidence, although they are dead or absent from the kingdom; and the other, with respect to prisoners in any gaol or house of correction, &c. by stat. 59 G. 3, c. 12, s. 28, which makes their deposition evidence as to their settlement, so long as they shall continue in prison.

Other public Documents.] Inquisitions are proved by examined copies, or the originals may be produced. *See* 1 *Arch. Pl. & Ev. civ. act.* 408, 409. Registers of baptisms, marriages and burials, may be proved by the register itself, or an examined copy of it. *Gilb. Ev.* 72. Entries in corporation books, and in the books of public offices or companies, as the books of the Custom House, Bank, East India Company, South Sea Company, and the like, relating to matters public and general, may be proved by examined copies. 1 *Str.* 93. 307. 2 *Id.* 954. 1005. *Hardw.* 128. 2 *Ld. Raym.* 851. 2 *Doug.* 593, *n.* 3. *Peake*, 43. 4 *Taunt.* 787. The King's proclamations are proved by the production of the Gazette containing them. *See* 2 *Campb.* 44. 4 *M. & S.* 532. The Articles of War may be proved by the copy printed and published by the King's Printer. 5 *T. R.* 442, 446. *See* 4 *B. & C.* 304.

Deeds and other private written Instruments.] Deeds and all other written instruments of a private nature, must be proved by the attesting witness, if there be one; or if there be no attesting witness, then by proof of the party's handwriting. *Gilb. Ev.* 99. 7 *T. R.* 266. *Peake*, 198. But where a deed or other writing is thirty years old, it proves itself. *Bull. N. P.* 255. *Gilb. Ev.* 94. So, if the attesting witness be dead, or have become insane, or blind, or be abroad out of the reach of the process of the court, or if after a bonâ fide, serious and diligent inquiry he cannot be found: in those cases the instrument may be proved, by proving the witness's handwriting. 1 *Arch. Pl. & Ev. civ. act.* 421—423.

The handwriting may be proved by any person who has seen the party write, or who knows his handwriting from having corresponded with him, particularly if he have acted upon the letters he received from him. 1 *Arch. Pl. & Ev. civ. act.* 423, 424. But it cannot be proved by comparing it with other writing of the party. *Id.* 424.

In appeals, all indentures of apprenticeship, leases, agreements, &c. tendered in evidence, must appear to be correctly stamped, otherwise they ought not to be received or read. In larceny also, if of bills of exchange, or other valuable security

requiring a stamp, or upon an indictment for obtaining it by false pretences, the bill, &c. must be duly stamped, otherwise it is not a valuable security within the meaning of stat. 7 & 8 G. 4, c. 29, s. 5. Therefore where a man was indicted for obtaining an order for the payment of 2*l.* by false pretences, and the order appeared to be an unstamped cheque upon a banker, which, from the manner in which it was drawn, required a stamp, the judges held that it was not a valuable security within the meaning of the act. *R.* v. *Yates, Ry. & M.* 170. Perhaps a distinction in this respect might be made between those instruments, which the commissioners of stamps may order to be stamped on payment of a penalty, and those which they have no authority to stamp after execution; but this point has not as yet been decided. In forgery, however, it is immaterial whether the forged instrument be stamped or not, although if the instrument were genuine it would require a stamp. *R.* v. *Hawkswood*, 2 *T. R.* 606.

4. *Parol Evidence.*

In all cases where a fact need not be proved by a record, deed, or other written evidence, (*see ante*, p. 138,) it may be proved by the parol testimony of witnesses. We shall now consider the doctrine of parol testimony, shortly, under the following heads.

Who may be Witnesses.] Quakers may now be witnesses in criminal cases, and may make an affirmation instead of taking an oath; 9 *G.* 4, *c.* 32; and indeed they may now make an affirmation instead of an oath, in all cases. 3 & 4 *W.* 4, *c.* 49. So may Moravians. 9 *G.* 4, *c.* 32. 3 & 4 *W.* 4, *c.* 49. So may that class of Dissenters called Separatists. 3 & 4 *W.* 4, *c.* 82. The form of the affirmation for a Quaker or Moravian, is thus: "*I, A. B., being* [*one of the people called Quakers,*" or "*one of the persuasion of the people called Quakers,*" or "*one of the United Brethren called Moravians,*" as the case may be,] "*do solemnly, sincerely, and truly declare and affirm,*" &c. The affirmation of the Separatists is thus: "*I, A. B., do, in the presence of Almighty God, solemnly, sincerely and truly affirm and declare that I am a member of the religious sect called Separatists, and that the taking of any oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also in the same solemn manner affirm and declare,*" &c.

Jews may be witnesses, and are sworn upon the Old Testament, or rather upon the Five Books of Moses. So Turks, Moors, Gentoos, and in fact all persons who believe in a God, in a future state of rewards and punishments, and in the moral obligation of the oath he is about to take, may be witnesses, *Bull. N. P.* 292. 1 *Arch. Pl. & Ev. civ. act. p.* 440, each to be

sworn in such form as he deems to be obligatory upon his conscience. But a person, who has no religious belief, which he deems binding upon his conscience to speak the truth upon oath, cannot be a witness. *Bull. N. P.* 292.

Infants of the age of fourteen may be witnesses; and under that age, if they appear to have competent discretion. 2 *Hal.* 278. Where they are very young, it is usual for the judge to question them as to their belief in God, their belief as to the punishment hereafter for swearing falsely, and the like, before he allows them to be sworn.

Deaf and dumb persons may be witnesses, if any person can be found who can interpret their signs to the Court and jury upon oath. *R.* v. *Pollock, MS.* 1814. *R.* v. *Ruston*, 1 *Leach*, 408.

Lunatics may be witnesses in their lucid intervals; *Com. Dig. Testm. A.* 1; idiots or insane persons cannot. *Co. Lit.* 6 *b.*

A judge may be a witness. And it is said that he may be so, even although he is the judge to try the cause; 2 *Hawk. c.* 46, *s.* 17; but this never occurs in practice. A juror however may be a witness, either for or against the prisoner, and must be sworn as such; *Id.*; but it is right that he should inform the Court of his having evidence to give in the case, before he is sworn as a juror, and indeed to decline acting as juror in that particular case, if the Court will permit him.

The prosecutor in criminal cases, (with a very few exceptions, which shall presently be mentioned,) may be a witness; even in cases of forgery, the person whose name is forged may now be a witness to sustain the prosecution. 9 *G.* 4, *c.* 32, *s.* 2. *See* 2 *Arch. P. A.* 238. 192. But where an offence is punishable upon indictment by fine only, and the fine or a part of it is given to the informer by statute, the informer cannot be a witness for the prosecution. *See R.* v. *Blackmore*, 1 *Esp.* 95. *R.* v. *Cole, Id.* 217. Also, upon an indictment for forcible entry on stat. 21 J. 1, c. 15, or 8 H. 6, c. 9, s. 3, the tenant or person upon whom the forcible entry was made, cannot be a witness for the prosecution, for by these statutes he is entitled, upon conviction, to have restitution; *R.* v. *Williams*, 9 *B. & C.* 549; but upon an indictment for forcible entry at common law, it would be otherwise. *Id.*

No inhabitant or person rated or liable to be rated to any rates or cesses of any district, parish, township or hamlet, or wholly or in part maintained or supported thereby, or executing or holding any office thereof or therein, shall by reason thereof be deemed an incompetent witness for or against such district, parish, &c. in any matter relating "to such rates or cesses; or to the boundary between such district, parish, township or hamlet, and any adjoining district, parish, township or hamlet; or to any order of removal to or from such district, parish, township or hamlet; or the settlement of any pauper in such district,

parish, township or hamlet; or touching any bastards chargeable or likely to become chargeable to such district, parish, township or hamlet; or the recovery of any sum or sums for the charges or maintenance of such bastards; or the election or appointment of any officer or officers, or the allowance of the accounts of any officer or officers of any such district, parish, township or hamlet." 54 *G.* 3, *c.* 170, *s.* 9. This however does not render the inhabitants of a district, indicted for non-repair of a highway, competent witnesses for the defence. *R.* v. *Inhabitants of Bondgate in Aukland*, 1 *Ad. & E.* 744. But as to bridges, and such portion of the highways at the ends of them as the county is of common right bound to repair, by stat. 1 Ann. st. 1, c. 18, s. 13, (reciting that many private persons and bodies politic or corporate were bound to repair decayed bridges and the highways adjoining them, but that in informations or indictments against them for non-repair, the inhabitants of the county, riding or division, in which such bridges or highways lay, were not allowed to be legal witnesses), it is enacted, that "in all informations or indictments to be brought and tried in any of Her Majesty's Courts of record at Westminster, or at the Assizes or Quarter Sessions of the Peace, the evidence of the inhabitants, being credible persons, or any of them, of the town, corporation, county, riding or division, in which such decayed bridge or highway lies, shall be taken and admitted in all such cases, in the Courts aforesaid." And lastly, by stat. 27 G. 3, c. 29, s. 1, "the inhabitants of every parish, township or place, shall be deemed and taken to be competent witnesses for the purpose of proving the commission of any offence within the limits of any such parish, township or place, notwithstanding the penalty by such offence, or any part thereof, is or may be given or applicable to the poor of such parish, township or place, or otherwise for the benefit or use or in aid or exoneration of such parish, township or place;" provided (*by sect.* 2) that the penalty to be recovered shall not exceed the sum of 20*l.*

As to husband and wife: in all cases where one of them is incompetent from interest, the other is so also. *See* 12 *East*, 250. And therefore in R. *v.* Williams, 9 B. & C. 549, already noticed (*ante*, p. 146), where the Court ruled that upon an indictment for forcible entry, on the stat. 21 J. 1, the tenant could not be a witness for the prosecution, because he was entitled to restitution upon conviction, they held also that his wife could not be a witness, for the like reason. Nor can a wife be examined as a witness for or against her husband, or a husband as a witness for or against his wife; *Gilb. Ev.* 133, 134. *Bac. Abr. Evidence*, *A.* 1; except in the case of a personal injury committed by one upon the other, in which case (from necessity) the one may be a witness against the other. *R.* v. *Azyre*, 1 *Str.* 633. *& see* 1 *Ph. Ev.* 79. But where, upon the trial of an appeal against an order

of removal, the only question being as to the validity of the pauper's marriage with a man named Willis, in 1815, the respondents began, by calling a woman, who proved that she was married to Willis in 1802, and she was confirmed by other testimony; the pauper's marriage with Willis in 1815, was then proved by the pauper and another witness: it was contended afterwards, in the Court of King's Bench, that this woman was not a competent witness to prove the first marriage, because it was criminating her husband, and proving him guilty of bigamy; but the Court held that she was perfectly competent; in the first place, she was examined before it appeared in evidence that there ever had been a second marriage; but even if this were not the case, yet as the witness's evidence or the judgment of the Sessions in this case could not be admitted as evidence in a prosecution against the husband for bigamy, she was a competent witness. *R.* v. *All Saints, Worcester*, 6 *M. & S.* 194. A wife also may exhibit articles of the peace against her husband, 13 *East*, 171, or a husband against his wife. But in no other cases of relationship are the parties incompetent to give evidence for or against each other: a father may be a witness for or against his son; a son against his father; a brother against a brother, &c. 2 *Hal.* 276.

An attorney cannot disclose any confidential communication, made to him as attorney, by his client, *Gilb. Ev.* 136. 4 *T. R.* 753, whether made with reference to any suit or not. 2 *Brod. & Bing.* 4. And this is not the privilege of the attorney, but of the client; and therefore the Court will not permit him to make the disclosure. 4 *T. R.* 753. The same rule applies to barristers; but not to medical men, or other persons. *Per Buller, J.*, 4 *T. R.* 760.

We have seen that the prosecutor may in most cases be a witness for the prosecution. On the other hand, where there are two or more defendants indicted jointly for a misdemeanor, and there appears to be no evidence whatever affecting one of them, then, when all the evidence is gone through, except such as that defendant might give if acquitted, the judge, upon application, may direct the jury to acquit him, and allow him to give evidence for his co-defendants. 2 *Hawk. c.* 46, *s.* 98. *and see Wright* v. *Paulin, Ry. & M. N. P. C.* 128. So, upon an indictment against two or more, the prosecutor may apply to have one of the defendants acquitted, in order to make him a witness for the prosecution; and the other defendants cannot object to it. *R.* v. *Rowland et al., Ry. & M. N. P. C.* 401.

An accomplice may give evidence against those jointly guilty with him. And they may be found guilty on his testimony alone, unconfirmed by any other evidence. *R.* v. *Jones*, 2 *Camp.* 132, 131. It is usual, however, for the judges to caution juries not to convict upon the testimony of an accomplice, unless his evidence

be confirmed in some material part of it, by other evidence. It is not necessary that his whole story be confirmed; if he is confirmed in a material part or parts of it, so as to induce the jury to believe that he is telling the truth in the remainder of his statement, as well as in that part in which he is confirmed, it will be sufficient. *See R.* v. *Barnard et al.*, 1 *Car. & P.* 88. So if he be confirmed as to one defendant, though not as to another, this will warrant the jury in finding both defendants guilty, if they believe the accomplice. *R.* v. *Dawber et al.*, 3 *Stark. R.* 34. If two or more accomplices, however, be examined, the evidence of one is not deemed confirmed by that of another, but the evidence of both requires to be confirmed by other testimony. *R.* v. *Noakes*, 5 *Car. & P.* 326. Where one of several persons imprisoned for felony, offers to become a witness for the prosecution, it is a very usual practice for the prosecutor, by his counsel, if he think that the case cannot be made out against the others without his testimony, to apply to the judge, or to the chairman at the Sessions, to order such prisoner to be taken before the grand jury, that he may be examined as a witness upon the bill; and the judge or chairman, if he think it necessary for the ends of justice that this should be done, will make an order accordingly. The accomplice, however, by thus giving testimony against his companions, does not acquire any legal right to a pardon; but if he conduct himself fairly in giving his evidence, and tell the truth, the Court always recommend him to the king's mercy, with respect to that particular offence. *R.* v. *Rudd*, *Cowp.* 331. But with respect to other offences, committed by him either before or after that, he is still as amenable as if he had not given evidence; and there are instances of accomplices being tried, convicted, and executed, or transported, for such other offences, committed by them before they gave their evidence, where the proceedings were holden by the judges to be correct. *See R.* v. *Thomas Lee*, *R. & Ry.* 361. *R.* v. *Brunton*, *Id.* 454. *R.* v. *Duce*, 1 *Ph. Ev.* 37.

Lastly, a person who has been convicted and had judgment for treason, felony, perjury, or conspiracy, at the suit of the King, is not competent to give evidence in any case, or for any purpose. 2 *Hawk. c.* 46, *s.* 19. The conspiracy, at the suit of the King, here mentioned, means seemingly such conspiracy only as the old writ of conspiracy would lie for, namely, a conspiracy falsely to indict a man, who is afterwards acquitted, or the like, and not such offences as are usually made the subject of the modern indictment for conspiracy. Therefore Sir Wm. Scott, after great consideration, determined that a conviction of a conspiracy to commit a fraud, did not render an affidavit of the convict inadmissible. 2 *Dods. R.* 174. So, a conviction upon an indictment for a conspiracy to raise the price of the public funds, by spreading false rumours concerning them, was

holden not to render a witness incompetent. *Crowther* v. *Hopwood*, 3 *Stark.* 21. But in Bushel *v.* Barrett, *Ry. & M. N. P. C.* 434, Gaselee, J., after consulting with Littledale, J., ruled that a witness, who was convicted of a conspiracy to obstruct the course of justice, by bribing a witness not to appear upon a trial, was not a competent witness. The only mode of objecting to a witness, on the ground of his being convicted, &c. is, by proving the judgment, &c. by the record, or an examined copy of it; *Bull. N. P.* 292; proving that he was convicted merely, without proving also that he had judgment for the offence, will not be sufficient. *Per Lord Mansfield, C. J., Cowp.* 3. So, where a woman swore that what she had sworn upon a former occasion was false, and that she had so sworn at the instance of the defendant, it was objected that it was not competent for her to contradict the fact she had before sworn to; but the Court held, that there was no foundation for the objection as to the competency, it merely went to the credit of the witness. *R.* v. *Teal et al.*, 11 *East*, 309, 307. *and see Rands* v. *Thomas*, 5 *M. & S.* 244, *S. P.* But even in the case of a conviction and judgment, a pardon will restore competency to the party as a witness. And by stat. 9 G. 4, c. 32, s. 3, where any offender, convicted of a felony not punishable with death, shall have endured the punishment adjudged for it, the punishment so endured shall have the like effect and consequences as a pardon under the great seal of the felony of which he was so convicted. And by sect. 4, reciting that there are certain misdemeanors which render the parties convicted thereof incompetent witnesses, it is enacted that where any offender hath been or shall be convicted of any such misdemeanor (except perjury or subornation of perjury), and shall have endured the punishment adjudged for the same, he shall not, after the punishment so endured, be deemed to be, by reason of such misdemeanor, an incompetent witness in any Court or proceeding, civil or criminal.

In order to ascertain whether a witness is competent or not, in all cases except where the incompetency arises from a conviction and judgment for felony, &c. as above mentioned, the counsel for the opposite party is entitled to examine him on the subject, before he is examined in chief. This is termed an examination on the *voire dire*. But if the incompetency appear at any period during the trial, the judge will give the party the benefit of it, by striking out the evidence of the witness. It is a general rule, that where the competency of a witness is impeached upon the *voire dire*, it may be restored upon his cross-examination by the party calling him, without producing or proving any written document for that purpose; but if the competency be impeached by other evidence, that evidence must be met and answered by documentary or other evidence, as in other cases. *Per Lord Kenyon, C. J., Botham* v. *Swingler*, 1 *Esp.* 164. *and see Id.* 162.

Number of Witnesses required.] In all cases, except treason and perjury, one witness is all that is required by law. In treason, not relating to the coin or seals, there must be two witnesses, either both to the same overt act, or one of them to one, and the other of them to another overt act, of the same treason. 7 & 8 *W.* 3, *c.* 3, *s.* 2. *and see s.* 4. In perjury, also, there must be two witnesses to the same assignment of perjury; for otherwise there would be the defendant's oath against the oath of his accuser.

Examination of Witnesses.] In the examination of a witness, the first rule to be attended to is, that the questions be relevant to the matter in issue. If this be not attended to, the examination will be rambling and uncertain, and likely to confuse and perplex the jury, from the very circumstance of its comprising irrelevant matter. Besides, the Court have a right to prevent any questions being put, which do not tend to the proof of the issue.

Secondly, no leading question, or in other words, no question which in itself suggests the answer required to it, should be put, in the direct examination of a witness, upon any point at all material to the issue. You may lead him upon immaterial matter, which is merely introductory; but as soon as you reach the material part of the examination, all leading questions should be carefully avoided.

Thirdly, a witness shall not be allowed to give testimony of any thing which he does not know of his own knowledge; what he has heard others say upon any subject, is not in general evidence. To this general rule, however, there are some exceptions: And *first*, what was said in the presence and hearing of the prisoner, at a time when he might have contradicted it, and did not, may be given in evidence against him. *Secondly*, hearsay evidence is receivable in proof of a prescription or custom. *Bul. N. P.* 295. 14 *East*, 327. *n. Thirdly*, hearsay evidence is receivable in proof of any part of a pedigree; and the declarations of any member of a family, as to the state of that family at any particular time, if made *ante litem motam*, may be proved by any person who may have heard them, and they are receivable as evidence of the state of the family at the time referred to. *Bul. N. P.* 294. *Berkeley Peerage Case*, 4 *Camp.* 400, *per Wood, B. Fourthly*, in a matter of science, a person intimately acquainted with it may be examined as to his opinion of the probable result or consequence from certain facts already proved by others: as for instance, upon a trial for murder or manslaughter, a surgeon or other medical man, who has heard the evidence given, may be examined as to his opinion of the cause of death, and whether he thinks the deceased died from the effects of the blow or wound or other injury proved by the other witnesses, although he him-

self may have never seen the deceased. *See* 1 *Arch. Pl. & Ev. civ. act. p.* 438. And *lastly*, the dying declarations of another, which, however, are evidence against a prisoner, only in cases where the cause of the death of the deceased is the subject of inquiry upon the trial, and the circumstances of the death the subject of the dying declaration, *R.* v. *Mead*, 2 *B. & C.* 605. *R.* v. *Lloyd, Williams, & Roberts*, 4 *Car. & P.* 233, and where it appears by other testimony that the deceased, at the time he made the declarations, was perfectly aware of his danger, and entertained no hope of recovery. *See* 2 *Arch. P. A.* 93. *R.* v. *Crockett*. 4 *Car. & P.* 544. *R.* v. *Bonner*, 6 *Car. & P.* 386. *R.* v. *Pike*, 3 *Car. & P.* 598. *R.* v. *Woodcock*, 1 *Leach*, 500. *R.* v. *John*, 1 *East, P. C.* 357.

The witness is allowed to refresh his memory, by a reference to any memorandum or entry, made by himself, at a time when the transaction was fresh in his recollection. And where an agent, who had given a receipt for money, afterwards became blind, the receipt, though unstamped, was allowed to be read to him in Court, for the purpose of refreshing his memory. *Catt* v. *Howard*, 3 *Stark. R.* 3. Also, where, upon the examination of a captain of a ship, the log-book was laid before him for the purpose of refreshing his recollection; and being asked if he had written it himself, he answered that he had not, but that from time to time he examined the entries in it while the occurrences therein mentioned were recent and fresh in his recollection, and that he always found the entries to be correct: Lord Ellenborough, C. J. held this to be the same, for the purpose of refreshing the witness's memory, as if the entries had been written by himself. *Burrough* v. *Martin*, 2 *Camp.* 112. This however must be understood as being allowed merely to aid the memory of the witness; for if he have no recollection of the fact stated in the memorandum or entry, except from his finding it entered there, he cannot be allowed to give evidence of it. *See Doe* v. *Perkins*, 3 *T. R.* 749. *Tanner* v. *Taylor, Id.* 754, *cit.* Where indeed an entry in a book stated a payment of a sum of 20*l.*, as being made to J. S., and was signed by J. S. with his initials; and upon J. S. appearing as a witness to prove the receipt of this 20*l.*, and the book being put into his hands for the purpose of refreshing his memory, he said "I have no recollection that I received the money; I know nothing but by the book; but seeing my initials, I have no doubt that I received the money:" the Court held this to be sufficient; and Bayley, J. remarked, that where a witness, called to prove the execution of a deed, sees his signature to the attestation, and says that he is therefore sure that he saw the party execute the deed, that is a sufficient proof of the execution, though the witness add that he has no recollection of the fact. *Mangham* v. *Hubbard et al.* 8 *B. & C.* 14.

The counsel for the prosecution should in fairness call all the

witnesses whose names are on the back of the indictment, whether they be necessary for the proof of his case or not, in order that the prisoner or his counsel may have an opportunity of cross-examining them, if he thinks proper; or if he refuse to call any particular witness, the judge, upon the application of the prisoner or his counsel, will have the witness called, and allow him to be cross-examined. *See R.* v. *Simmonds*, 1 *Car. & P.* 84.

At the commencement of the trial, or at any time during its progress, the Court upon application will order the witnesses on either or both sides out of Court, in order that none of them may be examined in the presence or hearing of others who are to be cross-examined after them. The attornies of the respective parties, *Pomeroy* v. *Baddeley*, *Ry. & M. N. P. C.* 430, and the surgeon or other medical man, and any other witness who is to depose to mere matter of opinion and not to facts, are never included in this order. If the witness do not withdraw, when ordered, or afterwards come into Court and is present during the examination of some other witness, it is discretionary with the judge whether he will allow him to be examined or not. *Parker* v. *M'William*, 6 *Bing.* 683. *R.* v. *Coley*, 1 *Moody & M.* 329.

Cross-examination.] A witness called merely for the purpose of producing a deed or other paper writing, need not be sworn; *Davis* v. *Dale*, 1 *Moody & M.* 514; and if not sworn, the opposite party has no right to cross-examine him. On the other hand, if a witness be called and sworn, although the party who calls him do not examine him, yet the opposite party is entitled to cross-examine him, if he will. *Phillips* v. *Eamer*, 1 *Esp.* 357. *R.* v. *Brooke*, 2 *Stark.* 472.

Upon cross-examination, the witness may be asked leading questions. And the questions need not be confined to the subject of the examination; the party cross-examining may question the witness, not only as to all matters relevant to the issue, but as to collateral matter also, for the purposes of trying his credit. But if a question be put to him thus upon a subject which has no relevancy to the matter in issue, you must be satisfied with the witness's answer; you cannot afterwards call any witness to contradict him. *Spencely* v. *De Willott*, 7 *East*, 109. *Harris* v. *Tippett*, 2 *Camp.* 637. *and see R.* v. *Clark*, 2 *Stark.* 243, 244. But if, in any matter relevant to the issue, he make a statement either in his examination or cross-examination, at variance with the account which at some previous time he gave of the same transaction to some other person, you may question him as to what he said to such other person, and if he deny it, you may call such other person to contradict him. 2 *Brod. & B.* 301. *Queen's Case. De Sailly* v. *Morgan*, 2 *Esp.* 691. And after asking the witness in cross-examination whether he did not say so and so to J. S., you may afterwards put the very words to J. S. and

ask him if the witness did not say so; and this is a more correct way of putting it, than merely to ask J. S. generally what the witness said to him. *See* 2 *Brod. & B.* 313. You cannot ask a witness in cross-examination a question, the answer to which in the affirmative would amount to an admission that he had committed some offence for which he might be subject to punishment. 2 *Hawk. c.* 46, *s.* 20. *Cundell* v. *Pratt*, 1 *Moody & M.* 108. *Cates* v. *Hardacre*, 3 *Taunt.* 424. *R.* v. *Pitcher*, 1 *Car. & P.* 85. *and see Stat.* 46 *G.* 3, *c.* 37. As to questions, the answers to which merely go to degrade a witness, but not to subject him, they may not only be asked, but must be answered. *Cundell* v. *Pratt*, *supra. and see R.* v. *Edwards*, 4 *T. R.* 440. *R.* v. *Clarke*, 2 *Stark.* 241. Also, questions, the answers to which may subject the witness, not to punishment, but merely to an action for a debt or other civil suit, may be put, and must be answered. 46 *G.* 3. *c.* 37.

Afterwards the character of the witness may be impugned, by calling other witnesses acquainted with his general character, who may be asked generally whether, from what they know of his character, they would believe him upon his oath. *Mawson* v. *Hartsink et al.* 4 *Esp.* 102. Or upon an indictment for a rape, or an assault with intent to commit it, witnesses may be called to prove the general character of the prosecutrix for want of chastity, but they will not be allowed to speak to any particular acts. *R.* v. *Clarke*, 2 *Stark.* 243.

Examination, &c. of Witnesses for the Defence.] The defendant may call witnesses to prove any defence he may set up to the charge made against him; and they may be examined and cross-examined, in the manner above mentioned. But where witnesses give evidence merely as to the prisoner's character, it is not usual to cross-examine them, unless it appear that they are practising an imposition on the Court, or under other peculiar circumstances.

Evidence in reply.] If the defendant set up any defence, and give evidence in proof of it, the prosecutor may then give evidence in reply. This evidence must be strictly confined to the defence; the prosecutor will not be allowed to wander from that, and give further evidence upon the original charge. Where upon an indictment for larceny, the prosecutor rested his defence upon the prisoner's recent possession of the goods; the prisoner set up as a defence that he bought the goods of J. T., and he called a witness to prove it; the prosecutor then proposed to call J. T. to prove, not only that he did not sell the goods to the prisoner, but that he saw the prisoner steal them: it was holden, however, that he could not do this, but that he must confine his evidence to the defence merely. *R.* v. *Stimpson*, 2 *Car. & P.* 415. *and see R.* v. *Hilditch et al.* 5 *Car. & P.* 299.

Witnesses, how compelled to attend.] The witnesses for the prosecution, who attend before the magistrate at the time the prisoner is committed, are usually bound over by recognizance to attend and give evidence; and, for non-attendance, they may be punished, by their recognizance being estreated. All other witnesses, on the one side or the other, may be compelled to attend by subpœna, issued either from the Crown Office in London, or by the Clerk of the Peace at Sessions: if it issue from the Crown Office, the remedy for non-attendance is by application to the Court of King's Bench for an attachment; *R.* v. *Ring*, 8 *T. R.* 585; if issued by the Clerk of the Peace, the remedy or punishment for non-attendance is, not by attachment, *R.* v. *Brownall*, 1 *Ad. & E.* 598, but by indictment. By stat. 45 G. 3, c. 92, s. 3, the service of a subpœna or other process upon any person in one part of the United Kingdom, requiring his appearance to give evidence in any criminal prosecution in any other part of the same, shall be as good and effectual as if it were served in that part of the United Kingdom in which he is required to appear; and in case he do not attend, then upon a certificate thereof being sent by the Court in which his attendance was required, to the Court of King's Bench in England, if the service were in England, or the Court of Justiciary in Scotland, if the service were in Scotland, or to the Court of King's Bench in Ireland, if the service were in Ireland; and these Courts respectively shall thereupon proceed against the person so making default, in such manner as if the subpœna, &c. had been issued from such Courts respectively. This statute applies only where the party is served in Scotland or Ireland with a subpœna to give evidence in England, or in England to give evidence in Scotland or Ireland, or the like.

If the witness be in custody on civil process, he must be brought up by writ of *Habeas Corpus*.

Witnesses' Expenses.] In what cases and how the expenses of witnesses are allowed and paid out of the County Rate in cases of felony, *see* 7 *G.* 4, *c.* 64, *s.* 22, 24—30. 1 *Arch. P. A.* 212, 213, 215—220; in certain cases of misdemeanor, *see* 7 *G.* 4, *c.* 64, *s.* 23. 1 *Arch. P. A.* 214. The witness cannot refuse to give his testimony in a criminal case, until his expenses have been paid to him, even although subpœnaed on the part of a defendant; *R.* v. *James et al.* 1 *Car. & P.* 322; and the indictment having been removed by *certiorari*, and the trial being of course in the *Nisi Prius* Court at the assizes, makes no difference. *Id.*

Section 6.

Indictments and Evidence in particular Cases.

Under this head, I mean to give the indictments and evidence in those cases only which usually occur at Sessions. The reader will find, in the list of offences punishable upon indictment, already given *ante, p.* 84, *et seq.*, references to books, where precedents of indictments for other offences, and the evidence necessary to support them, will be found.

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1. *Indictment for simple Larceny.*

Berkshire to wit: The jurors for our Lord the King upon their oath present, that A. B., late of the parish of ——, in the county aforesaid, labourer, on the third day of November, in the seventh year of the reign of our Sovereign Lord William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland King, defender of the faith, with force and arms, at the parish aforesaid, in the county aforesaid, [ten pieces of the current gold coin of the realm called sovereigns, of the value of ten pounds, one woollen cloth coat of the value of ten shillings, and one linen shirt of the value of five shillings], of the monies, goods and chattels of one C. D., then and there being found, feloniously did steal, take, and carry away, against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity. 1 *Arch. P. A.* 269, 270.

Transportation for seven years; or imprisonment not exceeding two years, and once, twice, or thrice public whipping, if the Court shall think fit; 7 & 8 G. 4, c. 29, s. 3; *such imprisonment may be with or without hard labour, and all or any portion of it may be in solitary confinement.* Id. s. 4.

Evidence.

This is proved, either by direct evidence of the taking, &c., or by proof of facts and circumstances from which the jury may fairly presume it.

Larceny is a felonious taking and carrying away of the personal goods of another. Where goods are stolen, and are very shortly afterwards found in the possession of a person, who is unable satisfactorily to shew by evidence in what manner he came by them, the presumption is that he is the person who stole them. It is therefore a very usual way of proving a larceny, first to call the prosecutor or other person, in whose possession the goods were at the time they were stolen, to prove when he last saw them in his possession, and when he missed them; then to call some person who can prove that they were

in the possession of the prisoner very shortly after they were stolen; and lastly, to call some person to indentify and prove the property in the goods. This is deemed good *primâ facie* evidence of the larceny, and has the effect of throwing the onus upon the prisoner, of proving that he honestly came by them. The presumption also may be very much strengthened by proof of any circumstances of suspicion in the conduct of the defendant, with relation to the goods in question: such as his selling them at an undervalue; his pawning them, or getting some other person to pawn them for him, in a feigned name; his denying their being or having been in his possession; his being near the place where, and about the time, they were stolen; or the like. The possession of the goods by the prisoner, however, must be proved to have been very recent after the felony committed. Where the goods were found in the prisoner's possession sixteen months after they were stolen, this was holden to be no evidence that he stole them. *Anon.* 2 *Car. & P.* 459. And in another case, where the stolen property was found in the prisoner's possession three months after they were stolen, J. Parke, J. ordered the prisoner to be acquitted, without putting him upon his defence. *R.* v. *Adams*, 3 *Car. & P.* 600. There may be cases in which, from circumstances, it may appear doubtful whether the possession of the goods by the prisoner does not prove, rather that he received them from another who stole them, than that he stole them himself: and the indictment should be drawn accordingly. However, the circumstances must amount to strong proof of the receiving, to be sufficient to rebut the presumption of the prisoner's being the person who stole the goods. Where goods stolen were shortly afterwards found concealed in an old engine-house, and the place being watched, the prisoners were observed to go there and take them away: the prisoners being indicted as receivers, there being no evidence of the goods having been stolen by any of them, Patteson, J. after remarking that this seemed to be evidence more of stealing than receiving, told the jury that if they were of opinion that the prisoners stole the goods, they must be acquitted on the present indictment; and the jury being of opinion that the prisoners stole them, they were accordingly acquitted. *R.* v. *Dursley and others*, 6 *Car. & P.* 399. So, in order to raise this presumption from the prisoner's possession of the goods, the previous possession of them by the prosecutor or his bailee, or the loss of them, must be clearly proved. Where upon an indictment for horse stealing, the prosecutor proved that he put the horse to agist with a person at a distance; that having heard from that person of the loss of the horse, he went to the field where it had been put to feed, and discovered it was gone; but the agister or his servant was not called, nor was any other evidence given of the loss of the horse: Gurney, B. held this to be insufficient, for it was consistent with all this that the

prisoners might have obtained the horse honestly from the agister, and not by felony. *R.* v. *Yend and Haines*, 6 *Car. & P.* 176.

It is only in the absence of direct evidence of the larceny, or where there is such evidence but it cannot prudently be depended upon, that the above mode of proving it by circumstantial evidence is resorted to. Where there is direct evidence, however, the larceny of course is proved by the persons who actually saw the prisoner commit it; and if there be at all a doubt whether their testimony will be believed by the jury, such part of the above circumstantial evidence may be given, as may be necessary to strengthen and confirm it. In treating of the direct evidence of larceny, it is necessary to consider what is a taking, a carrying away, and a felonious intent, within the definition of larceny.

1. As to the Taking: The taking, in larceny, is either actual or constructive: actual where the party actually takes the goods out of the possession of the owner or his bailee, *invito domino*, by force or by stealth, or the like, upon which it is not necessary to make any further observation. A constructive taking, is where the possession of the goods is obtained by some trick or artifice, or the like, with intent at the time to convert them to the party's own use, but which has not the effect of transferring any right of property in the goods from the owner to the party who has thus obtained possession of them; if a right of property pass, the offence is not larceny, but an obtaining of goods under false pretences. A few cases will sufficiently illustrate this. Davenport was indicted for larceny, in stealing two silver cream ewers from the prosecutor, a silversmith; he was formerly servant to a gentleman who dealt with the prosecutor; some time after he left this gentleman's service, he called at the prosecutor's shop, saying that his master (meaning the gentleman whose service he had left) wanted a silver cream ewer, desired the prosecutor to give it to him, and put it down to his master's account; the prosecutor gave him two ewers, in order that his master might select that which he liked best; the prisoner took both, sold them, and absconded: the prosecutor at the trial swore that he did not charge his customer with these cream ewers, nor did he intend to charge him with either, until he should have first ascertained which of them he would have chosen: it was objected for the prisoner, that this amounted merely to the obtaining of goods under false pretences, and not to larceny; but Bayley, J. held, that as the prosecutor had parted with the possession only, and not the right of property, the offence was larceny; if indeed he had sent but one cream ewer, in execution of the pretended order, and had charged the customer with it, it would have been otherwise. *R.* v. *Davenport, cor. Bayley, J. Newcastle Spring Assizes*, 1826. In a case similarly circumstanced, but where the

person in whose name the goods were obtained was not called as a witness, nor was there any evidence that she had not sent the prisoner for the goods: Patteson, J. held, that on that account the prisoner should be acquitted; for *non constat* but that the prisoner had been sent for the goods, as she had stated, and had delivered them to the person who sent her. *R.* v. *Ann Savage*, 5 *Car. & P.* 143. The substance of this last decision is, that the pretence by means of which the goods have been obtained, must be proved to be false, in larceny, in the same manner as upon an indictment for obtaining goods under false pretences. So, where it appeared that a servant of the prosecutor being sent to a fair with some oxen, to sell them for ready money, the prisoner bargained with him, and desired him to go to the inn and he would pay him for them; he went accordingly to the inn, but the prisoner never came; and upon his going back to the fair, he found that the oxen were gone; the prisoner had taken them, and sold some of them: upon the trial of the prisoner as for larceny, these facts were proved, and the servant in his evidence said that he would not have delivered the oxen until he was paid; the jury being of opinion that the prisoner never meant to have paid for the oxen, found him guilty; and the judges afterwards held the conviction to be right. *R.* v. *Gilbert*, *Ry. & M.* 185. *see R.* v. *Harvey*, 1 *Leach*, 467. *see also R.* v. *John Campbell*, *Ry. & M.* 179. *R.* v. *Pratt*, *Ry. & M.* 250, *S. P. and see* 1 *Arch. P. A.* 272, 273. So, where the prisoner went to a shop and asked for change of half-a-crown, and the person attending gave him two shillings and six penny-pieces; he then held out the half-crown, and the other just took hold of it by the edge, but never actually got it into his custody; the prisoner immediately ran away both with the half-crown and the change: being indicted for stealing the two shilling and six pennies, Park, J. held that it was larceny, but said, that if he had been indicted for stealing the half-crown, he should have entertained great doubt whether the indictment would lie. *R.* v. *Williams*, 6 *Car. & P.* 390. *see R.* v. *Coleman*, 2 *East*, *P. C.* 672. *R.* v. *Oliver*, 4 *Taunt.* 274, *cit. R.* v. *Aickles*, 2 *East*, *P. C.* 675. On the other hand, where, upon an indictment for stealing in the house of a pawnbroker a diamond broach and other articles, it appeared that the prisoner called at the shop of the pawnbroker with duplicates of the broach, &c., mentioned in the indictment, which he had before then pawned there for £34, and desired to redeem them; he, at the same time, shewed the pawnbroker's shopman a parcel of loose diamonds which he wished to pawn, and the shopman agreed to lend £160 upon them; he sealed the parcel of diamonds in the shopman's presence, and gave him what he believed, at that time, to be the same parcel; the shopman then gave him the broach, &c. mentioned in the indictment, and the balance of the £160, after de-

ducting the £34, for which the broach, &c. were pledged, and interest; but the parcel, upon being afterwards opened, was found to contain some coloured stones of little value: the shopman swore that he was authorized by his master to receive money for pledges, and to lend money on them; and that, when he delivered the articles in question, he parted with them entirely, believing he had received a full equivalent: this case being referred to the judges, they held that it was not larceny, because the shopman parted with the property and ownership, and not merely with the possession. *R.* v. *Jackson, Ry. & M.* 119. *And see R.* v. *Parkes,* 2 *Leach,* 614. So, where the prosecutor, a hatter, sold a hat to one of his customers, and the prisoner, knowing the circumstance, sent a messenger to the prosecutor for the hat in the name of the customer, and obtained it: the judges held this not to be larceny, but obtaining goods under a false pretence merely. *R.* v. *Phineas Adams, R. & Ry.* 225. *See R.* v. *Hench, Id.* 163. 1 *Arch. P. A.* 275. *R.* v. *Atkinson,* 2 *East, P. C.* 673. But where, upon an indictment for stealing three chests of tea, the property of S. Tanner and his partners, it appeared that Tanner & Co. were carriers from London to Tewkesbury; the prisoner, Isaiah John Longstreeth, calling himself Langstan, came to Tanner's office at Tewkesbury, and inquired if there were any teas for him; the porter informed him there were three chests directed to J. Creighton, whom he did not know; the prisoner said they were for him, and that the party who sent them had spelt his name wrongly by mistake; he paid the carriage and porterage, the three chests were delivered to him, and he afterwards removed and concealed them; the teas were not in fact his, but belonged to a person named J. Creighton, to whom they were directed: the prisoner being found guilty, it was referred to the judges to say whether this was a larceny; and they held that it was; because the ownership in the goods was not parted with, the carrier's servant having no authority to deliver them to the prisoner. *R.* v. *Josiah John Longstreeth, Ry. & M.* 137. In the practice of ring-dropping, (which was formerly so prevalent), if the prosecutor merely deposit his money, &c. with the pretended finder, as a security that he will account with him for his share of the produce of the property found, the offence will be larceny; *R.* v. *Patch,* 1 *Leach,* 238. *R.* v. *Watson,* 2 *East, P. C.* 680. *R.* v. *Moore, Id.* 679; but if the prosecutor give him a sum of money, &c. for his share of the property found, it will not. So where money is obtained from a man by means of a pretended bet,—if he merely deposits the money with the party as a stakeholder, who hands it to his confederate under pretence that he has won it, the offence is larceny; *R.* v. *Robson, Gill, Fewster & Nicholson, R. & Ry.* 413. *and see R.* v. *Standley, Jones & Webster, Id.* 305; but if he pay the money, imagining he has lost the bet, it is not. *R.* v. *Nicholson,* 2 *East, P. C.* 669.

But, however well established this general rule may be, there may be cases coming so exactly upon, or so near to, the line of distinction between the one offence and the other, that there may be some difficulty in deciding whether they amount to larceny, or to the obtaining of money, &c. under false pretences. In such cases it is advisable to indict the prisoner as for obtaining money, &c. by false pretences; for by stat. 7 & 8 G. 4, c. 29, s. 53, upon an indictment for the latter offence, if "it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor."

But where a person obtains possession of goods or chattels, without any trick or artifice, and without, at the time, having any felonious intention of appropriating them to his own use, his afterwards so appropriating them will not, in general, amount to larceny. Thus, where a woman saved some goods of the prosecutor, at a fire which was at his house, and took them home to her lodgings, and the next morning denied that they were in her possession: being tried for stealing them, and the jury being of opinion, that, when she first took them, her intentions were to save them from the fire and restore them to the owner, and that she had no intention to appropriate them to her own use until afterwards, the judges held that it was not larceny. *R.* v. *Leigh*, 2 *East, P. C.* 694. If a man lose goods, and another find them, and, not knowing the owner, sell them, or otherwise applies them to his own use, this is not larceny; 1 *Hawk. c.* 33, *s.* 2. 1 *Hal.* 506; but if he know the owner, it is. *R.* v. *Wynne*, 2 *East, P. C.* 664. *R.* v. *Lamb, Id.* 664. So, where goods are bailed by the owner to another, the bailee, whilst the bailment subsists, cannot, in general, be said to commit larceny of them, by converting them to his own use; because, in such a case, there is no felonious taking, the bailee being already in the legal possession of the goods. *See* 1 *Arch. P. A.* 277. If a man give his watch to a watch-maker to repair, and he sell it, this is not larceny, unless, indeed, he obtained it by some trick or fraud, with the intent, at the time, of converting it to his own use. *R.* v. *Levy*, 4 *Car. & P.* 431, *cor. Vaughan, B.* Even where a man hired a horse for a particular purpose, but the day following, after the purpose for which he borrowed the horse was over, he rode the horse in a different direction, and sold it; and upon his trial, as for a larceny, the jury found that, at the time he borrowed the horse, he had no felonious intention: the judges held that this was not larceny; that, if the prisoner had not a felonious intention at the time he took the horse, his subsequent withholding and disposing of it did not constitute a new felonious taking; and that the doctrine laid down in 2 *East, P. C.* 690, 694, and 2 *Russell*, 1089, 1090, to the contrary, was not correct. *R.* v. *W. Banks, R. & Ry.* 441. But if the jury had been of opinion

that he had such felonious intention at the time of the bailment, the prisoner must have been found guilty; *see R.* v. *John Stock, Ry. & M.* 87; this is always a question for the jury to determine. And if a carrier, or other bailee, open a bale or package of goods entrusted to him, take out part, and dispose of that part to his own use, this is considered such a proof of an original felonious intention, that it has always been holden to be larceny; *see* 3 *Inst.* 107. 1 *Hal.* 505. *Arch. Sum.* 125. *R.* v. *Edward Madox, R. & Ry.* 92. *R.* v. *Pratley*, 5 *Car. & P.* 533. *R.* v. *Fletcher*, 4 *Id.* 545; although it would be otherwise, if he disposed of the whole bale or package without breaking it. *Supra.* But where the prosecutor sent forty sacks of wheat to the prisoner, a warehouseman and wharfinger, for safe custody; and the prisoner emptied several of the sacks of the wheat contained in them, which he sold, and then substituted for it other wheat of an inferior quality: it was doubted, at first, whether, as the prisoner had appropriated to his own use the whole of the wheat in each of the sacks which he had emptied, he could be deemed guilty of larceny; but, upon the question being referred to the judges, they were unanimously of opinion that it was larceny, and the prisoner had judgment accordingly. *R.* v. *Brazier, R. & Ry.* 337. But the rule here mentioned, as to carriers and other bailees, does not extend to their servants; and, therefore, if a bailee's servant sell or dispose of a bale or package of goods entrusted to his master, he will be guilty of larceny. *R.* v. *Harding, Hayes, Cooke & Mears, R. & Ry.* 125. So the owner's own servant is not deemed a bailee in this respect, and is liable to be indicted for larceny if he take and dispose of the goods of his master to his own use; for the possession of the servant is deemed the possession of the master. And therefore if a gentleman's butler having the care and custody of his plate, or his shepherd of his sheep, embezzle them, they are as much guilty of larceny as if they took them out of the actual custody of their master. 1 *Hal.* 506. *and see R.* v. *Robinson*, 2 *East, P. C.* 565. *R.* v. *Bass, Id.* 566. *R.* v. *Paradice, Id.* 565. *R.* v. *Chipchase*, 2 *Leach*, 699. *R.* v. *Hammon*, 4 *Taunt.* 304. And where a farmer hired a person, who sometimes acted as drover to him, but was not regularly in his service, to drive some sheep for him to Grantham fair, at the wages of 3*s.* a day; the master sold some of them there, and then sent the remainder by the prisoner to Smithfield market; but the prisoner, instead of taking them there, sold them, and absconded with the money: although the jury found that the prisoner, at the time he took the sheep under his care, had no intention to steal them, yet the judges held him to be guilty of larceny; for, being the owner's servant, his possession was the possession of the owner, who, therefore, had not parted with either the possession or the right of property. *R.* v. *M'Namee, Ry. & M.* 368. So, if a man give goods to

another to carry, or the like, and he himself be present all the time: this is not a bailment, nor is the owner deemed to have parted with the possession of the goods; and therefore if the person, to whom the goods are so entrusted, run away with them, he is guilty of larceny. *See* 1 *Hawk. c.* 33, *s.* 2. 2 *East, P. C.* 683, 684. In cases of this description, the distinction between bailee and servant, &c. as established by the above authorities, should be carefully attended to.

Formerly, if goods, &c. which had never been in the master's possession, were delivered to his clerk or servant for the master's use, and the clerk or servant, instead of delivering them to his master, sold them, or otherwise converted them to his own use, this was not larceny. *R.* v. *Bazely*, 2 *Leach*, 835. *R.* v. *Bull*, *Id.* 841, *cit.* *R.* v. *Waite*, 2 *East, P. C.* 570. This was afterwards altered by statute; *see stat.* 39 *G.* 3, *c.* 85; and now, by stat. 7 & 8 G. 4, c. 29, s. 47, "if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattel, money, or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same, or any part thereof: every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money or security was not received into the possession of such master, otherwise than by the actual possession of his clerk, servant, or other person so employed." It is usual however, in such a case, to indict specially for the embezzlement. *See post.*

Also, persons who have the bare use of the goods of another, are not deemed in law bailees; and therefore if a guest at an inn or tavern steal the plate or other articles, of which he has the use at his meals, &c. he is guilty of larceny, for he is said to have the use merely of them, and not the possession. 1 *Hal.* 506. 1 *Hawk. c.* 33, *s.* 6. But the tenant of furnished lodgings is deemed to have, not merely the use, but the possession also, of the furniture let with the lodgings; and formerly, if he sold or disposed of it for his own use, it was not deemed larceny. But now, by stat. 7 & 8 G. 4, c. 29, s. 45, the tenant, in such a case, may be indicted as for a simple larceny, and punished accordingly. *Vide post.*

But a joint-tenant or tenant in common of a personal chattel, cannot be guilty of larceny, by taking it and disposing of the whole to his own use; it is merely the subject of a civil remedy. 1 *Hal.* 513. But if he take it out of the hands of a bailee, with whom it is left for safe custody or the like, and the effect of such taking will be to charge the bailee, it is otherwise. Therefore where a woman, a member of a benefit society, entered the room of a person, with whom a box, containing the funds of the society, was deposited for safe custody, and took and carried away the box with intent to appropriate the contents to her own use: the

commit fornication with him: the judges held that this was not a felonious taking. *R.* v. *Richard Dickinson, R. & Ry.* 420. *and see R.* v. *Cornelius Von Muyen, R. & Ry.* 118. So where, upon an indictment for stealing two horses, it appeared that the prisoners took the two horses out of the prosecutor's stables, rode them about thirty miles, and then left them at an inn, saying they would be back in three hours, and desiring that the horses should be taken care of; and they were afterwards taken on the same day about fourteen miles distant from the inn, and walking in a direction from it: the jury found that the prisoners took the horses merely for the purpose of riding them the thirty miles, and that they left them at the inn without intending to come back for them or dispose of them; and ten of the judges held this not to be larceny. *R.* v. *Philips, et al.*, 2 *East, P. C.* 662, 663. But where, upon a similar indictment for horse stealing, it appeared that the horse in question had been before stolen by one Haworth, who was about to be tried for the offence; and the prisoner, in order (as he thought) to screen Haworth from conviction, clandestinely took the horse out of the prosecutor's stable, led him to a coal pit, and backed him into it, and the horse was killed: it was objected at the trial that this was not a larceny, because the taking appeared not to have been done with intention to convert the horse to the use of the taker *animo furandi et lucri causâ*; but seven of the judges held it to be larceny; and six of this majority held, that to constitute larceny, it is not essential that the taking should be *lucri causâ*; if it be fraudulent, and with intent wholly to deprive the owner of the property, it is sufficient. *R.* v. *Wm. Cabbage, R. & Ry.* 292.

And the felonious intent must be entertained at the time of the taking. This has been already incidentally mentioned in many instances. *See R.* v. *Leigh, ante, p.* 161. *R.* v. *W. Banks, ante, p.* 161, *&c.* Where a letter, containing a bill of exchange, directed to J. M., St. Martin's Lane, Birmingham, was delivered to another person of that name living near St. Martin's Lane, there being in fact no person residing in the lane of that name; the party, upon opening the letter, must have perceived that it was not for him, but he nevertheless applied the bill to his own use: the judges held this not to be larceny, as it did not appear that the party had any *animus furandi* at the time he received the letter. *R.* v. *James Mucklow, Ry. & M.* 160.

4. As to the identity of the goods, and proof of property in them: The larceny must appear to have been committed of the goods mentioned in the indictment, or some of them; a material variance between the goods proved to have been stolen, and the description of them in the indictment, will be fatal. *See ante, p.* 127. *and see* 1 *Arch. P. A.* 281, 282. If the goods have been found and are forthcoming, they are always produced at the trial, in order that the prisoner may have a fair opportunity of cross-

they be detached from the place where they were taken, nay, the slightest removal from the place, will be a sufficient carrying away to constitute larceny. Where it appeared that the prisoner, who was sitting on the driving box of the Exeter mail coach, took hold of the upper end of a bag that was in the front boot, and lifted it from the bottom of the boot on which it rested; he handed the upper end of it to a person near him, and they were both endeavouring to pull it out of the boot, with a common intent to steal it, when the guard of the coach coming up, they dropt the bag again into the boot: the judges were of opinion that this was a complete asportation of the bag, sufficient to constitute larceny. *R.* v. *James Walsh, Ry. & M.* 14. So, where it appeared that the prisoner drew a pocket book out of the inside breast pocket of the prosecutor's coat, about an inch above the top of the pocket; but the prosecutor suddenly putting his hand up, the prisoner let go the book whilst it was still about the person of the prosecutor, and the book fell back again into the pocket: the judges held this to be a sufficient asportation to constitute a simple larceny, although the larceny from the person was not complete. *R.* v. *Wm. Thompson, Ry. & M.* 78. *See also R.* v. *Pitman,* 2 *Car. & P.* 423. *R.* v. *Simpson, Kel.* 31. *R.* v. *Coslet,* 1 *Leach,* 256. But where a thief was not able to carry off goods he intended to steal from a shop, on account of their being attached by a string to the counter, this was holden not to be a sufficient asportation to constitute larceny, because there was no severance, the goods all the time being attached to the counter. *Anon.* 2 *East, P. C.* 556. So, where a thief was prevented carrying off a purse, on account of some keys attached to the strings of it getting entangled in the owner's pocket, it was holden not sufficient, for the same reason. *R.* v. *Wilkinson,* 1 *Hal.* 508. So, where the prisoner merely turned a bale of goods on end where it lay, for the purpose of cutting it open and taking the goods out, and he was detected before he effected his purpose: this was holden not to be a sufficient asportation to constitute larceny. *R.* v. *Cherry,* 2 *East, P. C.* 556.

3. As to the felonious intent: The taking, &c., must have been with a felonious intent, that is to say, it must be without any bonâ fide claim of right to the goods taken, on the part of the person taking them; it must be done fraudulently, and with the intent wholly to deprive the owner of the property. If the taking, &c., be by mistake, or under a bonâ fide claim of right, however mistaken, it cannot be larceny. 1 *Hal.* 506. 509. So, if not done with intent wholly to deprive the owner of his property, it cannot be larceny. Thus, for instance, where upon an indictment for larceny, it appeared that the prisoner had clandestinely taken the articles alleged to be stolen, merely for the purpose of inducing a young girl, the owner of them, to call for them, and thereby to give him an opportunity of soliciting her to

be, without specifying their names. 7 *G.* 4, c. 64, s. 18. If the name of the prosecutor be mis-spelt, it will be immaterial. *R.* v. *Foster*, *R.* & *Ry.* 412. If he be called by a name by which he is usually known, it will be sufficient, *R.* v. *Berriman*, 5 *Car.* & *P.* 601. *Anon.* 6 *Car.* & *P.* 408, although it be not his real name. *R.* v. *Norton*, *R.* & *Ry.* 510. *and see* 1 *Arch. P. A.* 285.

Where the goods consist of several articles, they must have been all stolen at the same time, or at times so near to each other that the several takings may appear to be parts of the same continuing transaction, otherwise each larceny must be made the subject of a distinct indictment. If they be comprised in one indictment, whether in the same or in different counts, and it appear at the trial that the goods were stolen at several distinct times, the Court will put the prosecutor to his election for which act of larceny he will prosecute, and will oblige him to confine his evidence to that. 1 *Arch. P. A.* 282. *and see R.* v. *Smith* & *Jefferies*, *Id.* 286. *and ante*, *p.* 125. But the Court will not thus put the prosecutor to his election, merely because the goods might have been, and probably were, stolen at different times, if, from any thing appearing in the case, it be not impossible that they might all have been stolen at one time. *R.* v. *Dunn* & *Smith*, *Ry.* & *M.* 146. 1 *Arch. P. A.* 435.

5. As to the county, &c., within which the larceny must be proved to have been committed: The offence must be proved to have been committed in the county or place stated as venue in the margin of the indictment. It is not however necessary to prove it to have been committed within the parish or place alleged in the body of the indictment as special venue; nor indeed is it now necessary to state any such parish or place, the county or other extent of jurisdiction being sufficient. *See stat.* 6 *G.* 4, c. 50, s. 13. *and* 1 *Arch. P. A.* 180, 181. If the offence be committed on the boundaries of two or more counties, or within five hundred yards of such boundaries, it may be tried in either county, in the same manner as if it had been actually committed therein; 7 *G.* 4, c. 64, s. 12; this however does not extend to trials in limited jurisdictions, but to trials in counties only. *R.* v. *Welsh*, *R.* & *M.* 175. 1 *Arch. P. A.* 205. Or if committed on a person, or with respect to property, in or upon a coach, waggon, or other carriage, or on board a vessel, &c., on a navigable river, canal or inland navigation, the offence may be tried in any county through which the carriage or vessel may have passed in its journey or voyage, in the same manner as if it had been actually committed in such county. 7 *G.* 4, c. 64, s. 13. At common law, also, if a man stole goods in one county, and carried them into another, he might be indicted and tried in either; and now, by stat. 7 & 8 G. 4, c. 29, s. 76, if any per-

son, having stolen or otherwise feloniously taken any chattel, money or valuable security, or other property whatsoever, in any one part of the United Kingdom, shall afterwards have the same property in his possession in any other part of the United Kingdom, he may be dealt with, indicted, tried and punished for larceny or theft in that part of the United Kingdom where he shall have such property, in the same manner as if he had actually stolen or taken it in that part. *See R. v. Prowes, Ry. & M.* 349. Where a man stole a brass furnace in Radnorshire, broke it in pieces there, and then brought the pieces of brass into the county of Hereford: Hullock, B. held that he could not be indicted in Hereford for stealing the furnace there, it never having in fact been there. *R. v. Halloway*, 1 *Car. & P.* 127. But no distance of time between the stealing in one county, and carrying the property in another, will prevent the party from being indicted in the latter county; and therefore, where the property was stolen by the prisoner in Yorkshire in November 1823, and brought by him into Durham in March 1824, the judges held that he might be indicted for the larceny in Durham. *R. v. Parkin, Ry. & M.* 45. Where the prisoners stole two horses at different times, and at different places in Somersetshire, but brought both at the same time into Wilts, and had them there together in their possession: Littledale, J. held that this did not warrant the including both larcenies in one indictment; and he therefore put the prosecutor to his election as to which horse he would prosecute. *R. v. Smith and Jefferies, Ry. & M. N. P. C.* 295.

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2. *Indictment for Larceny of Bills of Exchange, &c.*

Same as the form ante, p. 156, *to the words*] in the county aforesaid, feloniously did steal, take, and carry away one bill of exchange, [*or* "promissory note," &c. *describing thus shortly the security stolen,*] for the payment of the sum of fifty pounds, and of the value of fifty pounds, and two promissory notes for the payment of five pounds each, and of the value of five pounds each, then and there being found; the said bill of exchange and the said several promissory notes, at the time of the committing of the felony aforesaid, being the property of C. D., and the said several sums of money payable and secured by and upon the said bill of exchange and the said several promissory notes respectively being then and there due and unsatisfied to the said C. D., the proprietor thereof: against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity. *See* 1 *Arch. P. A.* 288.

Felony, same punishment as for stealing goods of the same value. 7 & 8 *G.* 4, *c.* 29, *s.* 5. *See ante, p.* 156. *This section of the Act*

extends not only to bills and notes, but to deeds, bonds, orders for payment of money or for the delivery or transfer of goods, &c.

Evidence.

To maintain this indictment, the prosecutor must prove:

1. A larceny of the bill and notes, as directed *ante, p.* 156. Upon an indictment for stealing a certain warrant for the payment of £22,000, and bank notes to the same amount, it appeared that Sir Thomas Plomer, the prosecutor, had given a check upon his banker for £22,000 to Walsh, the prisoner, for the purpose of purchasing Exchequer bills for him to that amount; the prisoner received the amount of the check in bank notes, and absconded with them: the jury being of opinion that the prisoner, before he received the check, had formed the design of converting the money to be received for it to his own use, found him guilty: but upon a reference of the case to the judges, they were of opinion that this was not a larceny;— not of the check, because the prisoner had used no fraud or contrivance to induce the prosecutor to give it to him, and also because, being the prosecutor's own check, and of no value in his hands, it could not be called his goods and chattels; nor was it a larceny of the notes obtained for the check, for the prosecutor never had possession of them but by the hands of the prisoner. *R.* v. *Benjamin Walsh, R. & Ry.* 215. *See also R.* v. *Minter Hart, infra.*

2. The bill and notes must appear to be such as is meant by the statute, and described in the indictment. Some country bank notes being paid by the agent in London, were sent by him to the country bankers, by whom they were to be reissued; on their way, they were stolen by the prisoner, and he was indicted for stealing the bank notes in the ordinary form, and also for stealing certain pieces of paper with certain valuable stamps upon them: the judges seem to have been of opinion that this could not be considered a stealing of bank notes, inasmuch as it could not be deemed that the sums payable and secured thereby were due and unsatisfied to the prosecutors; but they held that the prisoner was rightly convicted of stealing the paper and stamps. *R.* v. *Henry Clark, R. & Ry.* 181. So, where the prisoner was indicted for receiving certain stamped pieces of paper, the goods and chattels of the prosecutor, knowing the same to have been stolen; it appeared that the prosecutors were country bankers; that one of the partners had received a large parcel of their notes from their London agents, which had been paid in London, and he was taking them into the country, for the purpose of reissuing them, when they were stolen from him: the prisoner being convicted, the judges were of opinion that the notes were properly described in the indictment as the "goods and chattels" of the prosecutors; some of them doubted whether they could have

been considered as "valuable securities" within the statute. *R.* v. *Vyse, Ry. & M.* 218.

But in another case, where it appeared that the prosecutor, in answer to an advertisement offering an advance of money upon loan, sent a letter to the address therein mentioned, stating his wish to borrow £5000, and the prisoner called upon him in consequence of it; the prisoner offered to obtain the loan for him, upon his acceptance of ten bills of exchange for £500 each, and he produced ten 6*s.* stamps, which the prosecutor accepted in blank, and which the prisoner took away with him, and afterwards had bills drawn upon them for £500 each by a person in concert with him, of the name of Clissold; he was afterwards indicted for this, as for a larceny of ten bills of exchange for £500 each, of ten pieces of paper each stamped with a 6*s.* stamp, and of ten pieces of paper with the words "Accepted, F. Dugdale Astley, payable at Messrs. Praed & Co., 189, Fleet Street, London," upon each: Littledale and Bosanquet, JJ. and Bolland B. held that the prisoner could not be convicted upon this evidence; when these acceptances were obtained by him, they were not bills of exchange, orders or securities for money, neither drawer's name, sum, nor date being upon them, and of course they were of no precise or definite value; nor could the prisoner be convicted on those counts, which described these acceptances as ten pieces of paper with stamps on them, &c., because the stamps never belonged to the prosecutor, but to the prisoner. *R.* v. *Minter Hart*, 6 *Car. & P.* 106.

To be a valuable security for money, within the meaning of the statute, the bill, &c. must be stamped, where by law such a security requires a stamp. And therefore where a person was indicted, upon another section of the same statute, for obtaining an order for the payment of £2 by false pretences, and the order appeared to be an unstamped check upon a banker, which, from the manner in which it was drawn, required a stamp, the judges held that it was not a valuable security within the meaning of the act. *R.* v. *Yates, Ry. & M.* 170.

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3. *Indictment for stealing Sheep or Cattle.*

Same as in the form, ante, p. 156, *to the words*] in the county aforesaid, one ewe [" *horse, mare, gelding, colt or filly, bull, cow, ox, heifer or calf, ram, ewe, sheep or lamb,*"] of the price of two pounds, of the goods and chattels of one *C. D.* then and there being found, feloniously did steal, take, and drive away: against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity. *See* 1 *Arch. P. A.* 350. *If the indictment be for stealing a horse, &c. instead of* "drive away," *say* "lead away."

Felony. The punishment was formerly death; 7 & 8 *G.* 4,

c. 29, s. 25; *but it is now transportation for life*, 2 & 3 W. 4, c. 62, s. 1, *and, if the Court think fit, imprisonment with or without hard labour for not more than four years nor less than one, previous to transportation.* 3 & 4 W. 4, c. 44, s. 3; see 1 Arch. P. A. 349 n.

Evidence.

To maintain this indictment, the prosecutor must prove a larceny of the ewe, in the ordinary way, as directed *ante*, p. 156. *See R.* v. *M'Namee*, *ante*, p. 162. Where the proof was, that the prisoner removed a sheep from the middle of the field where it was grazing, to the gripe of a ditch, and there killed it, and stole a part of the carcase, and the jury found that he killed the sheep with intent to steal a part of the carcase: the judges held that this removal of the sheep for the purpose of killing it, was not such a taking and carrying away as would constitute a stealing of the sheep. *R.* v. *John Williams*, *Ry. & M.* 107. But where, upon an indictment for horse-stealing, it appeared that the prisoner went to an inn on a fair day, and desired the ostler to bring out his horse; the ostler saying he did not know it, the prisoner went with him to the stables, pointed to the horse in question, saying, "that is my horse, saddle him;" the ostler did so, and the prisoner attempted to mount him, but the horse being frightened at some noise, would not stand still; the prisoner then desired the ostler to lead the horse out of the yard that he might mount him, and the ostler did so; but before the prisoner could mount, a person who knew the horse came up, and the prisoner was secured: Garrow, B. held this to be sufficient to constitute the felony. *R.* v. *Pitman*, 2 *Car. & P.* 423. Upon the trial of an indictment for horse-stealing, the prosecutor stated that he had agisted the horse on the land of another person at some distance, and that hearing from that person of the loss of the horse, he went to the field where the horse had been put to feed, and discovered he was gone; but neither the agister nor his servant was called as a witness: Gurney, B. held that this was not sufficient evidence of the loss of the horse, for *non constat* but that the prisoner might have obtained possession of the horse honestly. *R.* v. *Yend and Haines*, 6 *Car. & P.* 176.

Where the animal is specifically mentioned in the statute, a description of it by any other name in the indictment will be bad, even although the name used be a generic name for the animal. Thus, where upon an indictment for stealing a "sheep," it appeared in evidence that it was an ewe, the judges held that the evidence did not support the indictment, as the statute mentions both ewes and sheep. *R.* v. *Puddifoot*, *Ry. & M.* 247. So, where upon an indictment for stealing five sheep, it appeared in evidence that they were lambs, the judges held that the evidence did not support the indictment, for the same reason. *R.*

v. *Loom, Crisp and Baxter, Ry. & M.* 160; *S. P. R.* v. *Birket*, 4 *Car. & P.* 216. So, evidence of stealing a heifer will not support an indictment for stealing a cow. *R.* v. *Cooke*, 2 *East, P. C.* 617. Upon a former statute against horse stealing, (2 & 3 *Edw.* 6, *c.* 33,) where the words were "horse, gelding or mare," it was holden that evidence of stealing a colt or filly or foal, would support an indictment for stealing a horse, gelding or mare respectively; *R.* v. *Welland, R. & Ry.* 494; but an indictment for stealing a colt, not saying whether it was a horse or a mare, was holden by the judges to be insufficient upon the above statute. *R.* v. *Henry Beany, R. & Ry.* 416. In analogy to these cases, evidence of stealing a foal, would support an indictment on the present statute for stealing a colt or filly; but evidence of stealing a colt or filly, would not support an indictment for stealing a horse, gelding or mare, because "colt" and "filly" are specifically named in the statute. So an indictment for stealing a foal, not saying whether it was a colt foal, or a filly foal, would be bad, as an indictment on the statute. So, as wethers are not specifically mentioned in the statute, they may be described in the indictment as "sheep," and in practice it is usual to describe them as "two wether sheep of the price of ——, and two other sheep of the price of ——." And where it is doubtful whether the animal stolen comes within one or other description in the statute, (as very frequently happens,) both descriptions may be used, in the same manner.

The section of the statute on which the above indictment is drawn, must be understood as extending only to the stealing of cattle which are alive; stealing a dead sheep, &c. is but common larceny, and the indictment should either state it to be dead, or describe it as so much mutton. *See* 1 *Arch. P. A.* 351.

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4. *Indictment for stealing Fixtures, or Lead, &c. fixed to Buildings, &c.*

Same as the form ante, p. 156, *to the words*] in the county aforesaid, fifty pounds weight of lead [" *any glass or wood work belonging to any building whatsoever, or any lead, iron, copper, brass or other metal, or any utensil or fixture, whether made of metal or other material,*"] of the value of ten shillings, the property of C. D., and then and there being fixed to the dwelling-house [" *any building whatsoever*"] of the said C. D. there situate, feloniously did steal, take, and carry away: against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity. 1 *Arch. P. A.* 403. *And see the form of an indictment for ripping, cutting or breaking such sand, &c., with intent to steal it, Id.* 403, 404.

Felony, same punishment as for simple larceny, 7 & 8 G. 4, c. 29, s. 44. See ante, p. 156.

Evidence.

To maintain this indictment, the prosecutor must prove:

1. The larceny of the lead, as in ordinary cases. *See ante, p.* 156.

2. That at the time it was taken, it was fixed to the dwelling-house of C. D. situate as described in the indictment. The statute mentions "any building whatsoever;" but care must be taken that there be no material variance, as to the description of the building, between the indictment and proof.

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5. *Indictment for stealing from the Person.*

Same as the form, ante, p. 156, *to the words*] in the county aforesaid, ten pieces of the current gold coin of the realm, called sovereigns, of the value of ten pounds, and one silver watch of the value of five pounds, ["*chattel, money, or valuable security,*"] of the monies, goods, and chattels of C. D., from the person of the said C. D., then and there feloniously did steal, take, and carry away: against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity.

Felony, transportation for life, or for not less than seven years; or imprisonment, with or without hard labour, for not more than four years, and (if the Court think fit) whipping. 7 & 8 G. 4, c. 29, s. 6.

Evidence.

To maintain this indictment, the prosecutor must prove:

1. A larceny of the property stated in the indictment, or some of it, as directed, *ante, p.* 156; except that the taking must be actual, and not merely constructive; and the carrying away must be, not that mere removal of the property which is sufficient in the case of simple larceny, (*see ante, p.* 165,) but an actual severance of it from the person of the prosecutor. Where it appeared that the prisoner drew a pocket-book out of an inside breast pocket of a coat the prosecutor had on him; it was drawn out about an inch above the top of the pocket; but the prosecutor suddenly putting his hand up, the prisoner let go the book, whilst it was still about the person of the prosecutor, and the book fell back again into the pocket: six of the judges held, that this, although a sufficient asportation to constitute a simple larceny, was not sufficient to warrant a conviction of stealing from the person, because from first to last the book remained about the person of the prosecutor; four of the judges were of a different opinion. *R.* v. *Thompson, Ry. & M.* 78.

It is immaterial whether the offence be committed by stealth or by force. If the facts, indeed, clearly amount to a robbery,

the prisoner, no doubt, should be prosecuted for that offence; but if it be doubtful whether the force used is sufficient to constitute robbery, it is better to indict him for this offence, as it has been decided that upon an indictment for stealing from the person, the prisoner may be convicted, although the facts proved amount in law to a robbery. *R.* v. *Joseph Pearce, R. & Ry.* 174. *R.* v. *Charles Robinson et al., R. & Ry.* 321.

2. It must appear that the property was in the personal possession of the prosecutor, at the time it was stolen. Whether a taking, not actually from the person of the prosecutor, but in his presence, would be sufficient, has never, I believe, been decided.

If a larceny be proved, but not a stealing from the person, the prisoner may be convicted as for a simple larceny.

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6. *Indictment for stealing in a Dwelling-house, to the value of* £5.

Same as the form, ante, p. 156, *to the words*] in the county aforesaid, one silver pint pot of the value of forty shillings, and nine pewter dishes of the value of twenty shillings, [" *chattel, money, or valuable security,*"] of the goods and chattels of C. D., in the dwelling-house of the said C. D. there situate, then and there being found, then and there in the said dwelling-house feloniously did steal, take, and carry away: against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity. *Where the words* " there situate" *were omitted, the judges held that the house must be considered as stated to be in the place laid as special venue, and must be proved to be situate there accordingly.* R. v. Napper, Ry. & M. 44.

Felony, 7 & 8 G. 4, c. 29, s. 12, *transportation for life*, 2 & 3 W. 4, c. 62, s. 1, *and (if the Court think fit) imprisonment, with or without hard labour, for not more than four years nor less than one, previous to transportation.* 3 & 4 W. 4, c. 44, s. 3.

Evidence.

To maintain this indictment, the prosecutor must prove:

1. The larceny, as in ordinary cases; (*see ante, p.* 156;) but the value of the goods must be proved to be 5*l.* at the least. Upon an indictment for stealing 68 yards of lace in a dwelling-house, it appeared that the prisoner, who was shopman to the prosecutor at Abingdon, sent the lace in a parcel by the coach from that place to London; the lace was in several pieces, none of which separately was worth 5*l.*, but the whole together was worth much more; and as those pieces might have been stolen at different times, the prisoner's counsel suggested that *in favorem vitæ* they should be taken to be so: but Bolland, B. said that he could not assume that, as it appeared that the prisoner

brought them all out of the prosecutor's house at one time, and sent them in one parcel to London. *R.* v. *Jones*, 4 *Car. & P.* 217. If you fail in proving the goods to be of the value of 5*l.*, still the prisoner may be convicted of the simple larceny.

2. That it was committed in the dwelling-house of C. D., situate as described in the indictment. And in this respect, by stat. 7 & 8 G. 4, c. 29, s. 13, no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house, "unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other." *See R.* v. *Burrowes*, *R. & Ry.* 274. 1 *Arch. P. A.* 312. Where it appeared that the prosecutor formerly lived with his family in a house in St. Martin's Lane, where he also carried on his business as an upholsterer; but he afterwards went with his family to live in the Haymarket, keeping the house in St. Martin's Lane as a warehouse and workshop, two of his workmen sleeping in it to take care of it: a larceny being committed in it, and the offender convicted as for a larceny in a dwelling-house, the judges held, that it could not be deemed the dwelling-house of the prosecutor. *R.* v. *Flannagan*, *R. & Ry.* 187. Where it appeared that the larceny was committed in a bed-room over the stable, which was not under the same roof with the dwelling-house, nor communicated with it, this was holden not to be a stealing in the dwelling-house. *R.* v. *Turner*, 6 *Car. & P.* 407. Care must be taken to describe the ownership of the house correctly, as in burglary. *See* 1 *Arch. P. A.* 312–316.

The goods also must appear to have been under the protection of the house, at the time of the larceny. Where it appeared that the prisoner, Taylor, who lodged in the house of one Wakefield, having met an acquaintance at a public house, brought him home to sleep at his lodgings, and during the night stole his watch from the bed-head; neither Wakefield nor his family knew of the prosecutor being there: upon an indictment for this offence, charging it as a larceny in the dwelling-house of Wakefield, it was doubted at first whether the prisoner could be convicted of a larceny in the dwelling-house, as it had been before decided that the statute did not extend to a man stealing in his own house; but a majority of the judges held, that the goods, although the property of the lodger's guest, were under the protection of the dwelling-house, and that the prisoner might therefore be convicted of stealing in the dwelling-house. *R.* v. *John Taylor*, *R. & Ry.*, 418. So, where the prosecutrix, residing at No. 38, Rupert Street, expected goods to be sent to her from Hanwell; they arrived in London, and were carried from the coach office, by the regular porter, to the house of one Davidson,

No. 33, Rupert Street, (whether by mistake or intentionally did not appear); and Davidson, imagining they were for the prisoner, who lodged in his house, delivered them to him, and he converted them to his own use and absconded: he was indicted for stealing goods in the dwelling-house, but it being doubted at first whether these goods were sufficiently under the protection of the house, to constitute a stealing in the dwelling-house, within the meaning of the statute, the point was reserved for the opinion of the judges; and they held, that the goods were under the protection of the dwelling-house, and that the conviction therefore was right. *R.* v. *Peter Carrol, Ry. & M.* 89.

If you fail to prove the larceny to have been committed in the dwelling-house, within the meaning of the statute, still the prisoner may be convicted of the simple larceny.

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7. *Indictment for Larceny by Tenants or Lodgers.*

If a tenant or lodger steal any chattel, let to be used by him in or with any house or lodging, the indictment may now be "in the common form as for larceny;" or if he steal any fixture, the indictment may be in the same form, as if he was not a tenant or lodger; and in either case the property may be laid in the owner or person letting to hire. 7 & 8 *G.* 4, *c.* 29, *s.* 45. See the common form of indictment for larceny, *ante, p.* 156; and the form for stealing a fixture, *ante, p.* 173.

Felony, punishable in the same manner as simple larceny. 7 & 8 G. 4, c. 29, s. 45. See ante, p. 156.

Evidence.

The evidence may be the same as for common larceny or the stealing of fixtures. respectively, in ordinary cases. *See ante, p.* 156, 173. The fact of the articles having been let to the prisoner with the house or lodging, and being in his possession under the contract at the time of the stealing, usually appears in evidence; but as this would now be no defence to the indictment, it is little matter whether it appear in evidence or not; and therefore any failure in proof of that part of the case, will be immaterial.

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8. *Indictment for Larceny by Clerks or Servants.*

Berkshire to wit: The jurors for our Lord the King upon their oath present, that before and at the time of the committing of the offence hereinafter [next] mentioned, A. B. late of the parish of ——, in the county aforesaid, labourer, was clerk [*or* servant] to one C. D.; and the said A. B., being such clerk to the said C. D. as aforesaid, afterwards and whilst he was such clerk, to wit, on the first day of August, in the seventh year of the reign of our Sovereign Lord William the Fourth, by the grace of God,

of the United Kingdom of Great Britain and Ireland King, defender of the faith, with force and arms, at the parish aforesaid, in the county aforesaid, ten pieces of the current gold coin of the realm called sovereigns, of the value of ten pounds, one woollen cloth coat of the value of ten shillings, and one linen shirt of the value of five shillings, [*" chattel, money, or valuable security,"*] of the monies, goods, and chattels of and belonging to the said C. D., his master aforesaid, then and there being found, feloniously did steal, take and carry away: against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity. *If it be doubtful whether the goods stolen were actually the property of the master, or were merely in his possession or power, at the time of the larceny, add another count thus:* And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B. afterwards and whilst he was such clerk to the said C. D. as aforesaid, to wit, on the said first day of August in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, ten other pieces, [*&c. as in the first count*], in the possession and power of the said C. D., his master as aforesaid, then and there being, feloniously did steal, take and carry away: against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity. *You may also add a count for larceny at common law, if you think it at all necessary. Or, if there be a doubt whether the offence amount to larceny, in the strict sense of the term, that is to say, whether the property in question ever had been received into the possession of the master, otherwise than by the actual possession of the clerk or servant, add a count for embezzlement, according to the next form.*

Felony, transportation for not more than 14 *nor less than* 7 *years; or imprisonment, with or without hard labour, for not more than* 3 *years, and (if the Court think fit) whipping.* 7 & 8 G. 4, c. 29, s. 46.

Evidence.

To maintain this indictment, the prosecutor must prove:

1. That at the time of the larceny, the prisoner was in the service of C. D., as clerk or servant, as stated in the indictment. If he fail to prove this, still the prisoner may be convicted on the third count of the indictment, as for a common larceny.

2. That the prisoner stole the goods, &c. specified in the indictment, or some of them. This is proved in the ordinary way, as directed *ante*, p. 156. Where upon an indictment for larceny, charging the prisoner in one count with stealing a promissory note for 5*l.*, and in another with stealing silver coin to the value of 5*l.*, it appeared that the prisoner being sent by his masters,

the prosecutors, to get change of a 5*l.* note, got silver for it from a neighbour, but absconded with the silver: being convicted on the second count, the judges held the conviction to be wrong, because the silver had never been in the possession of the masters, except by the hands of the prisoner; they said that he should have been indicted for embezzlement. *R.* v. *Wm. Sullens, Ry. & M.* 129. *See R.* v. *Hammon, R. & Ry.* 221.

3. That the goods were, at the time, either the property of C. D., or in his possession or power, as stated in the indictment. The value is immaterial.

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9. *Indictment for Embezzlement by Clerks or Servants.*

Same as the form ante, p. 156, *to the words*] in the county aforesaid, being then and there employed as clerk [" *clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant*"] to C. D., did by virtue of such his employment, then and there, and whilst he was so employed as aforesaid, receive and take into his possession certain money to a large amount, to wit, to the amount of ten pounds, [*or if it be a chattel, describe it as in larceny, and state its value,*] for and in the name and on the account of the said C. D. his master as aforesaid, and the said money then and there fraudulently and feloniously did embezzle: and the jurors aforesaid upon their oath aforesaid do say, that the said A. B. then and there, in manner and form aforesaid, the said last-mentioned money, the property of the said C. D. his master, from the said C. D. feloniously did steal, take and carry away: against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity. *As it is permitted by the Act* (7 & 8 G. 4, c. 29, s. 48,) *to charge the offender with any number of distinct acts of embezzlement, not exceeding three, which may have been committed by him against the same master, within the space of six calendar months from the first to the last of such acts: if it be intended to charge the prisoner thus with other offences, let the second and third counts of the indictment be thus:* And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B. afterwards, and within six calendar months from the time of the committing of the said offence in the said first count of this indictment charged and stated, to wit, on the —— day of —— in the year aforesaid, at the parish aforesaid, in the county aforesaid, being then and there employed as clerk to the said C. D., did by virtue of such his said last-mentioned employment, then and there, and whilst he was so employed as last aforesaid, receive and take into his possession certain other money to a large amount, to wit, to the amount of ten pounds, for and in the name and on the account of the said C. D., his master as aforesaid, and the said last-mentioned money then and there

fraudulently and feloniously did embezzle: And so, "*&c. as in the first count, to the end. It may sometimes be prudent, under circumstances, to add a count for larceny by the prisoner as clerk or servant to the prosecutor, and a count for simple larceny. See the note at the end of the indictment, ante, p.* 178.

The venue must be laid in the county in which the embezzlement took place, if that be known. But in the absence of express evidence upon the subject, the venue may be laid, either in the county where the prisoner received the money, or (perhaps more properly) in the county in which he ought to have accounted for it to his master, and did not. 1 *Arch. P. A.* 411. *and see the cases there cited.*

Formerly the money, &c. embezzled must have been described specifically, as in larceny; but by 7 & 8 *G.* 4, *c.* 29, *s.* 48, except in the case of an embezzlement of a "chattel," that is to say, in all cases where money, bank notes, bills of exchange, and all other securities for money coming under the denomination of "valuable securities," (*see Id. s.* 5,) are embezzled, it is sufficient to describe them in the indictment as "money," without stating any particular species of coin or valuable security. Nor is it necessary to state the exact amount or value of the thing embezzled. Nor is it necessary or usual to state from whom the money was received. Also, it is not actually necessary that the indictment should state that the prisoner "feloniously" embezzled the property, if the conclusion of the indictment state that he "feloniously" stole it. *R.* v. *Crighton, R. & Ry.* 62. It is usual, however, and more prudent, to use the word "feloniously" in both places.

Felony, transportation for not more than 14 *nor less than* 7 *years; or imprisonment, with or without hard labour, for not more than* 3 *years, and (if the Court think fit) whipping.* 7 & 8 G. 4, c. 29, s. 47.

Evidence.

To prove this indictment, the prosecutor must prove:

1. That the prisoner was "clerk or servant, or person employed for the purpose or in the capacity of clerk or servant" to the prosecutor. A female servant is within the meaning of the Act. *R.* v. *Elizabeth Smith, R. & Ry.* 267. So is an apprentice, although under age. *R.* v. *Wm. Mellish, R. & Ry.* 80. And it is not material whether the servant is paid by certain wages, or by a share of the profits arising from his labour. And therefore where, upon an indictment for embezzlement, it appeared that the prisoner was employed by the prosecutor, as master of one of his ships, to take coals from his colliery and sell them, and he was to have a certain portion of the profits (after deducting the price of the coals at the colliery), for his labour; he took a cargo of coals, sold them, received the price, and absconded

with it: a majority of the judges held that he was a servant, within the meaning of the Act. *R.* v. *John Hartley*, *R. & Ry.* 139. So, where the prisoner was employed by the prosecutors as traveller, to take orders for goods and collect money for them from their customers, and was paid by a per centage upon the amount of the orders he obtained for them; he did not live with them, or act in their counting-house; he paid his own expenses on his journies, and he was employed as traveller by several other houses besides: the judges held that he was a clerk to the prosecutor, within the meaning of the Act. *R.* v. *Wm. Carr*, *R. & Ry.* 198. *and see R.* v. *Hoggins*, *infra*. Where the prisoner was employed by the overseers of a township, as their accountant and treasurer, and he received and paid all money receivable or payable on their account; in the course of which employment he received a sum of money on account of the overseers, and embezzled it: the judges held that he was a clerk and servant within the meaning of the Act. *R.* v. *John Squire*, *R. & Ry.* 349. *and see R.* v. *Bedcall*, *Ry. & M.* 15. It is immaterial whether the employment be permanent, or occasional only. And therefore where a farmer, having beasts at Smithfield, of which the prisoner had the keeping as drover, sent the prisoner to deliver a cow to a purchaser and to receive the money for it, and the prisoner received and embezzled it: the judges held that the prisoner was a servant within the Act. *R.* v. *Hughes*, *Ry. & M.* 370. So, where it appeared that the prisoner had applied to the prosecutor for employment, who agreed to let him carry out parcels and go of messages when he should have nothing else to do, for which the prosecutor was to pay him what he should think fit; the prosecutor gave him an order, on which he was to receive 2*l.* for him; he received it and embezzled it: the judges held him to be a servant to the prosecutor, within the meaning of the Act. *R.* v. *Wm. Spencer*, *R. & Ry.* 299. *and see R.* v. *Thomas Smith*, *infra*. But, in a similar case, where the prosecutor had sent the prisoner with a check to a banker's for payment, and he received the money and embezzled it, it appeared that although the prisoner had been employed by the prosecutor, sometimes as a regular labourer, sometimes as a roundsman for a day at a time, and had on several occasions been sent to receive the amount of checks at the banker's, he was not at the time in question in the prosecutor's employment, but was to receive 6*d.* for going to the banker's: Parke, J. (after consulting Taunton, J.) held that he was not a clerk or servant within the meaning of the Act. *R.* v. *Freeman*, 5 *Car. & P.* 534. So, where the clerk of a chapelry was indicted for embezzling money collected by him from the communicants on Sacrament Sunday, and which was for the relief of the poor; and the indictment stated him in one count to be the servant of the clergyman, and in another of the chapel-wardens: the judges held that he could

not be deemed the servant of either. *R.* v. *Burton*, *R. & M.* 237. Where the master of a charity school was sent by the treasurer, who was also one of the committee, for 15*l.* which the Ironmongers' Company had given to the charity, and he received and embezzled the money; but it was not the duty of the schoolmaster to receive money on account of the charity, that being entrusted to the collector only: the judges held that he could not be deemed clerk or servant either to the treasurer or the committee. *R.* v. *Nettleton*, *Ry. & M.* 259. And even where the party is in fact clerk or servant to the prosecutor, yet if he was not authorized to receive money, &c. on his account, he will not be deemed a clerk or servant within the meaning of the statute; and therefore where a customer paid some money to a carrier's warehouse clerk, who was not authorized to receive it, that duty being entrusted to the collecting clerk only, and the warehouse-clerk embezzled it: the judges held that he was not a clerk or servant within the meaning of the Act. *R.* v. *Thorley*, *Ry. & M.* 343.

2. That he received or took into his possession the money, &c. for or in the name or on the account of his master, by virtue of his employment as such clerk or servant. That he received it, is usually proved by the person who gave it to him, or by his own admission. If chattels be specified in the indictment as having been received by the prisoner, the things described, or part of them, must be proved in the same way as in larceny; but if the indictment state a receipt and embezzlement of "money" merely, then the prosecutor may give in evidence a receipt of any species of coin, bank notes, bills, &c. or a receipt of a certain amount, without specifying any particular species of coin or valuable security. *See* 7 & 8 *G.* 4, *c.* 29, *s.* 48, *ante*, *p.* 179. And a variance between the indictment and evidence as to the amount received, is immaterial. *R.* v. *Carson*, *R. & Ry.* 303. According to the statute, (*s.* 47,) the prisoner shall be deemed guilty of the offence, although the "chattel, money, or security was not received into the possession of such master, otherwise than by the actual possession of his clerk or servant, or other person so employed." Where the prosecutor gave marked money to a friend, with directions to buy some article with it at the prosecutor's shop; and he accordingly bought the article from the prisoner, who was the prosecutor's shopman, and paid him with the marked money, which the prisoner received and embezzled: it was objected for the prisoner, that as the money had been in the possession of the master, and might be considered as the master's at the time that the prisoner received it, this case did not come within the statute, but was a larceny at common law; but the judges held it to be a case within the statute, and that an indictment at common law would

not lie for it. *R.* v. *Wm. Headge*, *R. & Ry.* 160. The judges in the last case, also, seemed to be of opinion that the statute did not apply to the cases which amount to larceny at common law. *Id.* And, therefore, if a clerk or servant, instead of receiving the money, &c. from a third person on account of his master, take it out of his master's stock, &c. he should be indicted for the larceny. As for instance, where the prisoner, who was clerk to the prosecutor, received from another of his clerks 20*s.* of his master's money to pay for an advertisement, and he paid only 10*s.*, charged 20*s.*, and appropriated the other 10*s.* to his own use: the judges held that he could not be convicted for this, as for embezzlement, as the money had been in the prosecutor's possession by the hands of his other clerk. *R.* v. *Murray*, *Ry. & M.* 276.

That he received it for, or in the name of, or on the account of, his master, the jury may infer from the circumstances of the case. Upon an indictment for embezzlement, it appeared that the prisoner worked for the prosecutors, who were turners; that it was part of his duty to receive orders for jobs, to take the materials from his master's stock and work them up, to deliver out the articles and receive the money for them, and to pay the whole of the money received to his masters; and every week he received for his labour a certain proportion of the money received for the articles made by him: in his character of servant to the prosecutors, he received an order for six dozen of coffee-pot handles, he took the wood from his masters' stock, he turned the handles on their premises and used their machinery, he delivered them, received the price, concealed the transaction, and kept the whole of the money, his own share of it being only about a third: the prisoner was convicted; but it being doubted whether this was not rather a larceny of the materials, than a case within the meaning of this Act, the matter was submitted to the judges; and they unanimously agreed that the conviction was correct. *R.* v. *John Hoggins*, *R. & Ry.* 145. Whether the case of a servant receiving money from the master, and embezzling it, be within the meaning of the Act, was a question submitted to the judges in *R.* v. *Elisabeth Smith*, *R. & Ry.* 267; but no opinion was delivered upon it, the case being decided upon another ground. Whether the money, &c. embezzled was really due to the master or not, whether he could have recovered it, or had a right in law to receive it, is immaterial, if the servant received it for him, and in his name, and on his account. *Resolved by the judges, in Beacall's case*, 1 *Car. & P.* 454.

That he received it by virtue of his employment as clerk or servant, or person employed in that capacity, may also be inferred from the circumstances of the case, and from the evidence given as to the nature of his employment. Where the lessees of the tolls of a turnpike road, hired the prisoner to collect at a

particular gate, at weekly wages, and this was his sole employment; on a particular occasion, one of his masters desired him to receive from a collector at another gate the money collected by him, which he did, and embezzled it: a majority of the judges held, that although the receipt of this money by the prisoner was out of his ordinary employment, yet as he was servant to the lessees, and in his character of servant to them had submitted to be employed by them to receive the money in question, and had received it by virtue of his being so employed, the case was within the statute. *R.* v. *Thomas Smith*, *R.* & *Ry.* 516. And in another case, where, upon an indictment for embezzling money of the prosecutors, who were carcass butchers, it appeared to be the duty of the prisoner every evening to receive from the porters the money they received in the course of the day for the meat sold, and to pay it over the next morning to the collecting clerk, but he was not expected in the course of his employment to receive money from the customers themselves; the prisoner called upon one of his master's customers for the amount of his account, received it, and embezzled it: and the judges were of opinion, that as the prisoner was entrusted to receive from the porters such monies as they collected from the customers in the course of the day, the receiving of it immediately from the customers, instead of receiving it through the medium of the porters, was such a receipt of money "by virtue of his employment," as the Act meant to protect. *R.* v. *Wm. Beechey*, *R.* & *R.* 319. But where it was proved to be the duty of the prisoner, a butcher's apprentice, to call daily on certain of his master's customers for orders, but it did not appear that he had ever been employed to receive money; and he received from one of the customers the amount of his bill, and embezzled it: being convicted, and his case being referred to the judges, they were of opinion, that as it was not proved that the prisoner was ever employed to receive money for his master, and it did not therefore appear that he received the money in question by virtue of his employment, the conviction was wrong. *R.* v. *Wm. Mellish*, *R.* & *Ry.* 80. So, where a customer paid some money to a carrier's warehouse clerk, who was not authorized to receive it, that duty being entrusted to the collecting clerk only, and the warehouse clerk embezzled it, the judges held that it was not a case within the statute. *R.* v. *Thorley*, *Ry.* & *M.* 343.

3. That he embezzled the money, &c. received by him, or some part thereof.—The usual evidence given of the embezzlement is, that having received the money, &c. he denied the receipt of it, or did not account to his master for it when he ought, or accounted for other monies received by him at the same time or after, and not for it; from which the jury may fairly infer that the prisoner either actually disposed of the money to his own use,

or withheld it from his master, with the intent so to dispose of it, which seems to be the meaning of the word "embezzle." The words in the former statute upon this subject, were, "embezzle, secrete, or make away with;" the words "secrete or make away with" are omitted in the present statute, as meaning, I presume, the same thing with the word "embezzle." Where it was proved that the prosecutor had given 5*l.* 8*s.* to the prisoner, his housekeeper, to pay the overseer of the poor for poor-rates, and that the overseer had never received that or any other sum from the prisoner: the judges held that this was not sufficient evidence of the prisoner having embezzled the money; the fact of not having paid the money over to the collector, was not evidence of actual embezzlement, it only negatived the application of the money in the manner directed. *R.* v. *Elizabeth Smith*, *R. & Ry.* 267. So, where the prisoner charged himself in his master's books with money received by him, but did not pay it over to the master, Vaughan, B. held this not to be embezzlement. *R.* v. *Hodgson*, 3 *Car. & P.* 422. Where the prisoner, a clerk to the prosecutors, received on their account a sum of 18*l.* in one pound notes, and entered in their books the sum of 12*l.* only; he also received on the same day the sum of 104*l.* 2*s.* and entered that correctly; and in the evening he accounted with the prosecutors for 116*l.* 2*s.* only: being indicted for embezzling 6*l.*, the difference between the 18*l.* received, and the 12*l.* accounted for, it was objected on his behalf, that the 116*l.* paid by him to the prosecutors might have included every one of the notes of which the sum of 18*l.* consisted, and if so, he could not be considered as having embezzled any of those notes; he was however convicted, but the point was reserved for the opinion of the judges; and a great majority of the judges held that the conviction was right, and that he was guilty of an embezzlement from the time of his making a false entry. *R.* v. *John Hall*, *R. & R.* 463. The difficulty suggested in this case, of proving an embezzlement of the identical notes or coin received by the offender, is now however wholly obviated by the 48th section of the present statute, as already mentioned, *ante*, *p.* 179.

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10. *Indictment for obtaining Goods, &c. by false pretences.*

Same as the form ante, p. 156, *to the words*] in the county aforesaid, unlawfully did falsely pretend to C. D., that [he, the said A. B. was sent to him the said C. D. by E. F. one of his neighbours to request the loan of five pounds, and that he the said E. F. would repay the same to him the said C. D. on the next following day;] by which said false pretence, the said A. B. then and there unlawfully did obtain from the said C. D. [five pieces of the current gold coin of the realm called sovereigns,] of the monies, goods, and chattels of him the said C. D., with intent

then and there to cheat and defraud the said C. D. of the same: whereas, in truth and in fact [he the said A. B. was not sent to him the said C. D. by the said E. F., to request the loan of five pounds, or any other sum of money; and whereas in truth and in fact the said E. F. did not say, or send the said A. B. to the said C. D. to say, that he would repay the same to him the said C. D. on the next following day,] as he the said A. B. did then and there so falsely pretend to the said C. D. as aforesaid: to the great damage of the said C. D., to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity. *See* 1 *Arch. P. A.* 428.

The indictment must specify the pretences, *R.* v. *Munot*, 2 *Str.* 1127. *R.* v. *Mason*, 2 *T. R.* 581, and must negative them by special averment, *R.* v. *Perrot*, 2 *M. & S.* 379, as in the above precedent.

Misdemeanor, transportation for 7 years; or fine, or imprisonment, with or without hard labour, or both. 7 & 8 G. 4, c. 29, s. 53.

Evidence.

To maintain this indictment, the prosecutor must prove:

1. The pretence.—It must be a statement of some pretended existing fact, and made for the purpose of inducing the prosecutor to part with his property. Where four were indicted for falsely pretending that one of them had made a bet with a colonel at Bath of 500 guineas, that another of them would run ten miles within the hour, and thereby obtaining 20 guineas from the prosecutor as part of the pretended stakes: it was objected that as the pretended bet related to a future event, it was not within the Act; but the Court held otherwise: it was also objected, that the indictment was not sufficiently certain, merely stating "a colonel at Bath," without naming him; but the Court held it sufficient, for probably he was not named by the defendants: it was also objected that the person alone who actually uttered the false pretences could be convicted, and that the others ought to have been acquitted; but the Court held that as all were present, and acting in the deceit, they were all equally guilty. *Young et al.* v. *Rex in error*, 3 *T. R.* 98. But where a man induced a butcher to send him meat, upon pretence that he would pay for it on delivery: the judges held that this was not a pretence within the meaning of the statute; it was merely a promise for future conduct. *R.* v. *Moses Goodhall*, *R. & Ry.* 461. So, where the prisoner, a parish pauper, being urged by the overseer to go to work, excused himself by saying that he had no shoes, and the overseer therefore gave him a pair; whereas, in fact, he had at that time two pair of shoes which he had before obtained from the parish: the judges held that

this was not a pretence within the meaning of the Act; it was rather a false excuse for not working, than a false pretence to obtain goods. *R.* v. *Thomas Wakeling*, *R. & Ry.* 504. It is not necessary however that the pretence should be in words; there may be a sufficient false pretence within the meaning of the Act, by the acts and conduct of the party, without any verbal representations of a false or fraudulent nature. Thus, where the prisoner, in payment of some small articles, tendered in payment a forged promissory note for 10*s.* 6*d.* and received the change; and being indicted as for obtaining the goods and money under false pretences, (notes under 20*s.* being declared void by statute, and not the subject of a prosecution for forgery,) it was objected that here there was no representation made by the prisoner, no false suggestion of a fact, the fraud being in the fabrication of the instrument, and not in the representation of the prisoner: but the judge being of opinion that the uttering of the note as a genuine instrument, was tantamount to a representation that it was so, the prisoner was convicted; and a majority of the judges afterwards held the conviction to be right. *R.* v. *Henry Freeth*, *R. & Ry.* 127. So, where a man of the name of Story, presented a Post Office order, payable to one Storer, to the post-master for payment, and being desired to write his name upon it, wrote his real name, and was paid: being indicted for obtaining the money under a false pretence, it was objected, that as the prisoner had merely presented the order for payment, without making any untrue declaration or assertion, it was not a case within the meaning of the statute; but the judges held, that by presenting the order for payment, and signing his name at the Post Office, he had represented himself to the post-master as the person named in the order, and that such representation was clearly a pretence within the meaning of the Act. *R.* v. *John Story*, *R. & Ry.* 81. Where the prisoner passed a note of a country bank, which he knew had stopped payment, and was indicted as for obtaining money under false pretences; it appearing that one of the partners was solvent, Gaselee, J. held that the prisoner could not be convicted. *R.* v. *Spencer*, 3 *Car. & P.* 420. Where the prisoner sold to the prosecutor a reversionary interest he had in some money left by his grandfather, and the prosecutor took a regular assignment of it, with the usual covenant for title; and it appeared that he had previously sold the same interest to another: being indicted for this, as for obtaining money by false pretences, Littledale, J. held that he could not be convicted, and that the prosecutor's only remedy was by civil action on the covenant; if this were an offence within the Act, every breach of warranty or false assertion at the time of making a bargain might be treated as such, and the party be transported. *R.* v. *Codrington*, 1 *Car. & P.* 661. Where the prisoner obtained

goods by means of a forged order or request note, Taunton, J. held that he could not be indicted for obtaining them by false pretences, but should have been indicted for the forgery under stat. 11 G. 4, & 1 W. 4, c. 66. *R.* v. *Evans*, 5 *Car. & P.* 553. *See* 2 *Arch. P. A.* 275.

Care must be taken that there be no material variance between the pretence laid and that proved; if there be any doubt upon the subject, it should be stated differently in different counts, to correspond with the proof. Where the false pretence stated was a paper, which according to the indictment purported to be an order for the payment of 100*l.*, and the paper when produced appeared not to be directed to any person: the judges held, that as the paper did not purport to be an order for the payment of money, as stated in the indictment, the prisoner ought not to be convicted. *R.* v. *Cartwright*, *R. & Ry.* 106. But, where the pretence or any part of it is in writing or printed, and there is any variance between the writing and the statement of it in the indictment, if the trial be before a Court of oyer and terminer and gaol delivery, or any judge sitting at *nisi prius*, such Court or judge may order the indictment to be amended, and the trial may then proceed. 9 *G.* 4, *c.* 15, *ante*, *p.* 127. It is not necessary, however, that the whole of the pretence charged should be proved; proof of part of the pretence, and that the money, &c. was obtained by such part, is sufficient. *R.* v. *Wm. Humphrey Hill*, *R. & Ry.* 190. If the false pretence be a writing, and be lost before the trial, the prosecutor will be allowed to give secondary evidence of it. *R.* v. *Chadwick*, 6 *Car. & P.* 181.

2. That the prisoner obtained the five sovereigns, by means of the representation so made by him. *Vide Wakeling's case*, *ante*, *p.* 186. Where the prisoner, by lodging with his banker in the country, a bill drawn on a person in London, which he represented as good and would be accepted, but which in fact never was accepted afterwards, was allowed by his banker to draw checks in favour of other persons, but it appeared that he never received any money upon them himself: the judges held that it was not an offence within the meaning of the statute. *R.* v. *Wavell*, *R. & M.* 224. In strictness it should appear that the prosecutor parted not only with the possession of the money or goods, &c., but with the right of property also; for if he parted with the possession only, and not the right of property, the offence, we have seen, (*ante*, *p.* 158,) would amount to larceny. But by 7 & 8 G. 4, c. 29, s. 53, it is provided that if upon the trial of any person for this offence, "it shall be proved that he obtained the property in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted." Where the prisoner was indicted for obtaining,

under false pretences, a certain order for the payment of 2*l.*, and the order appeared to be a check drawn by the prosecutor, the Earl of Brecknock upon his bankers, payable to D. Francis Jones, without saying "or order" or "or bearer:" the judges held that this required a stamp under stat. 55 G. 3, c. 184; and as it was not stamped, it was not a valuable security within the meaning of the statute. *R.* v. *Wm. Yates, alias Daniel Frederick Jones, R. & M.* 170.

3. That the pretence was false.

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11. *Indictment against a Receiver of Stolen Goods, as Accessory, together with the Principal.*

Draw the indictment against the principal felon, to the words] "against the peace of our Lord the King, his crown and dignity." And the jurors aforesaid upon their oath aforesaid do further present, that E. F., late of the parish aforesaid in the county aforesaid, labourer, on the day and year aforesaid, with force and arms, at the parish aforesaid in the county aforesaid, [six brass candlesticks of the value of six shillings, and four pewter dishes of the value of four shillings, being parcel of] the goods and chattels above mentioned, so as aforesaid feloniously stolen, taken and carried away, feloniously did receive, he the said E. F. then and there well knowing the said goods and chattels [last mentioned] to have been feloniously stolen, taken and carried away, as aforesaid: against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity. *See* 1 *Arch. P. A.* 434.

Felony, transportation for not more than 14 *years, nor less than* 7*; or imprisonment, with or without hard labour, for not more than* 3 *years, and (if the Court think fit) whipping.* 7 & 8 G. 4, c. 29, s. 54. and see s. 55—57.

Evidence.

To maintain this indictment, the prosecutor must prove:

1. The larceny, as in ordinary cases.

2. That the prisoner received the goods stolen, or some of them. That they were found in his possession, will be sufficient evidence of this fact, if nothing appear from which a presumption would arise that they were stolen by him. Where goods stolen were shortly afterwards found concealed in an old engine-house, and the place being watched, the prisoners were observed to go there and take them away; the prisoners being indicted as receivers, and there being no evidence of the goods having been stolen by any of the prisoners, Patteson, J., after remarking that this seemed to be evidence more of a stealing than receiving, told

the jury, that if they were of opinion that the prisoners stole the goods, they must be acquitted on the present indictment; and the jury finding that the prisoners stole them, they were acquitted accordingly. *R.* v. *Dursley et al.* 6 *Car. & P.* 399. Where one of two prisoners was indicted for stealing six bank notes of 100*l.* each, and the other prisoner for receiving them; and it appeared that the one, after stealing them, got them changed for 20*l.* notes, some of which the other received: it was holden that the latter could not be convicted, for he did not receive the notes that were stolen. *R.* v. *James and George Walkley*, 4 *Car. & P.* 132. Upon an indictment against Eliza and Sophia Archer for burglary and larceny, and against John Archer and Mary his wife, and two of their children, for receiving the goods stolen, knowing them to be stolen: John Archer and Mary his wife, being found guilty of receiving, &c., the judges held that, as the charge against the husband and wife was joint, and it had not been left to the jury to say whether she had received the goods in the absence of her husband, the conviction of the wife could not be supported, even although it appeared that she had been more active in the matter than he. *R.* v. *Elis. Archer et al. Ry. & M.* 143.

3. That at the time he received the goods, he knew that they had been stolen.—This is proved, by giving evidence of circumstances, from which the jury may fairly infer the guilty knowledge. In an indictment against Henry Dunn for stealing, and against Martha Smith for receiving, a variety of articles, the property of Dunn's master; it appeared probable that Dunn stole these several articles at different times, but not impossible that he might not have stolen them all at the same time; it appeared however that Smith received them at several times: at the trial, it was objected for Dunn, that the prosecutor should make his election as to which of the articles stolen he would proceed; and for Smith, that not only the prosecutor should so elect, but that he should not give evidence of her receipt of other articles as evidence of her knowledge that they had been stolen: the judge however held, that as it was not impossible that Dunn had stolen all the articles at the same time, he would not put the prosecutor to his election as to him; and as to Smith, that the prosecutor must elect as to the receipt of what articles he would prosecute, but that other instances of her receiving might be given in evidence, to prove her guilty knowledge; and the judges held the decision to be right. *R.* v. *Dunn & Smith, Ry. & M.* 146.

12. *Indictment against a Receiver of Stolen Goods, as for a substantive Felony.*

Same as the form ante, p. 156, *to the words*] in the county aforesaid, one silver tankard of the value of six pounds, of the goods and chattels of C. D., by one E. F. [*or* "by a certain ill-disposed person to the jurors aforesaid unknown] then lately before feloniously stolen, taken and carried away, of the said E. F. [*or* "the same ill-disposed person"] feloniously did receive, he the said A. B. then and there well knowing the said goods and chattels to have been feloniously stolen, taken and carried away: against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity. *The venue may be laid in the county in which the prisoner received the goods, or in the county in which he at any time had them, or in the county in which the principal might by law be tried.* 7 & 8 G. 4, c. 29, s. 56.

Where an indictment, in one count, charged the prisoner with a burglary and larceny of certain goods, and in another count with receiving the goods knowing them to have been stolen, and the prisoner was convicted on the second count: the judges held that the counts might legally be joined, but they agreed that thereafter the clerks of assize should be instructed not to join a count for larceny and a count for receiving, in the same indictment. R. *v.* Galloway, Ry. & M. 234. *And in a subsequent case,* R. *v.* Madden, Ry. & M. 277, *the judges held that the above rule laid down in Galloway's case should be adhered to. In a similar case, Vaughan, B. put the prosecutor to his election upon which of the two counts he would prosecute.* R. *v.* Flower, 3 Car. & P. 413. *Where the indictment stated the larceny to have been committed by a certain "evil disposed person," without saying "to the jurors aforesaid unknown," Tindal, C. J. held it sufficient; the offence was not the receiving of the stolen goods from any particular person, but receiving them knowing them to be stolen.* R. *v.* Jervis, 6 Car. & P. 156.

Felony, same punishment as in the last case, ante, p. 189.

Evidence.

Same as in the last case. Where the principal felon made a confession before the magistrate, in the presence of the prisoner, not only of his own guilt, but also of matters affecting the prisoner as receiver, the judge at the trial received evidence of the confession, as to the principal's guilt, in proof of the larceny, but not what she said with respect to the prisoner: the prisoner being convicted, the judges held the conviction to be wrong, as the confession of the principal was not admissible in evidence against the receiver for any purpose; and many of the judges held, that even if the principal were convicted, and the indict-

ment against the receiver stated the guilt only of the principal and not the conviction, the conviction could not be received in evidence to prove it, but it must be proved by other means. *R.* v. *Turner*, *R.* & *M.* 347. But if the indictment state the conviction of the principal, the record of the conviction, or an examined copy of it, is clearly evidence to prove it; *see* *R.* v. *Baldwin*, *R.* & *R.* 241; and in *R.* v. *Blick*, (4 *Car.* & *P.* 377,) this was allowed by Bosanquet, J., even although it appeared to be a conviction upon a plea of guilty.

Where the larceny is stated to have been committed by a person unknown, proof that it was done by J. S. will not support the indictment. *R.* v. *Walker*, 3 *Camp.* 264. But where it was so stated, the judges held it to be no objection that the grand jury had at the same assizes found a bill for larceny against J. S. *R.* v. *Bush*, *R.* & *Ry.* 372.

Where the indictment charged two prisoners jointly with receiving property, and it appeared in evidence that one received it first, and then gave it to the other, both knowing it to be stolen: the judges held that it did not support the indictment; to support a joint charge of receiving, a joint receipt must be proved. *R.* v. *M.* & *J. Messingham*, *R.* & *M.* 257.

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13. *Indictment for a subsequent Felony, after a previous Conviction for Felony.*

Berkshire to wit: The jurors for our Lord the King upon their oath present, that heretofore, to wit, [at the General Quarter Sessions of the Peace, holden at ——, in and for the county of ——,] on the —— day of ——, in the sixth year of the reign of our Sovereign Lord William the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland King, defender of the faith, A. B. was then and there convicted of felony; and which said conviction is still in its full force, strength, and effect, and not in the least reversed, annulled, or made void: And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B. late of the parish of ——, in the county of Berks aforesaid, afterwards, on the first day of August, in the seventh year of the reign aforesaid, with force and arms, at the parish last aforesaid in the county of Berks aforesaid, [ten pieces of the current gold coin of the realm, called sovereigns, of the value of ten pounds, one woollen cloth coat of the value of ten shillings, and one linen shirt of the value of five shillings], of the monies, goods, and chattels of one C. D., then and there being found, feloniously did steal, take and carry away:—[*describing the subsequent felony, as in ordinary cases:*] against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity.

Felony: transportation for life or not less than 7 years; or imprisonment for not more than 4 years, and (if the Court think fit) whipping. 7 & 8 G. 4, c. 28, s. 11.

Evidence.

To maintain this indictment, the prosecutor must prove:

1. The felony for which the prisoner is now indicted, as in ordinary cases.

2. The former conviction, by producing a certificate of it, signed by the clerk of the Court or other officer having the custody of the records of the Court where the prisoner was first convicted, or by his deputy, as directed by stat. 7 & 8 G. 4, c. 28. s. 11, (*see* 1 *Arch. P. A.* 264,) and which is evidence without proof of signature, &c. Formerly this evidence of the former conviction was not put in, until the jury had first decided upon the prisoner's guilt as to the second felony; but the judges have since holden that it should be given in evidence, before the prisoner is called upon for his defence. *Per Park, J. in R. v. Jones*, 6 *Car. & P.* 391.

3. The identity of the prisoner, as the person before convicted; which may be proved by the gaoler or any other person who was present at his trial.

If you fail in proving the former conviction, or the identity of the prisoner, it should seem that the jury may, upon this indictment, find the prisoner guilty of the subsequent felony alone.

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14. *Indictment for uttering Counterfeit Coin.*

Same as the form ante, p. 156, *to the words*] in the county aforesaid, one piece of false and counterfeit coin, apparently intended to resemble and pass for ["*resembling or apparently intended to resemble or pass for*"] certain of the King's current gold coin called a sovereign, as and for a good, legal, and current gold coin called a sovereign as aforesaid, unlawfully did tender and utter ["*tender, utter, or put off*"] to one C. D., he the said A. B., at the time he so tendered and uttered the said piece of false and counterfeit coin, then and there well knowing the same to be false and counterfeit: against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity. *If the prisoner merely offered the base coin and was detected, the indictment may be in the above form; but if he succeeded in passing it, then you may state that he* "did tender, utter, and put off," &c.

Misdemeanor: imprisonment, with or without hard labour or

solitary confinement, for not more than one year. 2 W. 4, c. 34, s. 7, 19.

Evidence.

To maintain this indictment, the prosecutor must prove:—

1. The tendering or uttering of the coin in question by the prisoner, or that he was present, aiding and abetting at the time. See several cases as to the uttering of forged bank notes and other forgeries, 2 *Arch. P. A.* 253, 246, which may in a great measure be deemed authorities upon this subject. What is vulgarly termed "ringing the changes," that is, where good money is given to a person in payment, and he returns instead of it a piece of counterfeit money, pretending it to be the same that was given to him, and declining to take it on account of its being bad: this has been holden to be an uttering, within the meaning of the statute. *R.* v. *Franks*, 2 *Leach*, 736.

2. Produce the counterfeit coin, and prove it to be counterfeit. It is not necessary to prove this by any officer of the Mint, but it may be proved by any other credible witness. 2 *W.* 4, *c.* 34, *s.* 17. In the country, at the assizes and sessions, silversmiths are usually the witnesses called for this purpose. And it may be necessary to remark, that genuine coin, gilt or silvered, &c., so as to make it appear as coin of a higher denomination, is to be deemed counterfeit coin, within the section of the statute on which this indictment is drawn. 2 *W.* 4, *c.* 34, *s.* 21.

3. That the prisoner knew the coin to be counterfeit, at the time he uttered it. This is proved, by proving circumstances from which the jury may presume it; *see ante, p.* 128; such as his having in his possession other base coin at the time; his having passed other base money about the same time, or the like. *See* 2 *Arch. P. A.* 247, *&c.*

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15. *Indictment for an Assault and Battery.*

Same as the form, ante, p. 156, *to the words*] in the county aforesaid, in and upon C. D., in the peace of God and of our Lord the King then and there being, with force and arms did make an assault, and him the said C. D. then and there did beat, wound, and ill-treat, and other wrongs to the said C. D. then and there did: to the great damage of the said C. D., and against the peace of our Lord the King, his crown and dignity.

Misdemeanor: fine or imprisonment, or both. C. L.

Evidence.

To maintain this indictment, the prosecutor must prove that the defendant assaulted or beat him.

An assault is an attempt or offer, with force and violence, to do a corporal hurt to another: as by striking at him, with or without a weapon; or presenting a gun at him, at a distance to which the gun will carry; or pointing a pitch-fork at him, whilst standing within the reach of it; or holding up one's fist at him; or by any other such act done in an angry or threatening manner. 1 *Hawk. c.* 62, *s.* 1. But no words whatever can amount to an assault. *Id.*

A battery is an injury, however small, actually done to the person of another, in an angry, revengeful, rude or insolent manner: as by spitting in his face, or in any way touching him in anger, violently jostling him out of the way, or the like. 1 *Hawk. c.* 62. *s.* 2. So, where it appeared that a schoolmaster took most indecent liberties (not amounting to an attempt to commit a rape,) with the person of his female scholar, without her consent, although she did not actually offer resistance: the judges held this to be fully sufficient to support a count for a common assault and battery. *R.* v. *John Nichol, R. & Ry.* 130.

But it is no battery, to lay one's hand gently on another, against whom an officer has a warrant, and to tell the officer this is the man he seeks; 1 *Hawk. c.* 62, *s.* 2; or to lay one's hand on a man, if it be necessary to do so, in order to serve him with process. *Harrison* v. *Hodgson*, 10 *B. & C.* 445. So, if an officer, having a warrant against a man, who will not suffer himself to be arrested, beat or wound him in an attempt to take him; or if a parent in a reasonable manner chastise his child, or a master his servant, or a schoolmaster his scholar, or a gaoler his prisoner; or if one confine a friend who is insane, and bind or beat him, in such a manner as is proper in his circumstances; or if a man force a sword from one, who offers to kill another therewith; or if a man gently lay his hand upon another, and thereby stay him from inciting a dog against a third person; or if I beat one (without wounding him or throwing at him a dangerous weapon,) who wrongfully endeavours with violence to dispossess me of my land or goods, or the goods of another delivered to me for safe custody, and will not desist upon my laying my hand gently on him and disturbing him; or if a man beat, or (as some say) wound or maim one, who makes an assault upon him, or upon his wife, parent, child, or master, especially if it appear that he did all he could to avoid fighting before he gave the wound; or if a man fight with or beat one who attempts to kill a stranger: these and the like are not deemed breaches of the peace, 1 *Hawk. c.* 60, *s.* 23, and the defendant in such cases may justify the battery, by giving the special circumstances in evidence under the plea of not guilty. *Id. c.* 62, *s.* 3.

16. *Indictment for an Assault upon a Peace Officer or Revenue Officer, or upon any Person acting in his aid.*

Same as the form, ante, p. 156, *to the words*] in the county aforesaid, in and upon one C. D. (the said C. D. then being a peace officer, to wit, a constable of the said parish, and in the due execution of his duty as such constable then and there being) [*or* " the said C. D. then being a revenue officer, to wit, an officer of his said Majesty's Excise, and in the due execution of his duty as such officer of excise then and there being;" *or* " the said C. D. then and there acting in aid of one E. F., a peace" *or* " revenue officer, to wit, a ——, in the due execution of his duty as such —— then and there being"] did make an assault, and him the said C. D., so being in the execution of his said duty as aforesaid, then and there did beat, wound, and ill-treat; and other wrongs to the said C. D. then and there did: to the great damage of the said C. D., against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity. *Add a count for a common assault. See ante, p.* 194.

Misdemeanor: imprisonment, with or without hard labour, for not more than two years, and if the Court think fit, they may fine the offender, and require him to find sureties to keep the peace. 9 G. 4, c. 31, s. 25.

Evidence.

To maintain this indictment, the prosecutor must prove:

1. That he is a peace or revenue officer, as stated in the indictment, and was at the time in question in the due execution of his duty. It is not necessary to produce or prove his appointment; proving that he executes the office, will be sufficient. *See ante, p.* 136. Or, if the indictment be for an assault upon one who was acting in aid of such officer, prove that he was an officer, or acting as such, and in due execution of his duty, as above mentioned, and then prove that the prosecutor was acting in his aid.

2. That the prisoner assaulted him, whilst he was so acting in the execution of his duty. If the prosecutor fail in proving that he was thus acting at the time of the assault, the prisoner may still be found guilty on the second count of the indictment, for the common assault.

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17. *Indictment for an Assault, with intent to commit a Felony.*

Same as the form, ante, p. 156, *to the words*] in the county aforesaid, in and upon one C. D., in the peace of God and our said Lord the King then and there being, unlawfully did make

an assault, and her the said C. D. then and there did beat, wound, and ill-treat, with intent [" *here state the felony intended; as for instance: with intent*" her the said C. D., then and there, violently and against her will, feloniously to ravish and carnally know." *See* 2 *Arch. P. A.* 150;] and other wrongs to the said C. D. then and there did: to the great damage of the said C.D., against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity. *Add a count for a common assault.*

Misdemeanor: imprisonment, with or without hard labour, for not more than 2 *years, and the Court may also fine the offender, and require him to find sureties for keeping the peace.* 9 G. 4, c. 31, s. 25.

Evidence.

To maintain this indictment, it is necessary to prove an attempt to commit the felony alleged to have been intended; it must appear to have been done under such circumstances, that if the attempt had succeeded, the prisoner would have been guilty of, and might be indicted for, the felony described. And the felony, so described and proved, must be an offence against the person of the party said to be assaulted; for an attempt to commit any other offence, is not in law an assault.

If you prove an assault, but fail in proving the intent, the party may still be convicted on the second count, as for a common assault. Where, upon an indictment against a schoolmaster, for an assault with intent to commit a rape upon one of his female scholars, with a second count for a common assault, it appeared from the evidence that he did not actually attempt to commit a rape, nor perhaps intend it, but he had taken most indecent liberties with the person of the girl, and without her consent, although she did not actually offer resistance: the judges were of opinion that the evidence was fully sufficient to support the count for a common assault, although not for the assault with intent to commit a rape. *R.* v. *John Nichol, R. & Ry.* 130. *See also R.* v. *Rosinski, Ry. & M.* 19. *R.* v. *Butler,* 6 *Car. & P.* 368.

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18. *Indictment for a Riot and Assault, &c.*

Berkshire to wit: The jurors for our Lord the King upon their oath present, that A. B., late of the parish of —— in the county of Berks aforesaid, labourer, C. D. late of the same place, yeoman, E. F. late of the same place, carpenter, and G. H. late of the same place, blacksmith, together with divers other evil-disposed persons to the jurors aforesaid unknown, on the first day of October, in the seventh year of the reign of our Sovereign Lord William the Fourth, by the grace of God of the United

Kingdom of Great Britain and Ireland King, defender of the faith, with force and arms, to wit, with sticks, staves, and other offensive weapons, at the parish aforesaid, in the county aforesaid, unlawfully, riotously, routously, and tumultuously did assemble and gather together, to disturb the peace of our said Lord the King; and being so assembled and gathered together as aforesaid, in and upon one J. K., in the peace of God and of our Lord the King then and there being, unlawfully, riotously, and routously did make an assault, and him the said J. K. then and there unlawfully, riotously, and routously did beat, wound, and ill-treat, and other wrongs to the said J. K. unlawfully, riotously, and routously did: and also whilst so assembled and gathered together, did then and there unlawfully, riotously, routously, violently, and tumultuously make a great noise, riot, tumult, and disturbance, and did then and there unlawfully, riotously, routously and tumultuously stay and continue making such noise, riot, tumult, and disturbance for a long space of time, to wit, for the space of [two] hours then next following, to the great terror and disturbance, not only of the liege subjects of our Lord the King there being and residing, but of all other of the King's liege subjects then and there passing in and along the King's common highway there: in contempt of our said Lord the King and his laws, to the great damage of the said J. K., and against the peace of our Lord the King, his crown and dignity.

Misdemeanor: imprisonment, and (if the Court think fit) hard labour, 3 *G.* 4, *c.* 114; *or fine; or both.*

Evidence.

A riot is a tumultuous disturbance of the peace, by three persons or more assembling together of their own authority, with an intent mutually to assist one another against any one who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. 1 *Hawk. c.* 65, *s.* 1.

To maintain this indictment, therefore, the prosecutor must prove:

1. The assembly: that the defendants, or the defendants and others, to the number of three at the least, assembled together of their own authority. It is immaterial, however, whether a defendant was one of the party first assembled, or whether he joined that party afterwards during the progress of the riot, and took part in it; in either case he is equally guilty. 1 *Hawk. c.* 65, *s.* 3.

2. That they so assembled together, with intent to execute some enterprise of a private nature, and also mutually to assist

one another against any person who should oppose them in doing so. The intent in this, as in every other case, is proved, by proving facts from which the jury may presume it. The actually executing the enterprise charged in the indictment, is abundant proof of their previous intention to execute it. So, their intention mutually to assist each other, may be inferred either from their afterwards actually assisting each other, or from their exclamations or actions, &c. whilst so assembled. *See R. v. Hunt*, 3 *B. & Ald.* 566. And the injury or grievance complained of, and intended to be revenged or remedied by such an assembly, must relate to some private matter or quarrel only, such as the inclosing of lands in which the inhabitants of a particular town have a right of common, or gaining the possession of lands, the title to which is in dispute, or the like; for whereever the intention of such an assembly is to redress public grievances, as to pull down all inclosures generally, to reform religion, to remove evil counsellors from the King, &c., if they attempt to execute such their intentions with force, this would be a levying of war against the King, and high treason. 1 *Hawk. c.* 65, *s.* 6. Also, as to the act intended to be done, it is immaterial whether it be lawful or unlawful: as for instance, it is lawful to abate a nuisance, if done peaceably; but if three or more join in doing it in a violent and tumultuous manner, it is a riot; for the law will not suffer persons to seek redress of their private grievances, by such dangerous disturbances of the public peace. 1 *Hawk. c.* 65, *s.* 7.

It seems agreed, that if a number of persons, having met together at a fair or market, or any other lawful or innocent occasion, happen on a sudden quarrel to fall out, they are not guilty of a riot, but of a sudden affray only, of which none are guilty but those who actually engage in it, because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly, without any previous intention concerning it. 1 *Hawk. c.* 65, *s.* 3. Yet it is said, that if persons innocently assembled together, do afterwards, upon a dispute happening to arise among them, form themselves into parties, with promises of mutual assistance, and then make an affray, they are guilty of a riot, because, upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design. *Id.* However it seems clear, that if, in an assembly of persons met together on any lawful occasion, a sudden proposal should be started of going together in a body to pull down a house or inclosure, or to do any other act of violence, to the disturbance of the public peace, and such motion be agreed to, and executed accordingly, the persons concerned cannot but be rioters, because their associating themselves together for such a

new purpose, is no way extenuated by their having met at first upon another. 1 *Hawk. c.* 65, *s.* 3.

3. That they actually executed the enterprise intended: If not executed, the assembly would not amount in law to a riot, but to an unlawful assembly or rout only;—an unlawful assembly, where the enterprise is merely contemplated, but nothing further done for the purpose of carrying it into execution;—a rout, where the enterprise is not only contemplated, but the parties take some steps towards carrying it into execution; 1 *Hawk. c.* 65, *s.* 8, 9; it is a riot, only where what was contemplated is actually carried into execution. And the execution of such enterprise must be attended with such circumstances either of actual force or violence, or at least of an apparent tendency thereto, as are naturally calculated to strike terror into the people: as the show of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done *in terrorem populi.* 1 *Hawk. c.* 65, *s.* 5. *and see s.* 4. *See also R. v. Hughes,* 4 *Car. & P.* 373. *R. v. Cox et al. Id.* 538. And it seems that wherever three persons or more use force and violence in the execution of any design whatever, wherein the law does not allow the use of such force, all who are concerned therein are rioters. *Id. s.* 2. On the other hand, three or more persons may assemble, for the purpose of executing a wrongful act, and actually execute it, without being rioters, if they do it without threats or other circumstances of terror. *Id. s.* 5.

If you fail in proving the assault, the defendants may still be convicted of the riot and tumult charged in the indictment, if the facts warrant such a verdict. Or if you fail in proving that the act contemplated was actually carried into execution, the defendants it seems may be found guilty of an unlawful assembly. *R. v. Birt et al.* 5 *Car. & P.* 154.

If two only are convicted, no judgment can legally be given, unless the indictment charge them with having committed the offence together with other persons to the jury unknown; for unless three persons were concerned in it, it could be no riot. 2 *Hawk. c.* 47, *s.* 8. But where six were indicted, and two died before trial, two were acquitted, and the remaining two found guilty, it was holden sufficient; for as the jury found them guilty, it must be presumed that they committed the offence with one or both of the defendants who died, for otherwise they could not have been found guilty of a riot. *R. v. Scott & Hans,* 3 *Burr.* 1262.

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19. *Indictment for Forcible Entry.*

Berkshire to wit: The jurors for our Lord the King upon their oath present, that before and at the time of the committing of the offence hereinafter mentioned, one C. D. was possessed of a certain dwelling-house with the appurtenances, situate and being

in the parish of —— in the county of Berks aforesaid, for a certain term of years, then and still unexpired; and the said C. D. being so possessed, one A. B. late of the parish aforesaid, in the county aforesaid, labourer, afterwards, to wit, on the first day of August, in the seventh year of the reign of our Sovereign Lord William the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland King, defender of the faith, at the parish aforesaid in the county aforesaid, into the said dwelling-house with the appurtenances there situate, with force and arms and with a strong hand, unlawfully and forcibly did enter, and the said C. D. from the peaceable possession of the said dwelling-house and appurtenances then and there with force and arms and with strong hand unlawfully did expel and put out; and the said C. D., being so unlawfully expelled and put out from the said dwelling-house and appurtenances as aforesaid, he the said A. B. from the day and year aforesaid until the day of the taking of this inquisition, from the said dwelling-house with the appurtenances aforesaid, with force and arms and with strong hand unlawfully and injuriously then and there did keep out, and still doth keep out: to the great damage of the said C. D., against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity. *If committed by three or more persons, they may in general be indicted as for a riot; and where the facts will warrant it, it may be advisable to add a count for a riot, as a riot is one of the misdemeanors in which costs are allowed.*

Imprisonment, and ransom at the King's will; 5 Ric. 2, c. 7; *and the property to be restored to the prosecutor,* 8 H. 6, c. 9, s. 10, *even although he held as tenant to the defendant,* 21 Jac. 1, c. 15, *provided the defendant have not been in peaceable possession of the premises three years before the finding of the indictment.* 31 Eliz. c. 11. *And as the prosecutor is thus to have restitution, the premises must be described in the indictment with convenient certainty.* See 1 Hawk. c. 64, s. 37.

Evidence.

To maintain this indictment, the prosecutor must prove:

1. That he was in possession of the house in question; and if he intend to have restitution, it must be stated in the indictment, and proved, that he held for a term of years, or as tenant from year to year, for a tenancy at will is not within the statutes as to restitution. 1 *Hawk. c.* 64, *s.* 38.

2. That whilst he was so possessed, the defendant forcibly entered into the house. An entry may be said to be forcible, not only in respect of a violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession, but also in respect of any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether

any person be in it at the time or not, especially if it be a dwelling-house. 1 *Hawk. c.* 64, *s.* 26. So, wherever a man, either by his behaviour or speech, at the time of his entry, gives those who are in possession of the tenements he claims, just cause to fear that he will do them some bodily hurt if they will not give way to him: his entry is deemed forcible, whether he cause such terror by carrying with him such an unusual number of servants, or by arming himself in such a manner, as plainly intimates a design to back his pretensions by force; or by actually threatening to kill, maim, or beat those who shall continue in possession; or by making use of such speeches as plainly imply a purpose of using force against those who shall make any resistance; or the like. 1 *Hawk. c.* 64, *s.* 27. But no entry shall be deemed forcible, from any threat to spoil another's goods, or to destroy his cattle, or to do him any other damage which is not personal. *Id. s.* 28. So an entry into a house through a window, or by opening the door with a key, is not forcible. *Id. s.* 26. So, if one who pretends title to lands, barely go over them, in his way to church, or to market or for such like purpose, without doing any act which either expressly or impliedly amounts to a claim to such lands, he cannot be said to make an entry therein within the meaning of the statutes, although he be accompanied at the time by a great number of attendants, or armed. *Id. s.* 20. Yet in such a case, if he make an actual claim, with any circumstances of force or terror, he seems to be guilty of a forcible entry within the stat. 5 Ric. 2, c. 7, whether his adversary actually quit the possession or not. *Id. s.* 21.

It may be necessary to mention, that a joint-tenant or tenant in common, may offend against the statutes, either by forcibly ejecting, or forcibly holding out his companion; for although the entry of such a tenant be lawful, so that no action of trespass will lie against him for it, yet the lawfulness of his entry in no way excuses the violence, or lessens the injury done to his companion; and therefore an indictment for a forcible entry into a moiety of a manor, &c. has been holden good. 1 *Hawk. c.* 64, *s.* 33.

All who accompany the person making a forcible entry, shall be deemed equally guilty, whether they actually enter upon the lands or not. 1 *Hawk. c.* 64, *s.* 22. But a man who barely agrees to a forcible entry, already made to his use, without his knowledge or privity, is not guilty, for he in no way concurred in or promoted the force. *Id. s.* 24.

3. The expulsion. This, however, is only necessary, to entitle the prosecutor to restitution; the offence of the forcible entry is complete, by the entry and force, although the prosecutor may not have been expelled.

As to restitution, *see* 1 *Hawk. c.* 64, *s.* 45—66.

20. *Indictment against a Poacher in the night time, for Assaulting a Game-keeper.*

Berkshire to wit: The jurors for our Lord the King upon their oath present, that A. B. late of the parish of —— in the county of Berks aforesaid, labourer, before the committing of the assault hereinafter mentioned, to wit, on the first day of September, in the seventh year of the reign of our Sovereign Lord William the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland King, defender of the faith, about the hour of eleven in the night of the same day, at the parish aforesaid in the county aforesaid, did, by night as aforesaid, unlawfully enter certain inclosed land of one C. D. there situate, and was then and there unlawfully in the said land, with a certain gun, for the purpose then and there of taking and destroying game; and he the said A. B. then and there, upon the said land, in the night time as aforesaid, with the gun aforesaid, for the purpose aforesaid, was found by one E. F., which said E. F. was then and there the servant [*"game-keeper or servant"*] of the said C. D., and had then and there lawful authority to seize and apprehend the said A. B.; and that [*the said A. B. then and there, from the land aforesaid, escaped into a certain close there situate, and the said E. F. then and there pursued him the said A. B. into the said last-mentioned close, for the purpose of seizing and apprehending him the said A. B. as aforesaid, he the said E. F., as such servant of the said C. D. as aforesaid, having then and there lawful right so to do, as aforesaid; and that*] the said E. F., being then and there about to seize and apprehend the said A. B. for the offence aforesaid, he the said A. B., with the gun aforesaid, [*"any gun, cross bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever,"*] which he the said A. B. in both his hands then and there had and held, did then and there unlawfully assault and beat, and offer violence towards the said E. F. [*"assault or offer violence towards,"*] he the said E. F. then and there being lawfully authorized to seize and apprehend the said A. B.: against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity. *You may omit the words between the asterisks, if not required or sustained by the evidence. Add another count, stating the land to be* " certain inclosed land then in the occupation of the said C. D. there situate." *In* R. *v.* Finucane & Williams, 5 Car. & P. 551, *J. Parke, J. held that this count might be joined with one on the 9th section of the same statute,* (9 G. 4, c. 69,) *against three or more persons, for being in land at night, armed, for the purpose of taking or destroying game.*

Misdemeanor: transportation for 7 years, or imprisonment and hard labour, for not more than 2 years. 9 G. 4, c. 69, s. 2.

Evidence.

To maintain this indictment, the prosecutor must prove:

1. That the prisoner entered certain land in the parish, either belonging to C. D. or in his occupation, as stated in the indictment. It is better not to mention the name of the land, in order to avoid the risk of variance. Where the indictment was for entering a certain wood called "Old Walk," belonging to and in the occupation of the Earl of Waldegrave, in the night time, armed, &c. with intent to destroy, take, and kill game; and in evidence it appeared that the wood was called "Long Walk," and was never known as "Old Walk:" the judges held the variance to be fatal. *R.* v. *Owen & Prickett, R. & M.* 118. So, a variance in the parish, or any other matter of local description, will be equally fatal.

2. That it was in the night time, that is to say, between the expiration of the first hour after sun set, and the beginning of the last hour before sun rise. *See* 9 *G.* 4, *c.* 69, *s.* 12. A variance between the hour stated, and that proved, will be immaterial, provided the time proved be within the hours now mentioned.

3. That he was then armed with a gun or other instrument, as stated in the indictment.

4. That he was there, for the purpose of taking or destroying game. This purpose is proved, by proving acts of the prisoner, or other circumstances, from which the jury may fairly presume it. And it seems, the intent must have been, to take or destroy game in that particular place in which the prisoner is proved to have been. Upon an indictment on the repealed statute, 57 G. 3, c. 90, for having entered a certain close situate, &c. in the occupation of Thomas Quaife, with intent then and there to destroy, take, and kill game, &c,: it appeared that the prisoner was taken in the close in question, in the night time, armed with a gun, and having two pheasants in his pockets; he was coming in a direction from a wood which was a preserve for game, and going towards two other woods which were also preserves, but the close in which he was taken was not a preserve: the judge left it to the jury to say, whether the defendant, when taken, was returning home, or still in pursuit of game; and if the latter, whether his purpose was to kill game in the close mentioned in the indictment; the jury found that the prisoner was still in pursuit of game at the time he was taken, but they could not say whether in the close or elsewhere: the prisoner being convicted, the judges held the conviction to be wrong; because the entry with intent to kill game, being confined by the indictment

to the close therein specified, the intent should have been proved as to that particular close. *R.* v. *Thomas Barham*, *Ry. & M.* 151. *and see R.* v. *Capewell & Pegg*, 5 *Car. & P.* 549.

5. That the prisoner was found there, in the actual commission of the offence.—This it seems is necessary, in order to give the game-keeper or servant authority to seize or apprehend the prisoner; and it is only in cases where such game-keeper or servant derives such authority from the statute, that an assault upon him is punishable under this section. Upon the repealed statute 57 G. 3, c. 90, which, however, was somewhat differently worded from this section, a prisoner being indicted for having entered a wood called Kingshoe Spinney, with intent illegally to destroy game, and being found in the said wood in the night, armed, &c.; and the second count charging that having entered into the said wood with intent, &c. he was found in a certain close, to wit, Kinshoe close: it appeared that the prisoner was not seen in the wood; he was seen in a close adjoining it; but shortly before he was seen, shots were heard and the flashes seen in the wood: the prisoner being found guilty, it was reserved for the opinion of the judges, whether it was necessary to prove that the prisoner was seen in the place where the indictment stated him to have been found; and the judges held that as there was evidence to satisfy the jury that the prisoner had been in the wood armed, or one of the party who had been so, it was sufficient. *R.* v. *Charles Worker*, *Ry. & M.* 165. Whether the judges would be of the same opinion upon this section, may perhaps be doubted.

6. That the prisoner escaped, and was pursued by E. F. into the close or place to which he escaped; this, if necessarily stated, (that is to say, if the assault were not in the land which the prisoner is stated to have entered for the purpose of taking or destroying game,) must be proved as stated.

7. That E. F. was then the game-keeper or servant of C. D., the owner or occupier of the land, as stated in the indictment.

8. The assault, as stated. That E. F. was at that time about to seize or apprehend the prisoner, is not necessary perhaps to be stated or proved; but if such were the fact, and that it can be proved, it is better to state it in the indictment.

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21. *Keeping a Disorderly House.*

By stat. 25 G. 2, c. 36, s. 5, in order to encourage prosecutions against persons keeping bawdy-houses, gaming-houses, or other disorderly houses, it is enacted, that if any two inhabitants

of any parish or place, paying scot and bearing lot therein, do give notice in writing to any constable, (or other peace officer of the like nature, where there is no constable,) of such parish or place, of any person keeping a bawdy-house, gaming-house, or any other disorderly house, in such parish or place, the constable or such officer as aforesaid, so receiving such notice, shall forthwith go with such inhabitant to one of His Majesty's Justices of the Peace of the county, city, riding, division or liberty in which such parish or place does lie; and shall (upon such inhabitants making oath before such justice that they do believe the contents of such notice to be true, and entering into recognizance in the penal sum of £20 each, to give or produce material evidence against such person for such offence,) enter into a recognizance in the penal sum of £30, to prosecute with effect such person for such offence at the next General or Quarter Session of the Peace, or at the next Assizes to be holden for the county in which such parish or place does lie, as to the said justice shall seem meet; and such constable or other officer shall be allowed all the reasonable expenses of such prosecution, to be ascertained by any two justices of the peace of the county, city, riding, division or liberty, where the offence shall be committed, and shall be paid the same by the overseers of the poor of such parish or place; and in case such person shall be convicted of such offence, the overseers of the poor of such parish or place shall forthwith pay the sum of £10 to each of such inhabitants; and in case such overseers shall neglect or refuse to pay to such constable or other officer such expenses of the prosecution as aforesaid, or shall neglect or refuse to pay upon demand the said sums of £10 and £10, such overseers and each of them shall forfeit to the person entitled to the same double the sum so refused or neglected to be paid. *See the form of the Notice*, 3 Burn, D. & W. 330; *affidavit of the truth thereof*, Id.; *recognizance to give material evidence*, Id.; *recognizance of constable to prosecute*, Id. 331; *allowance of constable's expenses*, Id. 332.

By stat. 58 G. 3, c. 70, s. 7, a copy of such notice shall also be served on or left at the places of abode of the overseers of the poor of such parish or place, or one of them, and such overseers or overseer of the poor shall be summoned or have reasonable notice to attend before such justice of the peace, before whom such constable shall have notice to attend; and if such overseers or overseer of the poor shall then and there enter into such recognizance to prosecute such offender as the constable is in and by the said Act (25 G. 2, c. 36, s. 5,) required to enter into, then it shall not be necessary for, nor shall such constable be required to enter into such recognizance; but if such overseers or overseer of the poor shall neglect to attend such justice on having such notice, or shall attend and shall decline to enter

into such recognizance to prosecute, then such constable shall enter into the same, and shall prosecute, and shall be entitled to his expenses, to be allowed as in and by the said Act is directed.

And by 25 G. 2, c. 36, s. 6, upon such constable or other officer entering into such recognizance to prosecute as aforesaid, the said justice of the peace shall forthwith make out his warrant, to bring the person so accused of keeping a bawdy-house, gaming-house, or other disorderly house, before him, and shall bind him or her over to appear at such general or quarter session or assizes, there to answer to such bill of indictment as shall be found against him or her for such offence; and such justice shall and may (if in his discretion he think fit) likewise demand and take security for such person's good behaviour in the mean time, and until such indictment shall be found, heard, and determined, or be returned by the grand jury not to be a true bill.

By sect. 7, if the constable neglect or refuse to go before the justice, or to enter into the recognizance, or if he be wilfully negligent in carrying on the said prosecution, he shall forfeit the sum of £20 to each of such inhabitants so giving notice as aforesaid.

By sect. 8, reciting that "whereas by reason of the many subtle and crafty contrivances of persons keeping bawdy-houses, gaming-houses, or other disorderly houses, it is difficult to prove who is the real owner or keeper thereof, by which means many notorious offenders have escaped punishment," it is enacted, that any person, who shall appear, act or behave him or herself as master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the owner thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not in fact be the real owner or keeper thereof.

By sect. 9, any person may give evidence against or for the defendant, notwithstanding his being an inhabitant or parishioner of the said parish or place, or having entered into such recognizance as aforesaid.

Indictment.

Berkshire to wit: The jurors for our Lord the King upon their oath present, that A. B. late of the parish of —— in the county of Berks aforesaid, labourer, and Elizabeth his wife, on the first day of October, in the seventh year of the reign of our Sovereign Lord William the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland King, defender of the faith, and on divers other days and times between that day and the day of the taking of this inquisition, at the parish aforesaid, in the county aforesaid, unlawfully did keep

and maintain a certain common ill-governed and disorderly house; and in the said house, for the lucre and gain of him the said A. B., certain persons of evil fame and of dishonest conversation, as well men as women, then and on the said other days and times, there, unlawfully and wilfully did cause and procure to frequent and come together; and the said men and women, in the said house of him the said A. B, at unlawful times, as well in the night as in the day, then and on the said other days and times, there, unlawfully and wilfully did permit, and yet do permit, to be and remain drinking, tipling, whoring, and misbehaving themselves: to the great damage and common nuisance of all the liege subjects of our said Lord the King there inhabiting, being, residing, and passing, to the evil example of all others in the like case offending, and against the peace of our Lord the King, his crown and dignity.

Misdemeanor: fine; or imprisonment, with or without hard labour; 3 G. 4, c. 114; *or both.*

Evidence.

To maintain this indictment, the prosecutor must prove:

1. That the house is such as is described in the indictment. It is clearly agreed that keeping a bawdy-house is a common nuisance, as it endangers the public peace, by drawing together dissolute and debauched persons; and has also a tendency to corrupt the manners of both sexes, by such an open profession of lewdness. 5 *Bac. Abr.* "*Nuisance,*" *A.* Proof that a woman keeps the house for the purpose of her own prostitution only, would not it seems be sufficient to maintain such an indictment; it must be proved to be a house for the common reception of men and women generally, for the purpose of prostitution. If the house is not a bawdy-house, but be disorderly in other respects, the occupier or keeper of it may still be indicted. In *R.* v. *Higginson,* 2 *Burr.* 1232, the indictment was the same as the above form, omitting the words "drinking, tipling, whoring," and substituting for them, "fighting of cocks, boxing, playing at cudgels," and upon motion in arrest of judgment, it was holden a good indictment.

2. That the defendants "appeared, acted, or behaved, as master and mistress, or as the persons having the care, government, or management" of the house. 25 *G.* 2, *c.* 36, *s.* 8, *supra.* It has been adjudged that a feme covert may be convicted of this offence, in the same manner as if she were sole, and that she may be indicted and convicted with her husband; for the keeping of the house alone does not necessarily import property, but may signify that share of government which the wife has in a family, as well as the husband; and in this she is presumed to

have a considerable share, as these matters are usually managed by the intrigues of her sex. 5 *Bac. Abr. Nuisance, A. R.* v. *Williams*, 1 *Salk.* 384.

3. That the house is locally situated, as described in the indictment.

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22. *Indictment for carrying on an Offensive Trade near a Highway.*

Same as the form ante, p. 156, *to the words*] defender of the faith, and on divers other days and times between that day and the day of the taking this inquisition, with force and arms, at the parish aforesaid in the county aforesaid, near unto the dwelling-houses of divers liege subjects of our said Lord the King, and also near unto a certain public and common highway there for all the subjects of our said Lord the King, with coaches, carriages, horses, waggons, carts, goods, chattels, and merchandizes, to go, return and pass at their will and pleasure, did unlawfully and injuriously kill and cause to be killed forty sheep, and the excrements, blood, entrails, and other filth coming from the said sheep, did then and on the said other days and times, there, cause and permit to lie, be, and remain on the said public and common highway for a long space of time, to wit, for the space of one week, whereby divers noisome and unwholesome smells, from the said excrements, blood, entrails, and other filth, then and on the said other days and times there did arise, so that the air was then and on the said other days and times there greatly corrupted and infected: to the great damage and common nuisance, not only of all the liege subjects of our said Lord the King, near the same place inhabiting, being, and residing, but also of all the liege subjects of our said Lord the King, along, by, and through the said public and common highway there going, returning, passing, and repassing, to the evil example of all others in the like case offending, and against the peace of our Lord the King, his crown and dignity. *See* 4 *Went.* 224. *Where the nuisance is of a permanent nature, it is usual, and indeed prudent, to add a count for continuing it, if you are not certain of being able to prove that the defendant first created it.*

Misdemeanor: fine or imprisonment, or both.

Evidence.

Prove the nuisance as laid. Erecting buildings near a highway, and near the dwelling-houses of several persons, and there manufacturing the acid spirit of sulphur, whereby the air was impregnated with noisome and offensive smells, which were proved to be noxious and hurtful to the health of the inhabitants, and to have made many of them sick,—was holden to be

a nuisance. *R.* v. *White & Ward*, 1 *Burr.* 333. As to erecting necessary houses near a highway, *see R.* v. *Pedley*, 1 *Ad. & E.* 822; as to nuisances by gas works, *see R.* v. *Medley et al.* 6 *Car. & P.* 292; as to running locomotive engines on a railroad in the vicinity of a common highway, *see R.* v. *Pease et al.* 4 *B. & Adolph.* 30; and as to keeping a shooting-ground near the highway, where persons came to shoot at targets and at pigeons, &c. *see R.* v. *Moore*, 3 *B. & Adolph.* 184. But where a tin-man was indicted for carrying on his trade in the neighbourhood of Clifford's Inn, to the common nuisance, &c., and it was proved that the noise he made was a great annoyance to some attornies having chambers at No. 14, 15, and 16 in the Inn, and prevented them attending to their business: Lord Ellenborough, C. J. held that the evidence did not sustain the indictment; the nuisance proved being a private nuisance merely. *R.* v. *Lloyd*, 4 *Esp.* 200. So, where a person was indicted for erecting a coke oven, which threw out great quantities of smoke and vapour, which was proved to be offensive to the inhabitants of the houses in the neighbourhood, but it did not affect their health, or render their houses uninhabitable, or even lower the value of their houses: Heath, J. held that it was not a public nuisance. *R.* v. *Davey et al.* 5 *Esp.* 217. Where a man was indicted for carrying on an offensive trade, but it appeared that it had been carried on at the same place by the defendant, and previously by his father, for nearly 50 years: Lord Kenyon, C. J. directed the jury to acquit him. *R.* v. *Samuel Neville*, *Peake R.* 126. *but see R.* v. *Cross*, 3 *Camp.* 227. And where, upon an indictment for this offence, it appeared that there had been other manufactories, which emitted disagreeable and noxious smells, carried on in the neighbourhood for many years, and that the defendant had come into the neighbourhood about four years before: Lord Kenyon left it to the jury to say whether the noxious vapour was much increased by this addition of the defendant; and his lordship said, "Where manufactories have been borne with in a neighbourhood for many years, it will operate as a consent of the inhabitants to their being carried on, though the law might have considered them as nuisances, had they been objected to in time; but if another man comes, and by his manufacture renders that which was a little unpleasant before, very disagreeable and uncomfortable, though it would not amount to a nuisance by itself, still be is answerable for it." *R.* v. *Bartholomew Neville*, *Peake R.* 125. Where a man, after building some dwelling-houses, built necessary-houses near the highway, to be used with them, and then let the houses; afterwards these necessary-houses, for want of cleansing, became a nuisance; but it did not appear clearly whether the necessary-houses had been let with the houses, or whether the tenants were under any contract to keep them cleansed, &c. or

not: the Court, however, held that whether that was the case or not, the defendant was liable to this indictment; he made the erection, and the nuisance was the natural consequence of the erection: and Littledale, J. said, "If a nuisance be created, and a man purchase the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance; but if, after the reversion is purchased, the nuisance be erected by the occupier; the reversioner incurs no liability; yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable; he is not to let the land, with the nuisance upon it." *R.* v. *Pedley*, 1 *Ad.* & *E.* 822.

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23. *Indictment for Obstructing a Highway.*

Kent to wit: The jurors for our Lord the King upon their oath present, that from time whereof the memory of man is not to the contrary, there was and yet is a certain common and ancient King's highway, leading from the vill of Tunbridge, in the county of Kent aforesaid, towards and into the vill of Indeley in the said county, used by and for all the liege subjects of our said Lord the King, and his predecessors, with their horses, coaches, carts, and other carriages, to go, return, pass, repass, ride, and labour at their free will and pleasure,* without any obstruction, hindrance, or impediment whatsoever: yet that A. B. late of the parish of —— in the county aforesaid, yeoman, C. D. late of the same place, labourer, and E. F. late of the same place, labourer, on the first day of August, in the seventh year of the reign of our Sovereign Lord William the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland King, defender of the faith, with force and arms, at the parish aforesaid in the county aforesaid, unlawfully and injuriously did erect and place, and did cause and procure to be erected and placed a certain gate and gate posts in, upon, and across the said King's highway between the said vill of Tunbridge and the said vill of Indeley, to wit, in the parish aforesaid in the county aforesaid, and unlawfully and injuriously did lock, fasten, and chain the said gate unto the said gate posts, and the said gate, so erected and placed, and so locked, fastened, and chained as last aforesaid, from the said first day of August, in the year aforesaid, until the day of the taking of this inquisition, there, unlawfully and injuriously did continue, and still do continue: so that the liege subjects of our said Lord the King, during the time last aforesaid, could not and still cannot go, return, pass, repass, ride, or labour with their horses, coaches,

carts, and other carriages, in, through, and along the King's common highway aforesaid, as they ought and were wont and accustomed to do: to the great damage and common nuisance of His Majesty's liege subjects going, returning, passing, repassing, riding, and labouring in, through, and along the King's common highway aforesaid; to the evil example of all others in the like case offending, and against the peace of our Lord the King, his crown and dignity. *See* 6 *Went.* 401, 405. 4 *Id.* 197.

Misdemeanor: fine, or imprisonment, or both; and the nuisance to be abated.

Evidence.

Prove the nuisance, as stated in the indictment. There is no doubt but that erecting a gate across a common highway, is a public nuisance. 1 *Hawk. c.* 76, *s.* 146. So is the locking or fastening a gate, already erected there by some other person. And the like, as to all other injuries to a highway, as by digging a ditch or making a hedge across it, or laying logs of timber in it, or by doing any other act by which it is rendered less commodious to the King's subjects. *Id. s.* 144. Where a carrier, having warehouses in a public street in a city, occupied one side of the street opposite to his warehouses in loading and unloading his waggons, for several hours at a time, both day and night, and having one waggon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, and sometimes even foot passengers were incommoded by cumbrous goods lying on that side ready for loading: this was holden to be a public nuisance, although there was room for two carriages to pass on the opposite side of the street. *R.* v. *Russell*, 6 *East*, 427. So, where the proprietor of stage coaches, running between Greenwich and London, allowed them to stand in the public street at Charing Cross for three-quarters of an hour at a time, taking up passengers, receiving parcels, &c.: this was holden to be a public nuisance; Lord Ellenborough, C. J. saying, that the King's highway was not to be used as a stable-yard; a stage coach may set down or take up passengers in the street, this being necessary for public convenience; but it must be done in a reasonable time; and private premises must be provided for the coach to stop in during the interval between the end of one journey and the commencement of another. *R.* v. *Cross*, 3 *Camp.* 224. Where the proprietor of a colliery made a railroad from it to a sea-port town; the railroad was 400 yards long, and laid along a turnpike road, which it narrowed so far, that in some places there was not a clear space for two carriages to pass: this was holden to be a public nuisance, although the defendant allowed the public to use his railroad, on payment of a toll. *R.* v. *Sir John Morris*, 1 *B.* &

Adolph. 441. Where an Act of Parliament prohibited the erection or continuance of any building within ten feet of a certain road, and declared that the footpaths should be subject to the Act and be part of the road; and it further enacted that if any such building should be erected or continued contrary to the Act, it should be deemed a common nuisance: it was holden that an open shop, having its front built on the foundation of an old wall immediately adjoining the footpath, and connected by a roof with the front of a house, which was more than ten feet from the road, was a building within the meaning of the Act. *R.* v. *Wm. Gregory*, 5 *B. & Adolph.* 555. By a separate clause in the same Act, authority was given to magistrates to convict the proprietor or occupier of such buildings, and to make an order for the removal thereof: the Court held, that, notwithstanding this clause, the party who erected or continued a building, contrary to the Act, might be indicted for the nuisance. *Id.* So, where the defendant, having a small timber-yard in a narrow street, was in the habit of having long pieces of timber laid down in the street, and sawed into shorter lengths, for the purpose of getting them into his yard: this was holden to be a nuisance, Lord Ellenborough, C. J. saying, that the defendant was not to eke out the inconvenience of his premises, by taking in the public highway into his timber yard; if the street were too narrow, he should remove to a more commodious situation for carrying on his business. *R.* v. *Jones*, 3 *Camp.* 230. But where an indictment charged the defendant with having placed a person on the footway of a public street, to deliver out printed bills, the Court upon application quashed it, holding that the matter charged was not the subject of an indictment. *R.* v. *Sarmon*, 1 *Burr.* 516.

A public navigable river is a public highway, and any obstruction to it is a public nuisance, in like manner as to a highway on land. *See R.* v. *Lord Grosvenor*, 2 *Stark.* 511. See also as to canals, *R.* v. *Trafford et al.* 1 *B. & Adolph.* 874. But where a vessel sunk by accident or misfortune in a public river, it was holden that the owner was not indictable as for a nuisance, in not removing it. *R.* v. *Watts*, 2 *Esp.* 675. Where upon the trial of an indictment for a nuisance, by erecting staiths upon the river Tyne for the loading of ships with coals, Bayley, J. told the jury that if they thought that the abridgment of the right of passage occasioned by these erections, was for a public purpose, and produced a public benefit, and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river, they should acquit the defendants; and he pointed out to the jury that, by means of the staiths, coals were supplied at a cheaper rate, and in a better condition, than they otherwise could be, which was a public benefit: it was holden by Bayley and Holroyd JJ. (*Lord Ten-*

terden, C. J. dis.) that this direction was correct. *R.* v. *Russell et al.* 6 *B. & C.* 566. This decision, however, has been much doubted. *See R.* v. *Gregory*, 5 *B. & Adolph.* 555.

Where an indictment for *erecting* a wall across a road, without charging a continuance of the nuisance, was tried at the sessions, and the defendants found guilty, a mandamus was granted, commanding the justices to give judgment on the indictment; and in their return, they stated that they had passed judgment upon the defendants, and fined them 6*d.* each: it was objected to this return, that the justices should also have ordered the nuisance to be abated; but the Court said, that as the indictment did not charge a continuance of the nuisance, they did not think that the justices ought to have adjudged an abatement of it; for any thing that appeared upon the indictment, the nuisance did not in fact exist at the time the indictment was preferred; but that, at all events, an erroneous judgment was the subject of a writ of error, and could not be made the subject of an objection to a return to a mandamus. *R.* v. *Justices of West Riding of Yorkshire*, 7 *T. R.* 467.

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24. *Indictment for not Repairing a Highway.*

Same as the last form, ante, p. 211, *to the asterisk,* and then thus:*] and that a certain part of the said common and ancient King's highway, situate, lying and being in the parish of —— in the county aforesaid, beginning at —— in the said parish and county, and ending at —— in the parish and county aforesaid, containing in length —— yards, and in breadth —— yards, and also a certain other part of the said common and ancient King's highway, situate, lying and being in the said parish and county, beginning at —— in the said parish and county, and ending at —— in the parish and county aforesaid, containing in length —— yards, and in breadth —— yards, on the first day of August, in the seventh year of the reign of our Sovereign Lord William the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland King, defender of the faith, and continually afterwards until the day of the taking of this inquisition, at the parish aforesaid in the county aforesaid, were and yet are very ruinous, miry, deep, broken, and in great decay for want of necessary reparation and amendment of the same, so that the liege subjects of our said Lord the King could not and still cannot go, return, pass, repass, ride, or labour with their horses, coaches, carts, and other carriages, in, through, and along the King's common highway aforesaid, as they ought and were wont and accustomed to do, without great danger of their lives and loss of their goods: to the great damage and common nuisance of His Majesty's liege subjects going, returning, passing, repassing, riding, and labour-

ing in, through, and along the King's common highway aforesaid; to the evil example of all others in the like case offending, and against the peace of our Lord the King, his crown and dignity. *See* 4 *Went.* 162, 170, 174, 179. 6 *Id.* 406.

Misdemeanor: fine. As to the manner in which such fine must be levied and applied, see stat. 5 & 6 W. 4, c. 50, s. 96. *And as to the power of justices to order an indictment to be preferred for the non-repair of a highway,* see Id. s. 95.

Evidence.

To maintain this indictment, the prosecutor must prove:

1. That the way in question is a public highway. It may be a carriageway, or a footway, or a foot and horseway, (which is also called a "pack and prime way," a "pack and drift way," or "bridle way,") and must be described accordingly in the indictment. It must lead from one town or vill to another, and be free for the passage of all his Majesty's subjects. 1 *Hawk.* c. 76, s. 1. But a way to a parish church, or to the common fields of a town, or to a private house, or perhaps to a village, which terminates there, and is for the benefit of the particular inhabitants of such parish, house, or village only, may be called a private way, but not a highway, *Id.*, and the non-repair of it cannot be the subject of indictment. So, if it be not a thoroughfare, it is doubted very much whether it can be deemed a highway. *See Wood* v. *Veal*, 5 *B. & Ald.* 454. So, if the owner of the fee, upon his first making a street or road, put a gate or bar across it, or do any other act, publicly indicating that he does not dedicate it to the public, it cannot be deemed a public highway; and, if the gate or bar, &c. be not afterwards kept up for a considerable time, still its having originally been so put up will rebut any mere presumption of its being dedicated to the public. *See Lethbridge* v. *Winter*, 1 *Camp.* 263, *n. Roberts* v. *Carr*, *Id.* 262, *n.* On the other hand, if the owner of the fee allow the public to pass over a way through it, without hindrance or obstruction, or any other indication of his dissent, it shall be presumed that he dedicates it to the public, and it may be deemed a public highway. *R.* v. *Lloyd*, 1 *Camp.* 260. *Lade* v. *Shepherd*, 2 *Str.* 1004. *Jarvis* v. *Dean*, 3 *Bing.* 447. But no consent by tenants merely will have this effect; and, therefore, where the tenants of houses in a street, allowed it to be used as a public thoroughfare during a term of 99 years, and the owner of the fee at the expiration of the term erected a fence across it, it was holden he might do so, for no person could dedicate a way to the public except the owner of the fee. *Wood* v. *Veal*, 5 *B. & Ald.* 454. *and see Harper* v. *Charlesworth*, 4 *B. & C.* 591. If, however, during the time it is so used by the public, there be a change of tenants, so that the owner of the fee had an opportunity of publicly indicating his dissent to its being so used, and did not: if

it appear that he, or even his steward, knew of it, he will be deemed to have dedicated the way to the public; and where in such a case the way was uninterruptedly used for many years by the public, during which there were several changes of tenants, Lord Ellenborough said he should presume that the owner of the fee had notice. *R.* v. *Barr*, 4 *Camp.* 16. And where land was vested in trustees for the purpose of a drainage, and the trustees dedicated part of it, as a way, to the public, who used it uninterruptedly for 25 years: it was holden that as it appeared that the user of the way by the public was not incompatible with the purposes of the drainage, the dedication was valid, and the parish was bound to repair the road. *R.* v. *Leake*, 5 *B. & Ald.* 469. *See* 5 & 6 *W.* 4, *c.* 50, *s.* 23, *infra*. It is doubted whether in law there can be a partial dedication of a way to the public, as for instance, for all purposes except the carrying of coals, *Marquis of Stafford* v. *Coyney*, 7 *B. & C.* 257, or the like; if not, such a dedication in fact, would be no dedication at all in law, and the public would be trespassers in using the way in any other manner than that permitted; *Id.*; but even if there may be in law such a partial dedication, it should seem that it would not have the effect of throwing the onus of repairing the way upon the parish.

The termini, if set out, and the local description of the road in the indictment, must be proved as laid. *See Rouse* v. *Bardon et al.* 1 *H. Bl.* 351. *R.* v. *Gamlingay*, 3 *T. R.* 513.

2. That the part of the highway, which is out of repair, is situate within the parish indicted. This may be proved by witnesses who know the road, and know the boundaries of the parish; old persons who in their youth have perambulated the boundaries, are good witnesses upon this subject.

3. That the parish are bound to repair it.—The parish by common right is bound to repair all public highways within it; even where a township, liable to repair a way by prescription, was relieved of its liability by an Act of Parliament, it was holden that the liability thereby necessarily fell upon the parish at large. *R.* v. *Sheffield*, 2 *T. R.* 106. *and see R.* v. *St. George, Hanover Square*, 3 *Camp.* 222. *Anon. Ld. Raym.* 725. So, if a turnpike road be out of repair, the parish in which it is situate, or the township, if the township be liable by prescription to repair all roads within it, may be indicted for the non-repair of it; for the tolls received upon it are deemed an auxiliary fund merely, and do not relieve the parish, &c. of its liability. *R.* v. *Netherthong*, 2 *B. & Ald.* 179. So, no mere agreement between the parish and other persons, will relieve the former of its common law liability to repair. *R.* v. *Liverpool*, 3 *East*, 86. So that, proving a way to be a public highway, and that it is within

the parish, is good primâ facie evidence that the parish are bound to repair it, and is conclusive evidence where the parish only pleads the general issue; if they would throw the burthen upon any other district or individual, they must plead it specially. It is not necessary for this purpose, either that it be stated in the indictment, or proved, that it has been a highway immemorially, or how it became so; it is sufficient to state and prove that it is a public highway. *Aspindall* v. *Brown*, 3 *T. R* 265. And a record of a conviction upon an indictment against the parish for non-repair of the same way, is conclusive evidence of their liability to repair; *R.* v. *St. Pancras, Peake, R.* 286; although, on the other hand, the record of an acquittal would be no evidence for them. *Id.* The parish having frequently repaired it, also, is (if not explained) strong evidence of their liability to repair.

In the case of a way dedicated to the public, it has been holden in one case that a mere adoption of it by the public, without evidence of some act on the part of the parish shewing their acquiescence in that dedication, was not sufficient to throw the burthen of maintaining the way upon the parish. *R.* v. *St. Benedict, Cambridge*, 4 *B. & Ald.* 447. In a later case, it was holden that no such acquiescence upon the part of the parish is requisite; if the public are allowed to use the road uninterruptedly, it is sufficient; *R.* v. *Leake*, 5 *B. & Ald.* 469; and this last decision seems to coincide with the ancient authorities upon the subject. However the matter is now put out of doubt by the express words of an Act of Parliament, 5 & 6 W. 4, c. 50, s. 23, by which it is enacted, that "no road or occupation way made, or hereafter to be made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set or to be hereafter set out as a private drift way or horsepath in any award of commissioners under an Inclosure Act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the person, body politic or corporate, proposing to dedicate such highway to the use of the public, shall give three calendar months' previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent, and shall make the same in a substantial manner and of the width required by this Act, and to the satisfaction of the said surveyor, and of any two justices of peace of the division in which such highway is situated in petty sessions assembled, who are hereby required, on receiving notice from such person or body politic or corporate, to view the same, and to certify that such highway has been made in a substantial manner, and of the width required by this Act, at the expense of the party requiring such view; which certificate shall be enrolled at the Quarter Sessions holden next after the granting thereof: then and in such case, after the said

highway shall have been used by the public, and duly repaired and kept in repair by the said person, body politic or corporate, for the space of twelve calendar months, such highway shall for ever thereafter be kept in repair by the parish in which it is situate." By the same section, however, it is provided that the surveyor shall call a vestry meeting, and if the inhabitants of the parish at such meeting think that the road will not be of sufficient utility to justify its being repaired by the parish, the person who made and dedicated it may thereupon be summoned before the justices at petty sessions, and the question as to the utility of the highway "shall be determined at the discretion of such justices." *Id.* The above Act, in reference to roads set out by commissioners under an Inclosure Act, notices only "private driftways or horsepaths." It must be observed, however, that a way set out as a private way by such commissioners, is not to be repaired by the parish in which it is situate. *R.* v. *Richards*, 8 *T. R.* 634. And where an Inclosure Act authorized the commissioners to set out public and private roads, the public roads to be repaired as other public roads, and the private roads to be repaired by such persons and in such manner as the commissioners should direct; and the commissioners, after setting out public and private roads, awarded that all the ways, whether public or private, should be repaired in like manner as other public highways are repaired by the laws of this realm: the Court held that the award, in this respect, as far as it related to private ways, was bad, and that no indictment therefore would lie against the parish for the non-repair of one of the private ways. *R.* v. *Cottingham*, 6 *T. R.* 20. But where such commissioners, under a similar power, made the like award, and a way, set out by them as a private road, although of the same width as the public roads, was afterwards commonly used by the public as a carriage road, and for 18 years was repaired by the parish: it was holden that, although the commissioners in the first instance had exceeded their authority, yet it was a question for the jury to determine under the circumstances, whether there had not since been a dedication of the way to the public; and that as the jury had found that question in the affirmative, it must be deemed a public highway. *R.* v. *Wright*, 3 *B. & Adolph.* 681. Where a local Act authorized commissioners to set out a private road in a certain parish, to be used by certain persons instead of an old accommodation road, and the commissioners set it out accordingly, but ever afterwards it was used by the public as a public carriage-way; and the question was, whether the parish was bound to repair it: the Court held that, as there was no evidence that the parish ever acquiesced in the road being dedicated to the public, they were not bound to repair it. *R.* v. *St. Benedict, Cambridge*, 4 *B. & Ald.* 447. And where a public road was made in pursuance of an Act of Parliament, which

continued in force during 21 years, and during that time the parish were bound to do statute duty upon it: the Court held that the liability of the parish to repair, ceased upon the expiration of the Act; after that, it was no longer a public way, and the parish had done no voluntary act indicating that they adopted it, as all they did was by compulsion. *R.* v. *Mellor*, 1 *B. & Adolph.* 32. So, where trustees were empowered to make a turnpike road from A. to B., a distance of 12 miles, and they completed it to the distance of eleven miles and a half, where it joined a public highway, but had not completed the remaining half mile, leading from the highway to B.: the Court held that until the whole of the road was made, the burthen of repairing it could not be thrown upon the parish. *R.* v. *Cumberworth*, 3 *B. & Adolph.* 108.

If a parish lie partly in one county and partly in another, and a road lying in both parts be out of repair, the whole parish must be indicted; it is not sufficient to indict that part of the parish lying in one county for the non-repair of the road lying in that county, but the whole parish must be indicted, for the whole is liable of common right. *R.* v. *Clifton*, 5 *T. R.* 498. *see R.* v. *Great Broughton*, 4 *Burr.* 2507, *cont.* And if a part of the road in each county be out of repair, two indictments must be brought against the entire parish, namely, one in one county for the part which is out of repair in that county, and another in the other county for the part which is out of repair in that county. *Semb.*

It often happens that a highway forms the boundary line between two parishes, and one side of the road is in one parish and the other side in the other; in which case formerly the indictment against each parish must state its liability to repair *ad medium filum viæ*. *See R.* v. *St. Pancras*, *Peake*, *R.* 286. But now, by stat. 5 & 6 W. 4, c. 50, s. 58, the justices at a special sessions for the highways, may, upon hearing the surveyors of both parishes, proceed in the manner there pointed out to determine what portion of the road shall be repaired by one parish, and what by the other, dividing the highway into two parts by a transverse line across it, and by their order assigning one part to be repaired by one parish, and the other by the other parish; and the like, where a part of such road is reparable by a body politic or corporate *ratione tenuræ* or otherwise; which order, with a plan, shall be filed with the clerk of the peace. And by sect. 59, "from and after such order and plan being so filed with the clerk of the peace as aforesaid, such parishes, and body politic or corporate, or person aforesaid respectively, shall be bound as of common right to maintain and keep in repair such parts of such highways so allotted to them as aforesaid, and shall be liable to be proceeded against for neglect of such duty, and shall, in all respects whatsoever, be

liable and subject to all the provisions, regulations, and penalties contained in this Act, and also shall be discharged from the repair of such part of such highway as shall not be included in their respective allotment."

4. That the part of the highway, mentioned in the indictment as being out of repair, is out of repair, as there stated. And the parish, upon their part, may call witnesses to prove, that the part described was in good and sufficient repair, at the time of the finding of the indictment.

Witnesses.] An inhabitant of the parish is a competent witness for the prosecution, for he is giving testimony against his interest; but he is not a competent witness for the defence, if he be rated to the highways in his parish. *R.* v. *Inhbts. of Bondgate, in Aukland*, 1 *Ad. & E.* 744. *see ante, p.* 147. *and see* 5 *& 6 W.* 4, *c.* 50, *s.* 100.

Costs.] Formerly, by stat. 13 G. 3, c. 78, s. 64, provision was made for the granting of costs, to the prosecutor if the defence was frivolous, or to the defendant if the indictment were vexatious. But that statute has been repealed; and now, by stat. 5 & 6 W. 4, c. 50, s. 98, "it shall and may be lawful for the Court before whom any indictment shall be preferred for not repairing highways, to award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said Court that the defence made to such indictment was frivolous or vexatious." As to defraying the expenses of the prosecution, *see Id.* s. 111. 95. By the former statute, the costs were to be awarded by the Court "before whom the indictment was tried;" and where the indictment was removed from Sessions by certiorari, and tried before a judge at *nisi prius* at the assizes, the Court of King's Bench refused to award costs, saying that the judge at *nisi prius* alone had the authority to award them, and the application should have been made to him. *R.* v. *Chatterton*, 5 *T. R.* 272. But by this Act the costs are to be awarded by the Court before whom the indictment is preferred; and where such an indictment, preferred at sessions, is now removed by certiorari, and tried at the assizes, there will be some difficulty, I fear, in obtaining costs: the judge at *nisi prius* cannot award them, for the indictment is not, and could not be preferred in his Court; the Court of King's Bench will not and cannot interfere, and the Sessions have no means of judging whether the defence was frivolous or vexatious. Where the judge certified on the back of the record that the defence was frivolous, without also awarding costs in express terms, the Court held that this certificate was in effect an awarding of costs, and sufficient for that purpose. *R.* v. *Clifton*, 6 *T. R.* 344.

Plea, that a particular district in the parish, is bound to repair.

Berkshire, Michaelmas Sessions, 1836.

The King *v.* The Inhabitants of the Parish of ——.

And A. B. and C. D., two of the inhabitants of the said parish of ——, by E. F. their attorney, for themselves and the rest of the inhabitants of the said parish (except the inhabitants of the township of L. within the said parish) come into Court here, and having heard the said indictment read, say, that our Lord the King ought not further to prosecute the said indictment against the inhabitants of the said parish (except the inhabitants of the said township of L. :) because they say, that the inhabitants of the said township of L., from time whereof the memory of man is not to the contrary, have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and still of right ought to repair and amend, when and so often as it hath been or shall be necessary, such and so many of the common highways situate in the said township as would otherwise be reparable and amendable by the inhabitants of the said parish at large. And the said A. B. and C. D. in fact say, that the said part of the said highway in the said indictment mentioned and described to be ruinous, miry, deep, broken, and in great decay, lies and is situate in the said township of L.; by reason whereof the inhabitants of the said township of L. in the parish aforesaid, during all the time last aforesaid, ought to have repaired and amended, and still ought to repair and amend the same part of the said common highway, so ruinous, miry, deep, broken and in decay, when and so often as it hath been and shall be necessary; and the inhabitants of the said parish at large ought not to be charged with the repairing and amending of the same. And this the said A. B. and C. D. are ready to verify; wherefore they pray judgment, and that they and the rest of the inhabitants of the said parish of ——, (except the inhabitants of the township of L. aforesaid) by the Court here may be dismissed and discharged from the said premises in the said indictment above specified. *If that part of the highway, stated to be out of repair, be situate in two or more townships, each of which repairs its own roads, the plea may be framed accordingly; but it must state with certainty what part of the road is within the one township, what within the other.* R. *v.* Bridekirk, 11 East, 304. *If the road in question have been a highway immemorially, it should seem that the custom may be pleaded as to this highway alone, without pleading it as to all the other highways within the township.* See R. *v.* W. R. Yorkshire, 4 B. & Ald. 623.

The above plea is framed upon the case of *R.* v. *Eccleyfield*, 1 *B. & Ald.* 348. In that case, it was objected that the parish

could not get rid of their common law liability, by throwing the burthen upon others, without stating in their plea some consideration for the liability of the latter; that in *R.* v. *St. Giles, Cambridge,* (5 *M. & S.* 260,) it was holden, that to an indictment against a parish for not repairing a highway within it, it was not sufficient to plead that another parish had immemorially repaired and ought to repair it, but the plea ought to have shewn a consideration; and that such was the case where individuals were charged with the repair of highways, and in all cases except where corporations are so charged. But the Court held the plea to be good, without stating any consideration; the mistake in imagining that a consideration should be stated, arose entirely from mistaking the custom laid in the plea, for a prescription: a custom must be alleged in the land, a prescription in the person; and as none but bodies politic or corporate, spiritual or temporal, which have perpetual succession, can be bound to repair a way by prescription, therefore it is, that a plea that an individual is liable to repair, must always shew a consideration, although it is otherwise in pleading the liability of a corporation; but where a custom, which is of a local and not of a personal nature, is pleaded, as in this case, where the plea states the liability of the district of a parish to repair a road within it, no consideration need be stated; if inded, as in R. *v.* St. Giles, it were sought to throw upon another parish, or on some district in the same parish, the liability of repairing a road not within it, there, inasmuch as a custom to repair could not be pleaded, a custom being to be alleged in the land as above mentioned, a consideration must be stated. In the above case, it was also objected that the plea ought to have concluded with a special traverse of the liability of the parish to repair; but the Court held, that even if a special traverse were necessary, the allegation towards the end of the plea, that the inhabitants of the parish at large ought not to be charged, &c. was a sufficient and effectual traverse. *Id.* Where the plea merely stated that a certain district of the parish immemorially ought to repair, without stating that it had immemorially repaired, it was holden bad, on writ of error. *R.* v. *Great Broughton,* 5 *Burr.* 2700.

The matter of this plea must be pleaded; it cannot be given in evidence under the general issue. *Ante, p.* 217. A parish can in no case, under the general issue, shew by evidence that another district or person is bound to repair a road within it, except in the case of their being relieved from their common law liability by Act of Parliament. *R.* v. *St. George, Hanover Square,* 3 *Camp.* 222.

Evidence.

To prove this plea, (supposing the custom to be traversed upon the part of the prosecution,) the defendants must prove:

1. The custom, as alleged, by old witnesses, or other evidence; and

2. That the part of the road described in the indictment, is within the township of L.

Plea, that a particular person is bound to repair, ratione tenuræ.

Berkshire, Michaelmas Sessions, 1836.

The King *v.* The Inhabitants of the Parish of ——.

And A. B. and C. D., two of the inhabitants of the said parish of ——, by E. F. their attorney, for themselves and the rest of the inhabitants of the said parish (except one G. H.,) come into Court here, and having heard the said indictment read, say, that our Lord the King ought not further to prosecute the said indictment against the inhabitants of the said parish (except the said G. H.:) because they say that, as to the said part of the said highway in the said indictment described to be ruinous, miry, deep, broken and in great decay, the said G. H., by reason of his tenure of certain lands and tenements called ——, lying and being in the said parish, ought to repair and amend the said part of the said highway in the said indictment so described to be ruinous, miry, deep, broken and in great decay as aforesaid, when and so often as there should be occasion, [as the said G. H, and all those who held the said lands and tenements, for the time being, from time whereof the memory of man is not to the contrary, hitherto were used and accustomed and of right ought to do, and the said G. H. still of right ought to do:] And this the said A. B. and C. D. are ready to verify; wherefore they pray judgment, and that they and the rest of the inhabitants of the said parish of ——, (except the said G. H.) by the Court here may be dismissed and discharged from the said premises in the said indictment above specified. *A plea that a body politic or corporate, spiritual or temporal, is bound to repair, may state merely a prescription, without stating a consideration, as in this plea. See R.* v. *Ecclesfield, ante, p.* 221, 222.

The matter of this plea must be pleaded specially; it cannot be given in evidence under the plea of not guilty. 1 *Hawk. c.* 76, *s.* 9. *and see R.* v. *St. George, Hanover Square, ante, p.* 222.

Evidence.

If the liability of G. H. to repair ratione tenuræ, be put in issue by the replication, the defendants must prove it. If it be proved that he, or those who occupied the same lands before him, have always repaired the way in question, this will be good evidence to support the plea. *See R.* v. *Skinner,* 5 *Esp.* 219. The indictment must be against the occupier of the lands, not against the reversioner.

One mode by which the occupier of land may become liable to repair a highway adjoining it, is by inclosure. Where a road is open to the land on either side of it, if the road become impassable or incommodious, the public have a right to go upon the adjacent land. 1 *Ro. Abr.* 390. *A. pl.* 1. *B. pl.* 1. *Abeor* v. *French*, 2 *Show.* 28. *Taylor* v. *Whichead*, *Doug.* 749. An inclosure of the land from the highway, deprives the public of this right; and for this reason it has been holden, that if the owner of lands not inclosed, next adjoining to a highway, incloses his lands on both sides, he is bound to make a perfect good way, as long as the inclosure lasts. 1 *Ro. Abr.* 390. *B. pl.* 1. *Duncombe's Case*, *Cro. Car.* 366. *Henn's Case*, *W. Jon.* 296. *R.* v. *Flecknow*, 1 *Burr.* 465. 1 *Hawk. c.* 67, *s.* 6. So, if he inclose the land on one side, the other side being before inclosed by an ancient fence, he ought to repair the whole way; but if there be no such ancient inclosure on the other side, he is in that case bound to repair only half the way. *R.* v. *Sloughton*, 1 *Sid.* 464. 1 *Hawk. c.* 76, *s.* 7. But where a highway is altered, changed or inclosed, by virtue of a writ of *ad quod damnum*, or a statute, or other legal course, the owner of the land is not bound to repair the new road, unless, in the case of a writ of *ad quod damnum*, the jury impose such a condition upon him, or unless the new road lies in another parish. *Ex parte Vennor*, 3 *Atk.* 771, 772. *R.* v. *Flecknow*, 1 *Burr.* 465. So, where a highway is inclosed under the authority of an Inclosure Act, the person who incloses his land from a highway, is not thereby bound to repair the highway. *R.* v. *Flecknow*, 1 *Burr.* 465. 2 *Saund.* 160. *n.* 12. As to the mode of pleading this liability by reason of inclosure, it may either be done specially, or in the above form, omitting the statement of the prescription between the brackets.

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25. *Indictment against a District of a Parish, or a Corporation bound to Repair by Prescription, or an Individual bound* ratione tenuræ, *for not Repairing a Highway.*

This indictment may be in the form, *ante*, except that instead of the concluding statement of the liability of the parish, you state the liability of the township, &c. or corporation, as in the plea, *ante*, *p.* 221, or the liability *ratione tenuræ*, as in the plea, *ante*, *p.* 223. Where an extra parochial hamlet was indicted for not repairing a highway within it, the indictment was holden bad, because it did not allege that the inhabitants had immemorially repaired the way. *R.* v. *Kingsmoor*, 2 *B.* & *C.* 190. *and see R.* v. *Penderryn*, 2 *T. R.* 513.

Under the plea of not guilty, the prosecutor must prove the custom, prescription, or liability *rationæ tenuræ*, as directed

ante, p. 223, 224. The rest of the evidence may be collected from the evidence against a parish, *ante, p.* 215. Upon the trial of an indictment for not repairing a highway, which it was alleged the defendant was bound to repair *ratione tenuræ*, it was holden that an award, made under a submission by a former tenant for years of the premises, could not be received in evidence:—not as an adjudication, for the tenant had no authority to bind the rights of his landlord;—nor as evidence of reputation, being *post litem motam*. *R.* v. *Cotton*, 3 *Camp.* 444.

As the defendants in these cases, respectively, are not bound of common right to repair, as a parish is, it is not necessary for them in any case to plead specially. *R.* v. *Ireton*, *Comb.* 396. *R.* v. *Norwich*, 1 *Str.* 183, 184. But under the general issue, they may not only give evidence in disproof of the custom, prescription, or liability *ratione tenuræ*, or of the road being in the township, &c., or out of repair, but they may even shew that another is bound to repair the highway in question, *ratione tenuræ*, or by reason of inclosure, or the like. *See R.* v. *Hatfield*, 4 *B.* & *Ald.* 75.

By the recent Highway Act, 5 & 6 W. 4, c. 50, s. 62, a highway, which any body politic or corporate, or any individual *ratione tenuræ* or otherwise, is bound to repair, may, with the consent of the inhabitants of the parish in which it is situate, in vestry assembled, be made a parish highway by order of the justices at a special sessions for the highways, upon the application either of the party liable to repair, or of the surveyor; and the order shall fix the proportion of the expenses of repairing the highway, to be paid annually by the party, or a sum certain in satisfaction of all future claims.

Presentments, for not Repairing Highways.

Formerly, any justice of the peace might present a highway, out of repair. The presentment in substance was the same as an indictment, was engrossed on parchment, and handed in open sessions by the justice to the clerk of the peace, to be filed, &c. And the parish, &c. thereby charged with the liability to repair, pleaded to it, and all subsequent proceedings to trial and judgment were had upon it, in the same manner precisely as upon an indictment.

But now, by stat. 5 & 6 W. 4, c. 50, s. 99, it shall no longer be lawful "to take or commence any legal proceedings by Presentment, against the inhabitants of any parish, or other person, on account of any highway or turnpike road being out of repair."

26. *Indictment for Disobeying an Order of Justices.*

Berkshire to wit: The jurors for our Lord the King upon their oath present, that heretofore and before the committing of the offence hereinafter mentioned, to wit, on the first day of August, in the seventh year of the reign of our Sovereign Lord William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland King, defender of the faith, at the parish of —— in the county of Berks aforesaid, at a petty sessions then and there holden, J. P. and L. M., esquires, two of his Majesty's justices of the peace for the said county, made their certain order in writing under their respective hands and seals, whereby, after reciting that, [&c.] "the said justices did order," [*&c. setting it out in the past tense*:] as by the said order, reference being thereunto had, will more fully and at large appear. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said order afterwards on the day and year aforesaid was duly served upon the said A. B., in the said order mentioned, and the said A. B. was then and there required to obey the said order; but that the said A. B., late of the parish aforesaid in the county aforesaid, labourer, upon being so served with the said order as aforesaid, did not ["*here insert that part of the order which has not been obeyed,*"] as by the said order he was required, but, on the contrary thereof, he the said A. B. then and there unlawfully and contemptuously did neglect and refuse so to do, and he hath not since complied with the said order or any part thereof, although often required so to do: in contempt of our Lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our Lord the King, his crown and dignity. *See* R. v. *Robinson*, 2 *Burr.* 799. R. v. *Boyall*, 2 *Burr.* 832. R. v. *Byce*, 1 *Bott*, 324. R. v. *Smith*, *Id.* 403. R. v. *Kingston*, 8 *East*, 41. R. v. *Gash*, 1 *Stark. R.* 441. R. v. *Fearnley*, 1 *T. R.* 316.

Misdemeanor: fine, or imprisonment, or both.

Evidence.

To maintain this indictment, the prosecutor must,

1. Produce and prove the order. *See* R. v. *Tanner*, 1 *Esp.* 304. And he must prove,

2. That the order was personally served upon the defendant; *see* R. v. *Kingston*, 8 *East*, 41. R. v. *Moorhouse*, *Cald.* 554; that is to say, that a true copy of it was personally served upon him, and at the same time the original was shewn to him.

3. That all things were done which were necessary to give the justices jurisdiction. Where justices made an order against the stewards of a benefit society, at the instance and upon the com-

plaint of one of the members, and the statute upon the subject required the justices to hear and determine such complaints according to the rules of the society, confirmed by the justices at sessions: upon an indictment for disobeying the order, it was holden that the prosecutor should have proved that the rules were confirmed at the sessions, for if not, the justices had no jurisdiction; and that it was not sufficient that the fact of their being so confirmed was recited in the order. *R.* v. *Gilkes et al.* 8 *B. & C.* 439. *see R.* v. *Wade et al.* 1 *B. & Adolph.* 861. *see also R.* v. *White, Cald.* 183. *R.* v. *Mytton, Cald.* 536. Where, on an indictment for not obeying an order of justices to abate a nuisance, it appeared to have been made in a case in which the justices had no jurisdiction, Abbott, C.J. directed an acquittal, although the defect appeared upon the record. *R.* v. *Hollis*, 2 *Stark. R.* 536.

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27. *Indictment for not Accepting and Serving Office.*

Berkshire to wit: The jurors for our Lord the King upon their oath present, that A. B., late of the parish of —— in the county of Berks aforesaid, yeoman, on the —— day of —— in the sixth year of the reign of our Sovereign Lord William the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland King, defender of the faith, and long before, was and still is a substantial householder in the said parish, and a fit and proper person to serve the office of an overseer of the poor of and for the said parish; and the said A. B., being such fit and proper person aforesaid, on the said —— day of —— in the year aforesaid, by a warrant under the hands and seals of J. P. and L. M., esquires, two of his majesty's justices assigned to keep the peace in and for the county aforesaid, (one of them being of the quorum,) was duly and lawfully nominated and appointed one of the overseers of the poor of the said parish, for one year then next ensuing, ["*pursuing the terms of the appointment*;"] whereof the said A. B. afterwards, to wit, on the day and year aforesaid, there had due notice: But that the said A. B., not regarding his duty in that behalf, but contriving and intending, as much as in him lay, to render the said nomination and appointment of no effect, on the said —— day of —— in the year aforesaid, and from thence continually afterwards until the day of the taking of this inquisition, at the parish aforesaid in the county aforesaid, unlawfully, wilfully, obstinately and contemptuously did refuse, and still doth refuse to take upon himself and execute the said office of overseer of the poor of the parish of —— aforesaid: in contempt of our said Lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our Lord the King, his crown and dignity. *See* 4 *Went.* 338.

Misdemeanor: fine, or imprisonment, or both.

Evidence.

To maintain this indictment, the prosecutor must,

1. Prove that the defendant is a housekeeper, which I conceive to be the meaning of the word "householder" in the statute. *See R. v. Poynder*, 1 B. & C. 178.

2. Produce and prove the appointment.

3. Prove that the defendant had notice of it.

4. That he refused or neglected to execute the office.

The defendant, under the plea of not guilty, may shew that he is exempted from serving the office; *see* 4 *Burn, D. & W.* 10—14; or that the appointment is void.

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28. *Indictment for a Conspiracy.*

Berkshire to wit. The jurors for our Lord the King upon their oath present, that A. B. late of the parish of —— in the county of Berks aforesaid, esquire, Sir C. D. late of the same place, knight, E. F. late of the same place, gentleman, G. H. late of the same place, gentleman, being evil disposed persons, and wickedly devising and intending to defraud one W. X., on the first day of August, in the seventh year of the reign of our Sovereign Lord William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland King, defender of the faith, at the parish aforesaid in the county aforesaid, did amongst themselves unlawfully conspire, combine, confederate and agree together, falsely and fraudulently to cheat and defraud the said W. X. of a certain large sum of money, to wit, the sum of £——, under the false and fraudulent pretence that the said A. B., in consideration of such sum of money, would secure and had the means of securing unto the said W. X., his executors, administrators, and assigns, a certain annuity, to wit, an annuity of £——, to be payable during the natural life of the said A. B.: AND the jurors aforesaid upon their oath aforesaid do further present, that in pursuance of and according to the said conspiracy, combination, confederacy and agreement amongst themselves, so had as aforesaid, the said Sir C. D. afterwards, to wit, on the tenth day of August, in the year aforesaid, at the parish aforesaid, [*here state the overt acts by each of the conspirators, or by two or more of them jointly, or by one of them* "in the presence and hearing and with the knowledge and consent" *of the others; commencing the statement of each overt act thus:* "AND the jurors aforesaid upon their oath aforesaid do further present, that in further pursuance of," *&c. ut supra; and con-*

cluding the count thus :] " to the great damage of the said W. X., and against the peace of our, Lord the King, his crown and dignity." *See the precedent*, 4 *Went.* 8. *and see* 6 *Went. Index, title Conspiracy. Add a general count, the same as the above, but omitting the overt acts. Also, if necessary, other counts, with overt acts, varying the statement of the conspiracy, with corresponding general counts without overt acts, may be added.*

As to the general counts, above recommended: in strictness, it is not necessary to insert overt acts at all, in an indictment for a conspiracy; the conspiring to effect an unlawful purpose, or a lawful purpose by unlawful means, is the offence in law, and the overt acts or means used by the parties to effect it, are merely matter of evidence to prove the charge, and not the crime itself. *See R.* v. *Eccles*, 1 *Leach*, 274. Where the indictment charged that the defendants " did conspire and combine together, by divers false pretences and subtle means and devices, to obtain and acquire to themselves of and from P. D. and G. D. divers large sums of money of the said P. D. and G. D., and cheat and defraud them respectively thereof," without adding any overt acts: the Court held the indictment to be sufficient; it was possible to conceive that the parties might meet together, and determine by some trick or device to cheat and defraud another, without at that time fixing or settling what the particular means or devices should be; and yet such a meeting would constitute an offence. *R.* v. *Gill & Henry*, 2 *B. & Ald.* 204. Where the conspiracy laid, was " to cheat and defraud the just and lawful creditors" of one of the defendants, and there were no overt acts laid, Lord Tenterden, C. J. seemed to think the charge too general, as the indictment did not state what was intended to be done, or who were to be defrauded; but he said he would not stop the trial on that point; and the defendants were afterwards acquitted. *R.* v. *Fowle & Elliott*, 4 *Car. & P.* 592. *and see R.* v. *Biers et al.* 1 *Ad. & E.* 327. Where, however, the indictment charged the defendants with conspiring to propagate false reports that Bonaparte was killed, and that peace would soon be made between England and France, and by such reports to cause a rise in the prices of the Government funds and securities, with a wicked intention to injure " all the subjects of the King," who should on that day purchase such funds or securities: it was objected that this was bad for uncertainty, in not stating the individuals by name who were intended to be injured; but the Court held that there was nothing in the objection, Lord Ellenborough, C. J. saying, that the defendants, at the time of the conspiracy, could not, except by a spirit of prophecy, divine who would be purchasers of such stock on a subsequent day. *R.* v. *De Berenger et al.* 3 *M. & S.* 67.

The conspiracy laid, must be, either to do an unlawful act,

or a lawful act by unlawful means. And therefore, where an indictment, after stating that a commission of bankrupt had issued against Jones, one of the defendants, charged that he and the others, intending to cheat the creditors of Jones, did conspire to conceal and embezzle certain of his personal property: this was holden to be insufficient; for if he had not committed an act of bankruptcy, or were not a trader, or there were no petitioning creditor's debt, (and the indictment stated nothing upon these subjects,) Jones would have a right to remove the goods, and no indictment for a conspiracy could in that case be maintained against the defendants. *R.* v. *Jones et al.* 4 *B. & Adolph.* 345. So, where the indictment merely charged a conspiracy to cause a female pauper, who was chargeable to a particular parish, to be married to a pauper of another parish, the Court held that this was not in itself unlawful; and that to render the conspiracy indictable, the indictment should have charged that the defendants had conspired to effect that purpose by unlawful means, which should be specified. *R.* v. *Seward et al.* 1 *Ad. & E.* 706. But where the conspiracy laid was, by false reports of the death of Bonaparte, to raise the price of the public funds, and it was objected that as there was nothing unlawful in raising the price of the public funds, conspiring to do it could not be an indictable offence: the Court, however, held that there was no ground for the objection; a public mischief was stated as the object of the conspiracy; the purpose to be effected was mischievous, it struck at the price of a vendible commodity in the market, and if it gave it a fictitious price in the market, by means of false rumours, it was a fraud levelled against all the public; a conspiracy to effect that fraud, was an indictable offence, and would have been complete, even if it had not been pursued to its consequences, or the parties had not been able to carry it into effect. *R.* v. *D. Berenger et al.* 3 *M. & S.* 67. An indictment, however, will not lie for a conspiracy to commit a mere civil trespass, as snaring hares in a preserve, although alleged to be done in the night, by persons armed with offensive weapons for the purpose of resisting any persons opposing them. *R.* v. *Turner*, 13 *East*, 228. So, where two persons were indicted for conspiring to sell the prosecutor an unsound horse, Lord Ellenborough, C. J. held, that it was not the subject of an indictment, but merely of an action on the warranty. *R.* v. *Pywell et al.* 1 *Stark.* 402. So, where an indictment charged a conspiracy to deprive a man of the office of secretary to an illegal unincorporated company, Lord Ellenborough, C. J. held, that it would not lie; so far from having any interest in the office, the prosecutor himself was guilty of a crime by executing the duties of it. *R.* v. *Stratton et al.* 1 *Camp.* 549. *n.*

The venue may be laid in any county, in which a distinct

overt act of the conspiracy was committed. R. v. *Brisac & Scott*, 4 *East*, 164, 170.

Misdemeanor: fine, or imprisonment, or both. Formerly what was termed the villainous judgment was passed upon defendants for conspiracy, whereby they could no longer serve upon a jury, or be credited as witnesses. 1 Hawk. c. 72, s. 9. *But this has long ceased to be the practice, there being no instance of the villainous judgment since the reign of Edward* 3. 4 Bl. Com. 136, 137. *And it may well be doubted whether it could be given for any other conspiracy, than that alone for which the old writ of conspiracy would lie, and which is the only one noticed in the old text books, namely, a conspiracy falsely to indict a man for an offence, of which he was afterwards acquitted.* See ante, p. 149.

Evidence.

To maintain this indictment, the prosecutor must prove:

1. Any facts necessarily stated in the indictment, by way of inducement. And if the matter thus stated cannot be rejected as surplusage, a failure in the proof of it will be as fatal as in proof of the conspiracy itself. Where an indictment for a conspiracy stated that an indictment had been preferred at the Quarter Sessions and found by the grand jury; and in order to prove this allegation, the indictment itself was produced, together with the minute book of the sessions, and these were received as sufficient evidence by the judge at the trial: but the Court afterwards granted a new trial, holding that the indictment and book were not evidence; in order to prove the allegation, the record should have been made up, and an examined copy produced and proved. *R.* v. *Smith et al.* 8 *B. & C.* 341. So, where it was stated as inducement in such an indictment, that a certain statute was passed in the 2d and 3d years of the reign of his present Majesty, and the defendant was convicted: the Court, upon motion, arrested the judgment for this error, for an Act of Parliament cannot be said to be passed in two years, but must be pleaded of that year in which it was actually passed. *R.* v. *Biers et al.* 1 *Ad. & E.* 327. In the present indictment there is no inducement stated; but the above observations are made with reference to cases of this description generally.

2. The conspiracy. A conspiracy is proved, either expressly, or by the proof of facts from which the jury may infer it. It is seldom proved expressly; nor can a case easily be imagined in which that is likely to occur, unless where one of the persons implicated in the conspiracy, consents to be examined as a witness for the prosecution. In nearly all cases, therefore, the conspiracy is proved, by what is usually termed circumstantial evidence, namely, by the proof of facts from which the jury

may fairly imply it. It is usual to begin by shewing that the defendants all know each other, and that a certain degree of intimacy exists between them, so as to shew that their conspiring together is not improbable; and if to this can be added evidence of any consultations or private meetings between them, there is then a strong foundation for the evidence to be subsequently given, namely, of the overt acts of each of the defendants, in furtherance of the common design. But although the proof above mentioned is desirable, because it satisfies the jury as you proceed, and they are better able to apply the evidence of the overt acts when it is afterwards given: yet, it is not essentially necessary, as the jury may imply the conspiracy of all, from the overt acts of each. In *R.* v. *Brisac & Scott*, (4 *East*, 171,) Grose, J. said, "conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them, and which hardly ever are confined to one place." Evidence must then be given of such acts of the defendants respectively, from which the jury may fairly and reasonably imply that they all have been acting with one common design, and that they designed to effect that which is stated in the indictment to be the object of the conspiracy. If the prosecutor fail in proving this, as against any of the defendants, that defendant must be acquitted. *See* *R.* v. *Pollman et al.* 2 *Camp.* 231, 229. But where the indictment charged a conspiracy falsely to indict a man, with intent to extort money from him, and the jury found that the defendants conspired to indict him with that intent, but not falsely: the Court held that the word 'falsely' might be rejected as surplusage, as it was equally an offence to conspire to indict a man with intent to extort money from him, whether the charge were true or false; and in criminal cases, it is sufficient for the prosecutor to prove so much of the charge, as constitutes an offence punishable by law. *R.* v. *Hollingberry*, 4 *B. & C.* 329.

General evidence of the conspiracy charged, may be received in the first instance, although it cannot affect a defendant until afterwards brought home to him, or to an agent employed by him. *The Queen's Case*, 2 *Brod. & B.* 302. *R.* v. *Hammond & Webb*, 2 *Esp.* 719. *S. P.*

3. The overt acts, or so many of them as may be necessary to prove the conspiracy against all the defendants: This subject has been above already alluded to. Every overt act, to be evidence, must have a tendency at least to prove, either the general nature of the conspiracy, or that one or more of the defendants were operating towards effecting that, which is charged in the indictment to have been the object of the conspiracy. Where the defendants were charged with a conspiracy to cause them-

selves to be esteemed persons of property and opulent, for the purpose of defrauding one A. B. and other tradesmen; and after evidence was given of their having hired a house in a fashionable street, and representing themselves to one tradesman, whom they had employed to furnish it, as persons of large fortune, it was proposed to prove that they had made similar representations to another tradesman, which was objected to: but Lord Ellenborough, C.J. held that there was no ground for the objection; he said that this being an indictment for a conspiracy to carry on the business of common cheats, cumulative instances were necessary to prove the offence. *R.* v. *Roberts et al.* 1 *Camp.* 399. In R. *v.* Hunt and others, (4 *B.* & *Ald.* 566,) which was a prosecution for a conspiracy to cause great numbers of people to meet at a certain place in Manchester, for the purpose of disturbing the public peace, and of exciting the King's subjects to discontent, hatred of the Government, &c. the prosecutor at the trial gave in evidence certain resolutions passed at a meeting previously holden in Smithfield, London, for the same avowed purpose as the meeting at Manchester, namely, Parliamentary Reform, at which Hunt presided as chairman; and this being objected to, on a motion for a new trial, on the ground that there was no evidence to shew that it was intended to propose the same resolutions at the Manchester meeting, the Court held that, as against Hunt, who, though a stranger, was invited to act, and acted as chairman also at the Manchester meeting, the evidence was properly received, as shewing his sentiments and views with respect to Parliamentary Reform, and to the assembling of multitudes of persons to hear speeches and resolutions under that pretext. It was also proved at the same trial, that large bodies of persons, who attended the meeting at Manchester, came from a distance, organized, and with a regularity of step and movement resembling that of a military march, and that one of these bodies came from a place called "White Moss," and evidence was given that a number of persons were previously seen at White Moss before the day break, practising the marching step, and that upon seeing the witnesses, they ill-treated them, called them spies, and extorted from one of them an oath never to be a King's man, or to name the name of a king; and it was also proved that some of the parties, in coming into Manchester on the day of the meeting in military order, as above mentioned, on passing the house of a witness who had been so ill-treated, expressed their disapprobation of him by hissing: this evidence as to what occurred at White Moss being objected to, the Court held that what took place at White Moss, coupled with the conduct of those marching to the meeting, in hissing as they passed the witness's house, was unquestionably competent evidence as to the general character and intention of the meeting, and was therefore properly received. *Id.* Upon a

trial of some journeymen hatters for a conspiracy to cause another journeyman to be dismissed from his employment, for not paying a fine of a guinea which they had imposed upon him, it was proved that the defendants and other journeymen hatters met at his master's manufactory, in a garret, and the prosecutor being sent for, and appearing before them, they told him he must pay a guinea; it was then proposed to ask him whether he heard any person at the meeting say any thing about the appointment of delegates; this was objected to, on the ground that the declarations of others could not be evidence against the defendants, who could be affected only by their own declarations; to which it was answered, that in conspiracy, wherever you lay a sufficient foundation by evidence of several having met for the purposes of the conspiracy, the declarations of any of the parties, made at any time or place, relating to the object of the conspiracy, was evidence as against all: of this opinion was Hotham, B. who tried the case, and the defendants were convicted. *R.* v. *Salter et al.* 5 *Esp.* 125. Perhaps the safer general rule to lay down upon the subject, would be this: wherever the writings or words of any one of the parties charged with or implicated in a conspiracy, can be considered in the nature of an act done in furtherance of the common design, it is admissible in evidence, not only as against the party himself, but as proof of an act, from which (*inter alia*) the jury may infer the conspiracy itself; wherever the writings or words of such a party amount to an admission merely of his own guilt, and cannot be deemed an act done in furtherance of the common design, in that case they can be received in evidence merely as against the party, and not as evidence of the conspiracy, and in strictness ought not to be offered in evidence until after the conspiracy has been proved *aliunde;* but wherever the writings or words of such party, not being in the nature of an act done in furtherance of the common design, merely tend to implicate others, and not to accuse himself, they ought not to be received in evidence for any purpose.

If a written instrument form any part of the offence, no objection can be made to its being given in evidence, on the ground of its not being stamped. *R.* v. *Fowle & Elliott,* 4 *Car. & P.* 592.

Witnesses.] A wife cannot be a witness for any other parties indicted with her husband for a conspiracy, even although called, not to disprove the conspiracy, but to prove merely that the others took no part in the transaction in question; for her husband may possibly be benefitted by it. *R.* v. *Locker et al.* 5 *Esp.* 107. *and see R.* v. *Frederick & Tracy,* 2 *Str.* 1095. Nor can a defendant who has pleaded guilty, be called as a witness for those who are tried. *See R.* v. *Lafone et al.* 5 *Esp.*

154. On the other hand, where three were indicted for conspiracy, and defended separately; and after two of them had addressed the jury and closed their cases, the third addressed the jury, throwing the whole guilt upon the other two defendants, and then called a witness whom he examined as to a conversation between himself and one of the other defendants; the counsel for the prosecution then began to cross-examine the witness as to other conversations which had also taken place between the third defendant and the other, which was objected to on the part of the other defendant, on the ground that such a cross-examination might establish quite a new case against him: but, Abbott, C. J. said, that as the third defendant had called the witness, and examined him as to one conversation, the counsel for the prosecution could not be prevented from cross-examining him as to other conversations between the same parties; but it might be a matter for future consideration, whether the other defendant, after such evidence, might not have a right to address the jury upon it. *R.* v. *Kroehl et al.* 2 *Stark.* 343.

Verdict, &c.] After the whole of the evidence is given, the jury have to decide upon three questions, namely, 1st. whether from the whole of the evidence, (if there be no express proof of the conspiracy) they can fairly infer that there was a conspiracy; 2d. whether that conspiracy was to effect the particular object stated in the indictment; and 3d. whether all the defendants or which of them were concerned in it. If they acquit all but one, they must acquit that one also, however criminal they may think him, unless the indictment charge him with having conspired with other persons who are not tried; for one person alone cannot be guilty of a conspiracy. 1 *Hawk. c.* 72, *s.* 8. And for the same reason, a husband and wife cannot alone be indicted for a conspiracy, for they are but one person in law. *Id.* But where two conspire, and one dies, the other may be indicted and tried for the conspiracy. *R.* v. *E. Nicholls*, 2 *Str.* 1227.

Where four were indicted for a conspiracy, and two pleaded not guilty, one pleaded in abatement, to which plea there was a demurrer, and the fourth did not appear; the record as to the two who pleaded not guilty was taken down for trial, and one was acquitted, and the other found guilty of having conspired with the party who pleaded in abatement; the demurrer was then argued, and judgment of *respondeas ouster* given, and that defendant then pleaded not guilty; the defendant who was found guilty was next brought up for judgment, and upon his part it was objected that no judgment ought to be passed upon him, until after the trial of him who had before pleaded in abatement, for if the latter should be acquitted, it would be a virtual acquittal of the other, and the judgment would be erroneous: but the Court said that they would not be justified in deferring a

judgment, fully warranted by the verdict already given, merely from the possibility of the acquittal of the other party. *R.* v. *J. S. S. Cooke*, 5 *B.* & *C.* 538.

SECTION 6.—*Proceedings and Practice of the Court of Quarter Sessions, as a Criminal Court.*

1. *The Grand and Petty Juries.*

Qualification.] Every man, between the ages of 21 and 60, residing in any county in England, who shall have in his own name or in trust for him, within the same county, 10*l.* by the year above reprises in lands or tenements, whether of freehold, copyhold or customary tenure, or of ancient demesne, or in rents issuing out of any such lands or tenements, or in such lands, tenements and rents, taken together, in fee-simple, fee-tail, or for the life of himself or some other person;—or who shall have within the same county 20*l.* above reprizes in lands or tenements, held by lease for an absolute term of 21 years or more, or for any term of years determinable on any life or lives;—or who being a householder shall be rated or assessed to the poor rate, in Middlesex, on a value not less than 30*l.*, or in any other county on a value not less than 20*l.*;—or who shall occupy a house containing not less than 15 windows:—shall be qualified and liable to serve on grand juries in Courts of Sessions of the Peace, and on petty juries for the trial of all issues joined in such Courts of Sessions of the Peace, and triable in the county, riding, or division in which every man so qualified respectively shall reside. 6 *G.* 4, *c.* 50, *s.* 1. In Wales, the qualification is three-fifths of the qualifications above mentioned. *Id.*

In all corporations within the late Municipal Corporation Act, to which a separate Quarter Sessions is or shall be granted, every burgess is qualified and liable to serve on grand juries in such borough, and also upon juries for the trial of all issues joined in any Court of Quarter Sessions of the Peace, triable within the borough of which such person shall be a burgess, 5 & 6 *W.* 4, *c.* 76, *s.* 121.

If persons serve on a jury, who are not qualified, it is only matter of challenge, and must be objected to, if at all, by way of challenge. *Semb.* *See R.* v. *Sutton et al.* 8 *B.* & *C.* 417.

Exemptions.] Peers are exempt from serving on juries; so are the Judges of the Courts of Record at Westminster; Clergymen in holy orders; Priests of the Roman Catholic faith, who have taken and subscribed the oaths and declarations required by law; persons who teach or preach in a congregation of Pro-

testant Dissenters, whose place of meeting is registered, and who follow no secular occupation, except that of schoolmaster, producing a certificate of some justice of the peace of their having taken the oaths and subscribed the declaration required by law; Serjeants and Barristers at Law actually practising; Members of the Society of Doctors of Law, and Advocates of the Civil Law actually practising; Attornies, Solicitors, and Proctors, actually practising, and having duly taken out their annual certificates; Officers of the Courts of Law and Equity, and of the Ecclesiastical and Admiralty Courts; Coroners, Gaolers, and Keepers of Houses of Correction; Members and Licentiates of the Royal College of Physicians in London, actually practising; Surgeons, being Members of the Royal College of Surgeons, in London, Dublin, or Edinburgh, and actually practising; Apothecaries, certificated by the Apothecaries' Company, and actually practising; Officers of the Navy or Army on full pay; Pilots licensed by the Trinity House of Deptford, Hull, or Newcastle-upon-Tyne, and Masters in the Buoy or Light Service of these Corporations, and Pilots licensed by the Lord Warden of the Cinque Ports, or by statute or charter in any other port; Household Servants of His Majesty; Officers of Customs or Excise; Sheriff's Officers, High Constables, and Parish Clerks. 6 *G.* 4, *c.* 50, *s.* 2. *and see* 5 *&* 6 *W.* 4, *c.* 76, *s.* 121. The inhabitants of the City and Liberty of Westminster, also, are exempt from serving on juries at the Sessions of the Peace for the County of Middlesex. 6 *G.* 4, *c.* 56, *s.* 49.

Aliens are not qualified to be jurors, except upon juries *de medietate linguæ;* 6 *G.* 4, *c.* 50, *s.* 3; but this is mere matter of challenge. *R.* v. *Sutton et al.* 8 *B. & C.* 417. Also, persons attainted of treason or felony, or convicted of any crime which is infamous, unless they have obtained a free pardon, or persons under outlawry or excommunication, shall not be qualified to serve on juries, 6 *G.* 4, *c.* 50, *s.* 3.

No Justice of Peace shall be summoned or impanelled as a juror, to serve at the sessions of the peace for the jurisdiction of which he is a justice. 6 *G.* 4, *c.* 50, *s.* 48.

Besides the exemptions above mentioned, every Member of the Council of any Borough, every Justice assigned to keep the peace therein, and the Treasurer and Town-clerk thereof, shall be exempt and disqualified from serving on any jury within the borough, and shall be exempt from serving on any other jury within the county in which such borough is situate; and all burgesses of a borough, for which a separate Court of Quarter Sessions shall be holden, shall be exempt from serving on juries for the trial of issues at the Sessions of the county. 5 *&* 6 *W.* 4, *c.* 76, *s.* 22.

Formerly Quakers and Moravians could not serve on juries, for they could not be sworn; *see R.* v. *Channeus, Ry. & M.* 374;

but as they may now make an affirmation instead of an oath, in all cases, (*see ante*, *p.* 145,) they may be jurors in both civil and criminal cases. So may members of the sect called Separatists. *Id.* *See the form of affirmation, ante, p.* 145.

Jury de Medietate Linguæ.] On the prayer of every alien, indicted or impeached of any felony or misdemeanor, the sheriff or other proper minister shall, by command of the Court, return for one-half of the jury, a competent number of aliens, if so many be in the town or place where the trial is had, and if not, then so many aliens as shall be found in the same town or place, if any; and no such alien jurors shall be challenged for want of freehold or other qualification, although they may for any other cause. 6 *G.* 4, *c.* 50, *s.* 47.

How returned, summoned, &c. in Counties.] In the first week in July in every year, the clerk of the peace in every county shall issue his warrant to the high constables, commanding them to issue their precepts to the churchwardens and overseers of the poor of the several parishes, and to the overseers of the poor of the several townships, within their respective constablewicks, requiring them to return a list of all men residing within their parishes, &c. qualified and liable to serve on jurors. 6 *G.* 4, *c.* 50, *s.* 4. The high constables make out their precepts accordingly; *Id.* *s.* 6; and the churchwardens and overseers make out the lists, *Id.* *s.* 8; and fix a copy on the church door on the three first Sundays in September; *Id.* *s.* 9; and at a special petty sessions to be holden in the last week in September, these lists shall be produced, and the justices may then strike out the names of any persons not qualified, or not able to serve by reason of any infirmity, or insert those omitted; and the lists so revised shall then be delivered to the high constable, who shall deliver them to the Court of Quarter Sessions at the next Sessions. *Id.* *s.* 10. The lists are then copied into "The Jurors' Book" by the clerk of the peace, and the book delivered by him to the sheriff, to be used from the 1st of January for one year. *Id.* *s.* 12. *The form of the Warrant, Precept, and Lists, are given in a Schedule to the Act; and see* 2 *Burn, D. & W.* 1151, 1152.

Before each sessions, a precept issues to the sheriff, requiring him to return a competent number of jurors; 6 *G.* 4, *c.* 50, *s.* 13; and the sheriff shall thereupon return the names of men contained in the Jurors' book, and no others. *Id.* *s.* 14. The precept directs him to return 24, but he usually returns 48. 2 *Hal.* 263. The jurors shall be summoned ten days at least before the day on which they are required to attend. 6 *G.* 4, *c.* 50, *s.* 25. As to the summoning of them within a liberty or franchise, *see R. v. John Jaram*, 4 *B. & C.* 692.

By 6 G. 4, c. 50, s. 20, however, it is provided, that the Courts of Sessions of the Peace, &c. shall have and exercise the same power and authority, as they have heretofore had and exercised, in issuing any writ or precept, or in making any award or order orally or otherwise, for the return of a jury for the trial of any issue before such Courts, or for amending or enlarging the panel of jurors; and the return thereto shall be made in the manner heretofore used, except that the jurors shall be returned from the body of the county, and not from any particular hundred, &c. and that they shall be qualified according to this Act. This seems to recognize the right of a Court of Quarter Sessions, to order the sheriff to return a jury immediately, as well in misdemeanors as felonies, which seems formerly to have been doubted. *See* 2 *Hawk. c.* 4, *s.* 1, 4. 2 *Hale*, 261, 262.

The clerk of the peace shall make out a list of the grand and petty jurors who attend, and transmit the same to the under-sheriff, who shall thereupon register the names in the Jurors' book; and the clerk of the peace shall give each juror, upon application, a certificate of his attendance. 6 *G.* 4, *c.* 50, *s.* 41. And no man shall be summoned to serve upon grand or petty juries at sessions, who shall have served as a juror at such sessions, within one year in Wales, or in the counties of Hereford, Cambridge, Huntingdon, or Rutland, or within two years in any other county, and has such certificate as aforesaid. *Id. s.* 42.

The like in Boroughs.] In boroughs within the late Municipal Corporation Act, 5 & 6 W. 4, c. 76, to whom separate quarter sessions have been or shall be given, seven days at the least before the holding of every quarter sessions, the clerk of the peace shall cause to be summoned a sufficient number of persons, being qualified and liable as before mentioned, (*ante, p.* 236,) to serve as grand jurors at every such sessions; and shall also cause to be summoned not less than 36 nor more than 60 persons so qualified and liable to serve as jurors at every such sessions. 5 *&* 6 *W.* 4, *c.* 76, *s.* 121. The clerk of the peace shall make out a list of the grand jurors, and a panel of the petty jurors, containing their names, places of abode, and descriptions. *Id.*

Grand Jury called, sworn, and charged.] The clerk of the peace calls over the names of the grand jurors. This is the first business done at the sitting of the Court of Quarter Sessions as a criminal Court, after the opening of the Court by proclamation, as mentioned, *ante, p.* 23, and after the names of the constables, &c. have been called over. As each juror answers, he goes into the grand jury box. The number must be at least twelve, *see* 2 *Hal.* 161, and must not exceed twenty-three. 2 *Burr.*

1088. They are sworn in this form; and first the Foreman, thus: "*You, as foreman of this inquest, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge. The King's counsel, your fellows' and your own you shall keep secret. You shall present no man for envy, hatred or malice; neither shall you leave any man unpresented for fear, favour, or affection, or hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding: So help you God.*" The remaining jurors are then sworn thus: "*The same oath which your foreman has taken upon his part, you and every of you shall well and truly observe and keep on your parts: So help you God.*"

The usual proclamation against vice and profaneness is then read. Then proclamation is made for silence, whilst the charge is delivered to the grand jury.

The chairman then charges the grand jury. And upon this subject, perhaps, I may be allowed to observe, that it seems to me to be infinitely better and more prudent to confine the charge entirely to the matters likely to come before the grand jury, explaining, or reading to them from some good treatise, the law upon any particular subject on which it is imagined they may possibly feel a difficulty in the exercise of their duties; but not to interfere, in the slightest degree, with the exercise of their judgment with reference to matters of fact; not to indicate in any way the opinion the chairman may have formed (from having read the depositions or otherwise) as to the merits of any particular case, or as to the enormity or venial nature of the offence; not to wander into topics irrelevant to the duties the grand jury are then about to perform; but, above all things, not to mix up politics with the charge, nor to use an expression, from which it can at all be implied that the Bench feel the slightest bias in their minds against or in favour of any prisoner, whose case is likely to come before the grand jury. It is of the greatest importance, in this country, that the minds of the public, and particularly of the poorer classes, should be strongly impressed with a confidence in the manner in which justice is here administered,—that it is fairly and equally meted out to all, rich and poor, without favour or affection to any. The people of this country are impressed with that feeling; it is that feeling which makes them submit quietly to the laws, and so honourably distinguishes them on this account from the inhabitants of some other countries, who, from a contrary impression, often take the laws into their own hands, and endeavour to right themselves. But for the purpose of continuing and fostering this confidence in the administration of justice, it is not sufficient merely that justice be in fact fairly and equally administered; but it is of almost equal importance that it should be done in a manner so apparently

free from all bias or prejudice, so mild, so unimpassioned, that all persons present, even the losing party himself, if possible, may be convinced that justice has been fairly administered. These are my reasons for the few observations I have above made as to the manner of charging a grand jury at a Court of Quarter Sessions. It may be said that judges at the assizes do not confine their charge within the limits I have here suggested, but often observe upon matters relating to the general affairs of the county, and other topics, not in any manner suggested by the calendar of the prisoners to be tried. Judges do so, no doubt, and in most cases rightly; but it must be recollected that they are at the time addressing a grand jury, many of whom are Magistrates, and all of whom are men of the first consequence and influence in the county, to whom a few hints from a judge of great legal knowledge and experience, either as to the manner in which they should exercise their duties as magistrates, or use their influence as country gentlemen, in furtherance of the welfare of their county and its inhabitants, must be extremely valuable, and are, I have no doubt, proportionably appreciated both by the grand jury, and the public, who hear the charge delivered. But there is really no necessity for any thing of this kind, in addressing a grand jury, at a Court of Quarter Sessions.

Petty Jury called.] The petty jurors are then called, and the first twelve who answer to their names usually go into the jury box. The rest are then called over, and the names of those who appear are ticked off upon the list or panel by the clerk of the peace. The names of the defaulters are then called over twice; and with respect to those who do not appear, the summoning officers who served them with the notices to attend, are then called, sworn and examined as to the respective services, and if no excuse by oath or affidavit be offered for their non-attendance, the Court order them to be fined, as mentioned *infra*.

Fine for Non-attendance.] If any man summoned to attend upon a jury, shall not attend in pursuance of such summons, or being thrice called shall not answer to his name, or if any such man or any talesman, after having been called, shall be present but not appear, or after his appearance shall wilfully withdraw himself from the presence of the Court: the Court shall set such fine upon every such man or talesman so making default, (unless some reasonable excuse shall be proved by oath or affidavit,) as the Court shall think meet. 6 *G.* 4, *c.* 50, *s.* 38. The stat. 5 & 6 W. 4, c. 76, s. 121, as to jurors at the quarter sessions in boroughs, contains a similar enactment, with this addition, that if the fine be not paid, the Court shall make an order that the same may be levied by distress and sale of the party's goods.

2. *Bills preferred and found.*

The bills in ordinary cases are prepared in the Indictment Office at the Sessions, by the proper officer there; they must be on parchment, and are usually filled up on blank printed forms. But where the indictment is required to be special, or in any manner different from the common forms, or where any doubt or difficulty occurs as to the manner in which the indictment should be framed, it will be prudent to have it drawn or at least settled by a barrister, and at most Courts of Quarter Sessions the fee paid in this respect is allowed to the prosecutor in costs. When drawn by a barrister, it must be ingrossed on parchment; which is sometimes done by the prosecutors' attorney, but usually in the Indictment Office. The names of the witnesses, intended to be examined before the grand jury, are then indorsed upon the bill, and the words "*sworn in Court*," added after them.

The witnesses, whose names are thus indorsed upon the bill, come into Court; and the bill being given to the crier, or other officer appointed for the purpose, he swears the witnesses, the chairman or recorder signs his name on the back of the bill, and it is then handed to the grand jury. All this must be done in open Court, and during the time that the Court are sitting.

The witnesses are then severally called in before the grand jury, and examined by them; and if a majority of the grand jury (amounting to twelve at the least) be of opinion that the evidence thus adduced, make out a sufficient case against the prisoner, to warrant his being put upon his trial before the petty jury, the foreman indorses on the bill "*A true Bill*," and signs his name to it, "A. B. foreman." But if a majority of the grand jury be of a different opinion, then the words "*Not a true Bill*" are indorsed. Having found one or more bills, the grand jury then come into Court, and hand the bills to the clerk of the peace, who thereupon addresses them thus: "*Gentlemen of the grand jury, you are content that the Court shall amend all matters of form, altering no matter of substance: Against C. D. for* [*felony* or '*a misdemeanor*'] *you say a true bill; Against E. F. for*," &c. The indictments are then filed by the clerk of the peace, in the order in which he has thus received and called them over; and the prisoners are usually tried in the order in which their respective indictments thus stand upon the files of the Court, the felonies however being taken first before the misdemeanors, and of the misdemeanors, those cases being taken first in which the defendants are in custody.

Where the bill is against two or more defendants, the grand jury may find it a "true bill" as to one, and "not a true bill" as to the others. So, where the bill contains two counts, the grand jury may find a "true bill" as to one count, and "not a true bill" as to the other. *R. v. Fieldhouse, Cowp.* 325. They

cannot however find a true bill as to part of a count, and ignore the rest of it. 2 *Hawk. c.* 25, *s.* 2. It is laid down indeed in the old text books, that where a bill for murder is preferred to a grand jury at the assizes, they may find it a true bill for manslaughter. But this is not done in modern practice; if a grand jury now intimate to the Court their wish to find a true bill for manslaughter only, the judge will order the bill to be altered, so as to make it a bill for manslaughter, and will direct it to be again laid before the grand jury.

3. *Arraignment, Plea, &c.*

Traverse.] Formerly, in all misdemeanors, the defendant was not bound to submit to have the indictment against him tried at the same assizes or sessions at which it was found: but if he was in custody, he was called upon to plead to the indictment, and he might then traverse it until the next assizes or sessions; and the same, if he were brought in by process during the assizes or sessions at which the bill was found; but if he were not in custody when the bill was found, or not brought in by process during the assizes or sessions at which it was found, but was brought in or bound over by recognizance previously to some subsequent assizes or sessions, then he was bound, not only to plead to such indictment, but to submit to be tried upon it also, at such subsequent assizes or sessions.

This is in some degree altered by stat. 60 G. 3, and 1 G. 4, c. 4, by the 3d section of which it is enacted, that "where any person shall be prosecuted for any misdemeanor by indictment at any session of the peace, session of oyer and terminer," &c. "having been committed to custody, or held to bail, to appear to answer for such offence twenty days at the least before the session at which such indictment shall be found, he or she shall plead to such indictment, and trial shall proceed thereupon at such same session of the peace, session of oyer and terminer," &c. unless the indictment be removed by certiorari. But, by sect. 5, where any person shall be so prosecuted, "not having been committed to custody, or held to bail to appear to answer for such offence twenty days before the session at which such indictment shall be found, but who shall have been committed to custody or held to bail to appear to answer for such offence at some subsequent session, or shall have received notice of such indictment having been found twenty days before such subsequent session: he or she shall plead to such indictment at such subsequent session, and trial shall proceed thereupon at such same session of the peace," &c. unless the indictment be removed by certiorari. By sect. 6, however, the Court, in both of the above cases, may allow a further time for pleading or trial, upon sufficient cause shewn for that purpose. Where a prisoner was

committed for a rape, more than twenty days before the assizes, and afterwards at the assizes the grand jury threw out the bill for the rape, but found a bill for an assault with intent to commit it: Vaughan, B. held that the prisoner was entitled to traverse this latter indictment. *R.* v. *James*, 3 *Car. & P.* 222.

By the 10th section of the above statute, it is provided that it shall not extend to prosecutions for the non-repair of any bridge or highway; which therefore may be traversed in the same manner as might have been done before the statute. It may also be necessary to remark, that there can be no traverse in a case of felony; but the Court, even in that case, may put off the trial until the next assizes or sessions, if they deem it necessary for the ends of justice; and in more than one instance, where the principal witness has been of such tender years, and so imperfectly instructed in religion, as not to warrant her being sworn, the judge at the assizes has ordered the trial to be put off until the next assizes, and directed the child to be in the meantime fully instructed in her religion, and particularly as to the nature and obligation of an oath.

Where the defendant appears at the sessions or assizes, and pleads to the indictment, and traverses it to the next sessions, he is obliged to enter into a recognizance with sureties to appear and try the case at the next assizes or sessions. And two days at least before such assizes or sessions, the defendant should give the prosecutor a notice of trial: for it is only upon proof of such notice, that the defendant can claim to be acquitted at the next assizes or sessions, in case the prosecutor does not appear. The notice may be in this form: "*Take notice that, in pursuance of my recognizance in this behalf, I shall appear at the next General Quarter Sessions to be holden on* ———, *at* ———, *in and for the county of* ———, *and then and there try my traverse upon the indictment for an* [*assault and battery*] *which you have preferred against me. Dated,*" &c. If the prosecutor appear at the trial, he waives all want of notice, or any irregularity or defect in a notice given. *R.* v. *Hobby*, 1 *Ry. & M.* 241.

Arraignment.] After the grand jury have found a true bill against a prisoner, the clerk of the peace orders the gaoler to bring him to the bar. When he appears, the clerk of the peace addresses him thus: "*A. B. hold up your hand: You stand indicted by the name of A. B, late of,*" &c. "*for that you on the,*" &c. [as in the indictment, to the end, except that it is addressed to the prisoner in the second person.] "*How say you, A. B., are you guilty of this felony whereof you stand indicted, or not guilty?*"

The holding up of the hand is a mere ceremony, and not of any importance; it is principally done where there are two or more arraigned upon the same indictment, for the purpose of

ascertaining which of them is A. B., which C. D., &c. *See* 2 *Hawk. c.* 28, *s.* 2. *R.* v. *Ratcliffe*, 1 *W. Bl.* 3.

Formerly, when there was more danger of rescue and escapes than there is at present, it was no uncommon thing for prisoners to be brought to the bar of the Court in irons. And they were obliged to stand in irons during the arraignment, and until they had pleaded, the judges saying that they had no authority to order them to be struck off until the trial. *R.* v. *Layer*, 16 *How. St. Tr.* 94, 99, 129. *R.* v. *Waite*, 2 *East, P. C.* 570. 1 *Leach*, 28, 36. At the trial, however, the irons were always struck off. *Id.*

Standing Mute, &c.] If any person, being arraigned upon or charged with any indictment or information for treason, felony, piracy or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information: in every such case it shall be lawful for the Court, if it shall so think fit, to order the proper officer to enter a plea of "not guilty" on behalf of such person; and the plea so entered, shall have the same force and effect, as if such person had actually pleaded the same. 7 & 8 *G.* 4, *c.* 28, *s.* 2. And for the purpose of ascertaining whether a person, who stands mute, is mute of malice or by the act of God, the judge will immediately charge the jury to try this collateral issue, and the gaoler or such other person as can give evidence upon the subject, shall be sworn and examined. *See R.* v. *Mercier*, 1 *Leach*, 183. *R.* v. *Steele*, 1 *Leach*, 451. Where a prisoner, on his arraignment, stated that he was deaf, and the indictment was thereupon read over to him, but he appeared not to understand it: Gifford, C.J. immediately directed a jury to be impanelled, to try whether he stood mute of malice, or by the act of God. *R.* v. *Halton*, 1 *Ry. & M.* 78. Where a prisoner, who had already been tried and convicted, but whose trial was deemed a nullity, on the ground of some informality in the swearing of the witnesses who gave evidence before the grand jury, was again arraigned upon an indictment for the same offence, and refused to plead, alleging that he had been already tried: Littledale, J. and Vaughan, B. ordered a plea of not guilty to be entered for him, under the above statute. *R.* v. *Bitton*, 6 *Car. & P.* 92. But if the jury, upon being so impanelled, find that the prisoner is insane, the Court shall record such verdict, and order the party to be kept in strict custody, in such place and in such manner as to them shall seem fit, until his Majesty's pleasure shall be known. 39 & 40 *G.* 3, *c.* 94, *s.* 2. *See ante*, *p.* 79.

Plea in Abatement.] Formerly, if the indictment gave the defendant no christian-name or a wrong one, no surname or a wrong one, no addition of degree or mystery or a wrong one, &c. the defendant might plead this matter in abatement. But by

stat. 7 *G.* 4, *c.* 64, *s.* 19, " for preventing abuses from dilatory pleas," it is enacted " that no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition of the party offering such plea;" —" but in such case the Court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded."

Plea of Not Guilty.] Upon being asked whether he is guilty, or not guilty, the defendant may plead *ore tenus* " Not guilty," and the clerk of the peace afterwards, in making up the record, will put it into proper form. *See the form, ante, p.* 31. Formerly the clerk of the peace asked the defendant also " *How will you be tried;*" and he answered, " *By God and my Country.*" But now, by stat. 7 & 8 G. 4, c. 28, s. 1, if any person, not having privilege of peerage, being arraigned upon any indictment for treason, felony or piracy, shall plead thereto a plea of " Not guilty," he shall by such plea, without any further form, be deemed to have put himself upon the country for trial; and the Court shall, in the usual manner, order a jury for the trial of such person accordingly.

If instead of pleading " Not guilty," the defendant say that he is " Guilty," this is a confession of the offence, which subjects him to precisely the same punishment, as if he were tried and found guilty by verdict. But as defendants often imagine that, by pleading guilty, they are likely to receive some favour from the Court in the sentence that will be passed upon them, it is usual for the chairman or recorder, before the confession is recorded, to undeceive the defendant in this respect, and apprize him that his pleading guilty will make no alteration whatever in his punishment. If, however, he still persist in his plea of guilty, it is then recorded by the clerk of the peace.

Auterfois acquit.] That the defendant was formerly indicted for the same offence, and acquitted, is a good plea in bar to a subsequent indictment for the same offence; 2 *Hal.* 241, 242. 2 *Hawk. c.* 35, *s.* 10; for the law will not suffer a man to be twice put in jeopardy for one offence. This plea sets out the former record of acquittal, to the end of the judgment: *see R.* v. *Wilday*, 1 *Maule & S.* 183; and it must appear, either from such record or by averment, that both indictments were for the same offence, *see R.* v. *Cogan*, 1 *Leach*, 448. *R.* v. *Taylor*, 3 *B. & C.* 502. *R.* v. *Clarke*, 1 *Brod. & B.* 473. *R.* v. *Emden*, 9 *East*, 437, and that the defendant in the present case, was also the defendant in the former. The former indictment must also appear to be a good and valid indictment for the offence, which might be supported by the same evidence as would be necessary to

prove the present one. *R.* v. *Vandercombe*, 2 *Leach*, 708. *and see Vaux's Case*, 4 *Co.* 45, *a. Wigges' Case*, 4 *Co.* 46, *b.* As this plea very seldom occurs at Sessions, I have not thought it necessary to give a precedent for it in this work.

Auterfois attaint.] Auterfois attaint of the same offence, is a good plea in bar to a subsequent indictment for the same offence. 2 *Hal.* 253. *and see R.* v. *Scott*, 1 *Leach*, 401. *R.* v. *Bowman*, 6 *Car. & P.* 337. So formerly auterfois attaint of another felony, was a bar to any subsequent indictment for felony, whilst the former attainder continued in force. But now, by stat. 7 & 8 G. 4, c. 28, s. 4, " no plea, setting forth any attainder, shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment."

Plea of Pardon.] A pardon may be pleaded in bar of an indictment for any felony or other offence previously committed. Formerly a pardon could not be pleaded, unless it were under the great seal. But now, by stat. 7 & 8 G. 4, c. 28, s. 13, and 6 G. 4, c. 25, s. 1, where the King, by warrant under his sign manual, countersigned by one of his principal secretaries of state, shall grant to any felon a free or conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the great seal, as to the felony for which such pardon shall be granted; but no pardon shall affect or mitigate the punishment of the offender for any felony committed by him after the granting of such pardon. And by stat. 9 G. 4, c. 32, s. 3, offenders convicted of felonies not punishable with death, who shall have undergone the punishment adjudged for the offence, the punishment so endured shall have the like effects and consequences as a pardon under the great seal, as to the felony whereof the party was so convicted. This latter statute, however, was made, more for the purpose of restoring such parties to their civil rights, without putting them to the expense of a formal pardon, than with any reference to the pleading of this matter in bar of any subsequent indictment; for the parties in such cases might plead auterfois attaint. *Vide supra.*

Demurrer.] As demurrers very seldom occur at Sessions, I have not thought it necessary to give a precedent of one in this work. Indeed they very seldom occur in practice at the assizes, or even in the Court of King's Bench: they are very seldom pleaded to indictments, because a defendant may have the same advantages by a motion in arrest of judgment after he has been convicted by verdict; whereas upon demurrer, in a case of a misdemeanor, the judgment is final, and not merely that the party

shall answer over; *Per Lawrence, J. in R. v. Gibson*, 8 *East*, 112; and demurrers to other pleadings occur still more seldom, as special pleadings scarcely ever occur in practice, except in prosecutions for the non-repair of highways or bridges.

A demurrer in criminal cases, has the effect of opening the whole record to the Court; and therefore upon arguing it, a defendant may take objections, as well to the jurisdiction of the Court where the indictment was found, as to the subject-matter of the indictment itself. *R. v. Fearnley*, 1 *T. R.* 316.

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4. *Petty Jury Sworn and Charged.*

Swearing the Jury.] Upon a full petty jury appearing, and the prisoners, who have been arraigned, being at the bar, the clerk of the peace, in cases of felony, addresses the prisoners thus: "*Prisoners: these good men who shall now be called, are the Jurors who are to pass between our Sovereign Lord the King, and you upon your* [*respective*] *trials*; *if therefore you* [*or either of you, or any of you*] *will 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.*"

The names of the jurors are then separately called over by the clerk of the peace, and the crier of the Court administers the oath thus: "*You shall well and truly try, and true deliverance make, between our Sovereign Lord the King and the prisoners at the bar, whom you shall have in charge, and a true verdict give according to the evidence: So help you God.*" As to the affirmation of Quakers, Moravians, and Separatists, *see ante*, p. 145.

As each juror is named, and before he is sworn, the prisoner may challenge him, as mentioned *infra*.

In misdemeanors, the jury are at once sworn, usually four jurors at a time, without giving the defendants their challenges, as above mentioned. The oath is thus: "*You shall well and truly try the issue joined between our Sovereign Lord the King and the defendant, and a true verdict give according to the evidence: So help you God.*"

Challenges of Jurors.] Jurors must be challenged, if at all, before they are sworn.

The King or the party might challenge the whole array, for favour. 1 *Inst.* 156. *See R. v. Edmunds*, 4 *B. & Ald.* 471. But by stat. 6 G. 4, c. 50, s. 28, no challenge shall be taken to any panel of jurors, for want of a knight's being returned in such panel, nor any array quashed by reason of any such challenge.

The prisoner may peremptorily challenge twenty jurors, but

not more, in cases of murder or other felony. 6 G. 4, c. 50, s. 20. But there is no peremptory challenge in misdemeanors, R. v. *Reading*, 7 *How. St. Tr.* 264, nor upon the trial of collateral issues. *Fost.* 42. *R.* v. *Ratcliffe*, 1 *W. Bl.* 3. Every challenge above the number above limited, is void, and the trial may proceed as if no such challenge had been made. 7 & 8 *G.* 4, *c.* 28, *s.* 3.

The King has no peremptory challenge: he can challenge only for cause; 6 *G.* 4, *c.* 50, *s.* 29; but he is not bound to shew cause, until the whole panel be gone through, and it appear that there will not be a full jury without the person challenged. 2 *Hawk. c.* 43, *s.* 2.

The prisoner, besides his peremptory challenges, may also challenge as many of the jury as he pleases for cause, shewing the cause presently, 1 *Inst.* 158, and being prepared to prove it. *R.* v. *Savage*, *Ry.* & *M.* 51. Thus, he may challenge a juror, because he is a peer; 1 *Inst.* 156. 2 *Hawk. c.* 43, *s.* 11; or because he is one of the grand jurors who found the indictment; *Lamb.* 554; or because he has not the qualification required by the Jury Act, 6 *G.* 4, *c.* 50, *s.* 27; or because he is an alien; 1 *Inst.* 156; or because he is under age; 1 *Inst.* 157; or because he is of kindred or of affinity to the prosecutor; *Semb.* 1 *Inst.* 157; or because he has made some declaration, shewing a prejudice against the prisoner; 2 *Hawk. c.* 43, *s.* 28; or the like. As to the manner of trying the challenges, *see* 2 *Burn*, *D.* & *W.* 1133. If a person serve on the jury, who has been regularly summoned, but against whom there is a cause of challenge, for which the prisoner would have challenged him if he were aware of it, still this is no ground for applying for a new trial. *R.* v. *Sutton*, 8 *B.* & *C.* 417. But where a son served on a jury for his father, at his father's request, and without collusion with either the prosecutor or the defendant, and the son was under age, and had no qualification, nor was his name upon the panel: the Court of King's Bench held this to be a mistrial, and granted a new trial. *R.* v. *Tremearne*, 5 *B.* & *C.* 254. *but see stat.* 7 *G.* 4, *c.* 64, *s.* 21, *post*, *p.* 255.

No challenge can be made until a full jury appears. *R.* v. *Edmonds*, 4 *B.* & *Ald.* 471.

Jury charged.] When the challenges (if any) have been disposed of, and a full jury have been sworn, the clerk of the peace, in cases of felony, and also in cases of misdemeanor, if no counsel be employed for the prosecution, charges the petty jury with each case thus: "*Gentlemen of the Jury: the prisoner stands indicted, by the name of A. B. late of,*" &c. "*for that he, on the,*" [&c. as in the indictment to the end.] "*Upon this indictment he has been arraigned, upon his arraignment he has pleaded not guilty, and for his trial has put himself upon his country,*

which country you are: Your charge therefore is, to inquire whether he be guilty of the [felony] whereof he stands indicted, or not guilty, and to hearken to the evidence."

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5. *Case stated, Evidence, Defence, &c.*

For the Prosecution.] If counsel be engaged for the prosecution, he addresses the jury, states the case to them, and then calls the witnesses to prove it. As to the examination of witnesses, *see ante, p.* 151; and as to the cross-examination, *see ante, p.* 153. If there be no counsel for the prosecution, the prosecutor himself has no right to address the jury as counsel, particularly if he is to be examined as a witness in the course of the trial. *R.* v. *Brice*, 2 *B. & Ald.* 606. *R.* v. *Milne*, *Id.* 606, *n.*

Each witness is sworn in this form: "*The evidence you shall give to the Court and jury sworn, between our Sovereign Lord the King and the prisoner at the bar* [or *defendant,*] *shall be the truth, the whole truth, and nothing but the truth: So help you God.*" As to the affirmation of Quakers, Moravians, and Separatists, *see ante, p.* 145.

For the Defence.] The defendant in all cases has, and at all times had, a right to address the jury in his defence. In misdemeanors he was and is still allowed to do this by counsel. But in high treason and felony, his counsel formerly was not allowed to address the jury for him.

In high treason and misprision of teason, however, this privilege was granted to defendants, by stat. 7 & 8 W. 3, c. 3, s. 1, by which it is enacted, that every person indicted, arraigned or tried for such offences, "shall be received and admitted to make his and their full defence by counsel learned in the law; and in case any person or persons so accused or indicted, shall desire counsel, the Court before whom such person or persons shall be tried, or some judge of that Court, shall and is hereby authorized and required immediately, upon his or their request, to assign to such person and persons such and so many counsel, not exceeding two, as the person or persons shall desire, to whom such counsel shall have free access at all seasonable hours."

And in felony, by stat. 6 & 7 W. 4, c. 114, s. 1, reciting that "it is just and reasonable that persons accused of offences against the law, should be enabled to make their full answer and defence to all that is alleged against them," it is enacted "that from and after the first day of October next, all persons tried for felonies 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, or by attorney in Courts where attornies practise as counsel."

And by sect. 2, it is declared and enacted, "that in all cases of summary conviction, persons accused shall be admitted to make their full answer and defence, and to have all witnesses examined and cross-examined, by counsel or attorney."

And by sect. 3, "all persons who after the passing of this Act shall be held to bail or committed to prison for any offence against the law, shall be entitled to require and have on demand (from the person who shall have the lawful custody thereof, and who is hereby required to deliver the same,) copies of the examinations of the witnesses respectively upon whose depositions they have been so held to bail or committed to prison, on payment of a reasonable sum for the same, not exceeding three halfpence for each folio of ninety words: Provided always, that if such demand shall not be made before the day appointed for the commencement of the Assize or Sessions at which the trial of the person on whose behalf such demand shall be made is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge or other person to preside at such trial shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such judge or other person so to preside at such trial, if he shall think fit, to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged."

And by sect. 4, "all persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the Court before which such trial shall be had."

If the defendant wish to address the jury, and to examine and cross-examine witnesses, he will of course be allowed to do so, and his counsel will be allowed to argue any points of law that may arise in the course of the trial, and to suggest questions to him for the cross-examination of the witnesses. *R.* v. *Parkins, Ry. & M. N. P. C.* 166. But he cannot have counsel to examine and cross-examine the witnesses, and reserve to himself the right of addressing the jury. *R.* v. *White,* 2 *Camp.* 98.

Reply, &c.] The Attorney General, when prosecuting for the Crown, has the privilege of replying, although no evidence have been given or witnesses called on the part of the defendant; and this, even upon the trial of collateral issues. *R.* v. *Ratcliffe,* 1 *W. Bl.* 3. But no other counsel has this privilege. *R.* v. *Lord Abingdon, Peake,* 236. *and see R.* v. *Smith, Id.* 236, *n.*

Where the counsel for a defendant, upon the trial of an indictment for a misdemeanor, opened new facts in his address to the

jury, and afterwards declined to call witnesses to prove the facts which he had so opened, is was holden that the counsel for the prosecution was entitled to the general reply. *R.* v. *Bignold*, 4 *D.* & *R.* 70. But this has since been frequently ruled otherwise at *nisi prius*.

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6. *The Summing-up, Verdict, &c.*

After the case has been closed upon both sides, the Chairman or Recorder then sums it up to the jury: he first states to them the substance of the charge against the prisoner; he then, if necessary, explains to them the law upon the subject; he next reads the evidence which has been adduced in support of the charge, making occasionally such observations as may be necessary to connect the evidence, to apply it to the charge, and to render the whole plain and intelligible to the jury; he then states the defence, and the evidence given on the part of the defendant; and he usually concludes by telling the jury that if, upon considering the whole of the evidence, they entertain a fair and reasonable doubt of the guilt of the prisoner, they should give the prisoner the benefit of that doubt, and acquit him.

It may be necessary to state, that a bill of exceptions will not lie; it is never allowed in a criminal case. Even where the Sessions sit as a court of appeal, a bill of exceptions cannot be tendered. *R.* v. *Preston-upon-the-Hill*, *Burr. S. C.* 77. 2 *Str.* 1040.

As soon as the summing up is concluded, the clerk of the peace usually says to the jury: "*Gentlemen, consider of your verdict.*" And the jury accordingly consult with each other upon the subject.

If the jury find any difficulty in coming to a conclusion, and wish to retire to the jury-room for the purpose of discussing the matter more freely in private, they may intimate their wish to the clerk of the peace; and the crier of the Court will then swear a constable to attend them, in this form: "*You shall swear that you will keep this jury without meat, drink, or fire, (candle light only excepted;) you shall suffer none to speak to them; neither shall you speak to them yourself, but only to ask them whether they are agreed upon their verdict: So help you God.*"

By permission of the Court, however, they may have refreshments, &c. *Dr.* & *Stud.* 158.

After the jury retire, they may come back for the advice or opinion of the Court upon any point; or they may request the chairman or recorder to read over to them again any particular part of the evidence; or they may ask any additional questions of the witnesses, provided this be done in open Court.

In what cases the Jury may be discharged.] The general rule is, that the jury must be kept together, from the time they are first charged with the prisoner or defendant, until they deliver their verdict. To this however there are some exceptions, from necessity. Where the trial lasts more than one day, although in a case of felony the jury cannot be allowed to disperse, but the Court usually order the Sheriff to provide them with beds, refreshments, &c., *see* R. v. *Hardy*, 24 *How. St. Tr.* 414, 572, yet in misdemeanors it is entirely in the discretion of the Court or judge to allow the jury to go to their respective homes or lodgings for the night, or not; and he may allow this, without the consent of parties. *R.* v. *Kinnear*, 2 *B. & Ald.* 462. But the judge, in such a case, usually cautions the jury not to hold any communication or conversation with other persons, upon the subject of the trial; and indeed if it could be proved that any of the jury had been tampered with in the interim, it might have the effect of avoiding the verdict. *Vide Id.* Where, during a trial for murder, one of the jury was seized with a fit, and was carried out of Court in a state of insensibility; after the Court had waited some time, and it was deposed on oath that he was not in a fit state to return immediately, Lawrence, J. discharged the jury, and ordered another jury (consisting of the remaining eleven jurors, and a twelfth from the jury panel,) to be sworn; and the prisoner was thereupon convicted, and executed. *R.* v. *Scalbert*, 2 *Leach*, 620. The same also occurred upon the trial of one Edwards for maliciously shooting, before Wood, B., in 1812; and the point being reserved for the opinion of the judges, they were unanimously of opinion that the judge had acted rightly. *R.* v. *Edwards*, *R. & Ry.* 224. 3 *Camp.* 207. 4 *Taunt.* 309. So, where a defendant, in the case of a misdemeanor, became so ill that he could not remain at the bar, the judge discharged the jury; and afterwards during the same assizes, upon his recovery, another jury were charged with him, and the whole of the proceedings were commenced *de novo*. *R.* v. *Streek*, 2 *C. & P.* 413. So where, on a trial for manslaughter, it was discovered, after the swearing of the jury, that the surgeon who had examined the body was absent: upon the prisoner requesting that the jury should be discharged, they were accordingly discharged, and the prisoner was tried on the next day by another jury. *R.* v. *Stokes*, 6 *Car. & P.* 151. And where an indictment for a misdemeanor was clearly bad upon the face of it, Abbott, C. J., discharged the jury from giving any verdict upon it. *R.* v. *Deacon*, *Ry. & M. N. P. C.* 27.

Verdict.] If the jury retire, then upon their afterwards returning into Court, the Clerk of the Peace addresses them thus: "*Gentlemen of the jury, answer to your names.*" He then calls over their names, and the jurors respectively answer.

As soon as the jury are ready to deliver their verdict, the Clerk of the Peace addresses them thus: "*Gentlemen, have you agreed upon your verdict? Who shall say for you? Your foreman. How say you, do you find the prisoner* [or *defendant*] *A. B. guilty of the* [*felony*] *whereof he stands indicted, or not guilty? Do you find the prisoner C. D. guilty of the felony whereof he stands indicted, or not guilty?*"

The jury answer "*guilty*," or "*not guilty*;" or they may say "*we find him guilty of stealing, but not in the dwelling-house*," or the like.

After the verdict is delivered, the Clerk of the Peace, having made a minute of it on the indictment, again addresses the jury thus: "*Gentlemen, hearken to your verdict, as the Court hath recorded it: You say that A. B. is* [*not*] *guilty of the felony whereof he stands indicted; and that C. D. is* [*not*] *guilty of the felony whereof he stands indicted; this is your verdict, and so ye say all.*"

There are some offences, which cannot be committed by less than a certain number of persons. For instance, a riot cannot be committed by less than three persons, *see ante*, p. 196, a conspiracy by less than two, *see ante*, p. 235. And therefore if several be indicted for a riot, and the jury acquit all but two, they must acquit those two also, unless it be charged in the indictment, and proved, that they committed the riot together with some other person not tried upon this indictment. 2 *Hawk. c.* 47. *s.* 8. *See ante*, p. 200. So if upon an indictment for a conspiracy, the jury acquit all the defendants but one, they must acquit that one also, however criminal they may think him, unless it be charged in the indictment and proved that he conspired with some other person not tried upon that indictment. 1 *Hawk. c.* 72, *s.* 8. *See ante*, p. 235. But in other cases, where the offence may be committed by one person, there, although the indictment charge two defendants with having jointly committed it, the jury may find one guilty, and acquit the other. *R. v. Taggart*, 1 *Car. & P.* 201. Where however two were jointly indicted for obstructing a highway, and on the evidence no joint act of obstruction appeared, Littledale, J., as soon as the case for the prosecution was closed, put the prosecutor's counsel to his election, as against which of the defendants he would proceed, and then ordered the other to be acquitted. *R. v. Lynn*, 1 *Car. & P.* 528.

If the indictment really state no indictable offence, it seems that the jury may be directed to acquit the prisoner, even although the case be proved; and the Court will not put him to his motion in arrest of judgment, or writ of error. Where an indictment charged a defendant with not obeying an order of justices, but it appeared on the face of the indictment that the justices had no authority in law to make the order: this being

objected to at the trial, it was answered, that as the objection appeared upon the record, the proper mode of taking advantage of it was by motion in arrest of judgment; Abbott, C. J., however holding the objection to be fatal, directed an acquittal. *R.* v. *Hollis*, 2 *Stark. R.* 536.

Persons acquitted "shall be immediately set at large," without payment of any fee to the sheriff or gaoler, 14 *G.* 3, *c.* 20, or any other person., 55 *G.* 3, *c.* 50, *s.* 4, 5.

It has already been observed (*ante*, *p.* 48.) that upon the trial of an indictment, a case cannot be reserved for the opinion of the Court of King's Bench.

What Defects are cured by Verdict.] By stat. 7 *G.* 4, *c.* 64, *s.* 21, "No judgment after verdict upon any indictment or information for any felony or misdemeanor, shall be stayed or reversed for want of a similiter; nor by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion; nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors; nor because any person has served upon the jury, who has not been returned as a juror by the sheriff or other officer; and that where the offence charged has been created by any statute, or subjected to a greater degree of punishment by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute."

And by sect. 20, "that the punishment of offenders may be less frequently intercepted in consequence of technical niceties, be it enacted, that no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved; nor for the omission of the words "*as appears by the record*," or of the words "*with force and arms*," or of the words "*against the peace*;" nor for the insertion of the words "*against the form of the statute*," instead of the words, "*against the form of the statutes*," or *vice versâ*; nor for that any person or persons mentioned in the indictment or information is or are designated by a name of office or other descriptive appellation, instead of his, her, or their proper name or names; nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to be committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened; nor for want of a proper or perfect venue, where the Court shall appear by the indictment or information to have had jurisdiction over the offence."

7. *New Trial; Arrest of Judgment.*

New Trial.] A new trial cannot be granted, even by the Court of King's Bench, in a case of felony. *R.* v. *Mawbey*, 6 *T. R.* 638. That Court may indeed grant it, in the case of misdemeanors; *Id. See R.* v. *Simmons*, 1 *Wils.* 329.; but they have always refused to do so, where the defendant has been acquitted; *R.* v. *Brice*, 2 *B. & Ald.* 606. *R.* v. *Mann*, 4 *M. & S.* 337. *R.* v. *Cohen*, 1 *Stark.* 516. *R.* v. *Praed*, 4 *Burr.* 2256. *R.* v. *Reynell*, 6 *East*, 315; and this even in the case of an indictment for non-repair of a highway. *R.* v. *Silverton*, 1 *Wils.* 298. *R.* v. *Burbon*, 5 *M. & S.* 392. *but see R.* v. *Wandsworth*, 1 *B. & Ald.* 63. *R.* v. *Sutton*, 5 *B. & Adolph.* 52. But a Court of Quarter Sessions cannot in strictness grant a new trial; at least it is so generally understood. Where two persons were indicted at Sessions for stealing oats, and convicted; but it appearing afterwards that, on the jury retiring, one of the jurors separated himself from the rest, and conversed with a stranger on the subject of the trial, the Sessions quashed the verdict, and awarded a *venire de novo* to the next Sessions; at which next Sessions the prisoners were again tried, and again convicted: they then brought a writ of error, and objected, first, that the Sessions have no authority to grant a new trial; and secondly, that there had been no new arraignment and plea before the second trial: as to the last point, the Court held that the parties having once pleaded and put themselves upon the country, it was unnecessary for them to do so a second time; and as to the first point, the Court said that this could not be deemed a new trial; the first trial was either good or bad; if good, the second trial was *coram non judice*, and might be deemed a nullity; if bad, it must be deemed a mistrial and a nullity, and therefore, as the prisoners had put themselves upon the country, they might well be tried at the next Sessions; in either view of the case, the judgment was right. *R.* v. *Fowler & Sexton*, 4 *B. & Ald.* 273. *See R.* v. *Inhabitants of Oxfordshire*, *ante*, *p.* 38.

Arrest of Judgment.] No defects in an indictment were aided by verdict at common law. We have seen (*ante*, *p.* 255,) what are now aided by statute. And for all defects which are not so aided, and for which the defendant might have demurred, he may move in arrest of judgment. At Sessions, the motion may be made at any time before sentence is passed. *See R.* v. *Jackson*, *ante*, *p.* 38.

As to writ of error, *see ante*, *p.* 30.

8. *Judgment.*

If no motion be made in arrest of judgment, or if made and decided against the defendant, the Chairman or Recorder then proceeds to pass sentence. In some Courts of Quarter Sessions, each prisoner or defendant is sentenced immediately after his trial; in others, sentence is passed at the end of each day, on all the prisoners who on that day have been convicted; and in others, not until the end of the Sessions, when sentence is passed on all the prisoners who have been convicted during the Sessions. The first seems to be the better method; at least it is calculated to have a better and more lasting effect upon the audience, in whose minds the crime and its punishment are immediately connected, the latter following speedily and certainly upon the former.

The punishments assigned by law for the different offences which are punishable upon indictment, will be found in a list, arranged alphabetically, in a former part of this work, *ante*, *p.* 84—116. There are some few sections of statutes, relating to the subject generally, which it may be useful to bring under the attention of the reader; and which I propose to do under the following heads:—

Punishment of Felony.] By stat. 7 & 8 *G.* 4, *c.* 28, *s.* 6, benefit of clergy, with respect to persons convicted of felony, was abolished altogether. And by sect. 7, "no person convicted of felony shall suffer death, unless it be for some felony which was excluded from the benefit of clergy before or on the first day of the present session of Parliament, or which hath been or shall be made punishable with death by some statute passed after that day." And by sect. 8, "every person convicted of any felony not punishable with death, shall be punished in the manner prescribed by the statute or statutes specially relating to such felony; and that every person convicted of any felony, for which no punishment hath been or hereafter may be specially provided, shall be deemed to be punishable under this Act, and shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned [with or without hard labour, s. 9.] for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment."

2. "Whenever sentence shall be passed for felony, on a person already imprisoned under sentence for another crime, it shall be lawful for the Court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence either of im-

prisonment or of transportation, the Court, if empowered to pass sentence of transportation, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation respectively may exceed the term for which either of those punishments could be otherwise awarded." 7 & 8 *G.* 4, *c.* 28, *s.* 10.

3. Persons convicted of a felony, not punishable with death, committed after a previous conviction for felony, may be transported for life, or for any term not less than seven years; or they may be imprisoned [with or without hard labour, s. 9.] for any term not exceeding four years, and, if a male, to be once, twice or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment. 7 & 8 G. 4, c. 28, s. 11.

Solitary Confinement.] For all offences within stat. 7 & 8 G. 4, c. 28, when imprisonment forms part of the sentence, the Court may order the prisoner to be kept in solitary confinement for the whole or any portion of such imprisonment. 7 & 8 *G.* 4, *c.* 28, *s.* 9. And the same, as to all offences within stat. 7 & 8 G. 4, c. 29, (Peel's Act, Larceny, &c.) *Id. s.* 4. And the same as to all offences within stat. 7 & 8 G. 4, c. 30, (Peel's Act, Malicious Injuries, &c.) *Id. s.* 27. And the same, as to all offences within stat. 11 G. 4, & 1 W. 4, c. 66, (relating to Forgery, &c.) *Id. s.* 26. And the same as to all offences within stat. 2 W. 4, c. 34, (relating to the Coin). *Id. s.* 19. And lastly, for all offences for which a woman might, before stat. 1 G. 4, c. 57, be sentenced to be whipped, the Court may order her to be confined to hard labour for any time not exceeding six months nor less than one month, or may pass sentence of solitary confinement for any time not exceeding seven days at any one time, in lieu of the sentence to be publicly or privately whipped. 1 *G.* 4, *c.* 57, *s.* 3.

Hard Labour.] For all offences within stat. 7 & 8 G. 4, c. 28, for which imprisonment may be awarded, the Court may sentence the offender to be imprisoned, or imprisoned and kept to hard labour, in the common gaol or house of correction, as to the Court in its discretion shall seem meet. 7 & 8 *G.* 4, *c.* 28, *s.* 9. And the same, as to all offences within stat. 7 & 8 G. 4, c. 29, (Peel's Act, Larceny, &c.) *Id. s.* 4. And the same, as to all offences within stat. 7 & 8 G. 4, c. 30, (Peel's Act, Malicious Injuries, &c.) *Id. s.* 27. And the same, as to all offences within stat. 11 G. 4, & 1 Wm. 4. c. 66, (relating to Forgery, &c.) *Id. s.* 26. And the same, as to all offences within stat. 2 Wm. 4, c. 34, (relating to the Coin.) *Id. s.* 19. So a woman, instead of being whipped, may be sentenced to imprisonment and hard labour,

for any time not exceeding six months, nor less than one. 1 *G.* 4, *c.* 57, *s.* 3. *Vide supra.*

Also, by stat. 3 G. 4, c. 114, hard labour, as well as imprisonment, may form part of the sentence upon persons convicted of any of the following misdemeanors:—Any attempt to commit a felony; any riot; keeping a common gaming-house, a common bawdy-house, or a common ill-governed and disorderly house; and wilful and corrupt perjury, or subornation of perjury.

There are also several statutes, which specifically assign hard labour as well as imprisonment, as a punishment for certain offences; but none, I believe, except those above-mentioned, which by one clause or section gives the Court a discretionary power to assign hard labour as a punishment for all offences within them.

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9. *Costs.*

In Felonies.] By stat. 7 G. 4, c. 64, s. 22, "the Court before which any person shall be prosecuted or tried for any felony, is hereby authorized and empowered, at the request of the prosecutor, or of any other person who shall appear on recognizance or subpœna to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution of such sums of money as to the Court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred, in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein; and although no bill of indictment be preferred, it shall still be lawful for the Court, where any person shall in the opinion of the Court *bonâ fide* have attended the Court in obedience to any such recognizance or subpœna, to order payment unto such person of such sum of money as to the Court shall seem reasonable and sufficient to reimburse such person for the expenses which he or she shall have *bonâ fide* incurred, by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpœna, and also to compensate such person for trouble and loss of time; and the amount of the expenses of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate or magistrates, granted before the trial or attendance in Court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all other expenses and compensation shall be ascertained by the proper officer of the Court."

Also by sect. 28, after authorizing courts of oyer and terminer,

&c., where any person shall appear to have been active in or towards the apprehension of a person charged with murder, or other felonies there specified, to order the sheriff of the county, in which the offence was committed, to pay such person "such sum or sums of money as to the Court shall seem reasonable and sufficient to compensate such person or persons for his, her or their expenses, exertions, and loss of time in or towards such apprehension:" it is enacted, that "where any person shall appear to any Court or Session of the Peace, to have been active in or towards the apprehension of any party charged with receiving stolen property, knowing the same to have been stolen, such Court shall have power to order compensation to such person, in the same manner as the other Courts hereinbefore mentioned." The sum thus paid by the sheriff, is to be repaid to him by the Treasury, *s.* 29.

In Misdemeanors.] By stat. 7 G. 4, c. 64, s. 23, "where any prosecutor or other person shall appear before any Court on recognizance or subpœna, to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving any stolen property knowing the same to have been stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace-officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subornation of perjury: every such Court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as Courts are hereinbefore authorized and empowered to order the same in cases of felony; and although no bill of indictment be preferred, it shall still be lawful for the Court, where any person shall have *bonâ fide* attended the Court in obedience to such recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony: Provided, that in cases of misdemeanor, the power of ordering the payment of expenses and compensation, shall not extend to the attendance before the examining magistrate."

Upon an indictment for a nuisance by a steam-engine, it is enacted by stat. 1 & 2 G. 4, c. 41, that it shall be "lawful for the Court by which judgment ought to be pronounced, in case of conviction on any such indictment, to award such costs as shall be deemed proper and reasonable to the prosecutor or prosecutors, to be paid by the party or parties so convicted as aforesaid, such

award to be made either before or at the time of pronouncing final judgment, as to the Court may seem fit."

How ascertained and paid.] The justices at sessions are to make such regulations, with respect to the costs to be allowed, as to them shall seem just and reasonable, and may from time to time alter the same; such regulations to be approved of by one justice of gaol delivery for the county. 7 *G.* 4, *c.* 64, *s.* 26.

The attorney for the prosecution makes out a bill of the costs and expenses, according to the regulations established at the particular Quarter Sessions. He then takes it to the Clerk of the Peace, who will tax it, and give him an order for the amount; for which he is to be paid one shilling for the prosecutor, or sixpence for each other person, whose expenses are allowed. *See* 7 *G.* 4, *c.* 64, *s.* 24. In counties, &c. this order is upon the treasurer of the county, riding, &c., and is paid out of the county rate; *Id.*; in boroughs, having separate Quarter Sessions, the order is upon the treasurer of the borough, and is paid out of the borough fund. 5 & 6 *W.* 4, *c.* 76, *s.* 113.

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10. *Restitution of Stolen Goods.*

As to goods &c. obtained by larceny, embezzlement or false pretences, it is enacted by stat. 7 & 8 G. 4, c. 29, s. 57, that " if any person guilty of any such felony or misdemeanor as aforesaid, in stealing, taking, obtaining or converting, or in knowingly receiving, any chattel, money, valuable security or other property whatsoever, shall be indicted for any such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof: in such case the property shall be restored to the owner or his representative; and the Court before whom any such person shall be so convicted, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: Provided always, that if it shall appear, before any award or order made, that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained or converted as aforesaid, in such case the Court shall not award or order the restitution of such security."

CHAPTER III.

The Practice of the Court of Quarter Sessions, as a Court of Appeal.

SECTION I.—APPEALS GENERALLY.

In what Cases an Appeal lies.

IT has already been observed, that the Court of Quarter Sessions derives its jurisdiction entirely, either from the commission of the peace, or from the provisions of certain acts of parliament. No jurisdiction whatever, as a court of appeal, is given to it by the commission; *see ante*, 2—9; jurisdiction in that respect, therefore, can be given to it by statute only. There is no general statute upon the subject; but the power of appealing to the Sessions is given by different statutes in particular instances. An appeal is thus given, against orders of removal, by stat. 13 & 14 C. 2, c. 12, s. 2, and 3 W. & M. c. 11. s. 9, 10; against poor rates, by stat. 17 G. 2, c. 38, s. 4; against county rates, by stat. 57 G. 3, c. 94, s. 2; against the appointment of overseers, by stat. 43 El. c. 2, s. 6. and 17 G. 2, c. 38. s. 4; against the allowance or disallowance of overseers' accounts, by stat. 17 G. 2, c. 38, s. 4, and 50 G. 3, c. 49. s. 2; against summary convictions in several particular instances, by some other statutes; and in some other cases. And it must appear to be given expressly by the words of the statute; it cannot be implied. Where a statute (25 G. 3, c. 72,) which imposed a certain excise duty upon cottons, &c., referred to the old excise statute, 12 C. 2, c. 24, and enacted that all powers and authorities, clauses, matters and things in that statute, and every other act relating to the excise, provided, for the securing, enforcing, mitigating, recovering, adjudging and ascertaining of the duties therein mentioned, should be applied to the managing, mitigating, adjudging, ascertaining and recovering the duties granted by that Act, in as full a manner as if such powers, &c. were repeated and re-enacted in that Act; and upon an application for a mandamus to the justices at Sessions to receive an appeal against a conviction for an offence under stat. 25 G. 3, c. 72, it was argued, that although that sta-

tute did not expressly give the appeal, yet the statute 12 C. 2, and other excise Acts did, and that therefore such appeal clause in the former statutes must be deemed to be embodied in this Act, and the party convicted had consequently a right to appeal; but the Court held, that the appeal clause, which was a special provision, could not be deemed to be included in the general words abovementioned, and that no appeal lies unless it is given by express words. *R.* v. *JJ. of Surrey*, 2 *T. R.* 504. And see *R.* v. *Skone*, 6 *East*, 514. *R.* v. *JJ. of Staffordshire*, 12 *East*, 572. But see *R.* v. *Mayor of Liverpool*, 3 *D. & R.* 275, *semb. cont.* On the other hand, where an appeal is given by the express words of a statute, the party shall not be deprived of it by any thing to be implied from other clauses in the Act. See *R.* v. *JJ. of Salop*, 2 *B. & Ad.* 145. *R.* v. *JJ. of Hants*, 1 *B. & Ad.* 654. Where there is such an express provision, therefore, the only question is, whether the particular grievance of which the party complains, and against which he intends to appeal, comes within the words and meaning of the appeal clause in question. Some of these clauses are specific enough, and there is no difficulty in judging to what grievances they extend; but much the greater number are couched in generic terms, (such for instance as, " if any person shall think himself aggrieved by any thing done in pursuance of this Act," &c.) and it often becomes a question whether a particular grievance comes within the general words of the statute. See *R.* v. *Tucker*, 3 *B. & C.* 544. *R.* v. *JJ. of St. Alban's*, 3 *B. & C.* 698. *R.* v. *JJ. of Kent*, 9 *B. & C.* 283. *R.* v. *JJ. of Devon*, 4 *M. & S.* 421.

By and against whom the Appeal is to be brought.

By whom.] This is always mentioned in the clause of the statute giving the appeal, either specifically or in general terms; and it is a question entirely of construction, whether the party, as well as the grievance, comes within the meaning of the clause. Where the words are specific, there is usually no difficulty upon the subject; but where the words are general—if any person shall think himself aggrieved, or the like—it sometimes becomes a question of difficulty whether the party seeking to appeal is a party aggrieved within the meaning of the statute. Where a licensed publican appealed, as a party grieved within stat. 9 G. 4, c. 61, (the Licensing Act,) s. 27, because the magistrates granted a licence to another person, who had set up a public-house within a few yards of his house; the Court held, that he was not a party aggrieved within the meaning of the statute; those only who were immediately aggrieved by the act done, and not those who were merely consequentially injured, were within the meaning of this appeal clause. *R.* v. *JJ. of Middlesex*, 3 *B. & Adolph.* 938. In another case it became a question who was to be deemed a party aggrieved, within the appeal clause in the Old Highway Act,

(13 Geo. 3, c. 78,) so as to appeal against the appointment of surveyors of the highways; and the Court said, that every inhabitant must be deemed to be aggrieved by a bad appointment of surveyors. *R.* v. *JJ. of St. Alban's*, 3 *B. & C.* 698.

Where one of eight overseers in a parish appealed against the allowance of the constable's accounts, although the other overseers dissented from the appeal: the Court held, that one overseer alone could not appeal in this case; the statute (18 G. 3, c. 19, s. 4,) gave authority to the overseer or overseers to appeal, if they found that the parish was aggrieved; and as they have thus to exercise a judgment in bringing the appeal, such appeal could not be instituted by a less number than the majority of them. *R.* v. *JJ. of Lancashire*, 5 *B. & Ald.* 755. On the other hand, where six several persons, rated to the poor by the same rate, jointly appealed against it, on the ground that some persons had been omitted and others underrated, and the Sessions refused to entertain the appeal, on the ground that there ought to have been a separate appeal by each appellant: the Court, upon application, granted a mandamus to the justices to enter continuances and hear the appeal, holding that there was nothing in the objection. *R.* v. *JJ. of Sussex*, 15 *East*, 206. So where several jointly appealed against a rate, each claiming exemption on a distinct ground from the other,—one because he was rated for ships, another for money lent on mortgage, another for household furniture, another for his pay as captain in the navy, &c.—it was deemed unobjectionable on this ground. *R.* v. *White et al.* 4 *T. R.* 771. Also, where there was one appeal against four rates, the Court held it to be sufficient. *R.* v. *JJ. of Suffolk*, 1 *B. & Ald.* 640.

Against whom.] The appeal is deemed to be brought against those to whom notice of appeal is directed by the statute to be given. An appeal against an order of removal, is deemed to be against the churchwardens and overseers of the removing parish or township, because the statute directs the notice of appeal to be directed to them. 9 G. 1, c. 7, s. 8. In an appeal against a poor-rate, the notice of appeal must be given to the churchwardens and overseers of the poor of the parish, &c. 17 G. 2, c. 38, s. 4, and to such occupiers and inhabitants as in the notice are stated to be omitted in the rate or underrated; *R.* v. *JJ. of Berkshire*, *Doug. on Elections*, 132. *R.* v. *Brooke, Bart.* 9 *B. & C.* 915; and the appeal must be deemed to be against them. In an appeal against the allowance of overseers' accounts, the notice of appeal must be given to "the churchwardens and overseers of the poor of the parish," &c.; 17 G. 2, c. 38, s. 4. 41 G. 3, c. 23, s. 4. *see R.* v. *JJ. of Norfolk*, 2 *B. & Adolph.* 944; which was intended and in practice is construed to mean, the persons whose accounts are the subject of the appeal, although at the time they are no longer overseers; and the appeal is accordingly deemed

to be against them. But in an appeal by overseers against the disallowance of items in their accounts, the statute (50 G. 3, c. 49, s. 2,) makes no mention of notice of appeal, nor has any case been decided upon it; but as the notice is to be against the order of the justices in special sessions disallowing the items, and such order is not made at the instance of the parish or any other person, the justices perhaps are to be deemed the respondents. In appeals against county rates, the notice of appeal must be given not only to those who made the rate, but also to the Clerk of the Peace and the hundred constable; 57 G. 3, c. 94, s. 2; and they are to be deemed the respondents. In appeals against convictions, the notice is sometimes required to be given to the prosecutor alone, as in the summary convictions under Peel's Acts, 7 & 8 G. 4, c. 29, s. 72, and c. 30, s. 38; sometimes to the magistrates alone, sometimes to both; and the appeal is accordingly intituled. In many cases, where an appeal is given, it is not mentioned to whom the notice of appeal is to be given: in such a case, if the proceeding appealed against, be the act of a justice of the peace, at the instance of some party who has an interest to support it, the notice of appeal may be directed to the party, or perhaps to both the party and the justice; but if it be the act of the justice, and not at the instance of a party, then it should seem that the notice of appeal must be given to the justice only, even although a party be really interested in the event.

To what Court the Appeal is to be.

The appeal must be made to the Court of Quarter Sessions, holden for the county or borough within which, or by the justices of which, the act complained of was done. And where the sessions are holden in different divisions of a county or riding by adjournment, the appeal not only may be to the sessions holden within that division where the order or conviction &c. appealed against was made, *R.* v. *JJ. of Sussex*, 7 *T. R.* 107, but it seems that it must be; for otherwise it would be in the power of the appellant to harrass the respondent, by entering the appeal at a sessions for a distant division of the county, and it might otherwise be attended with mischievous consequences. *R.* v. *Coyston*, 1 *Sid.* 149.

Formerly, against orders of removal, made by the justices of a borough which was not a county of itself, the appeal must have been to the sessions of the county within which the removing parish was situate. 8 & 9 *W.* 3, *c.* 30, *s.* 6. *and see Id. s.* 8. 9 *G.* 1, *c.* 7, *s.* 7. *R.* v. *Wendover*, 2 *Salk.* 490. *R.* v. *Malden, Set. & Rem.* 10. So in corporations or franchises not having four justices, all appeals against rates, and against overseers' accounts, might be brought to the sessions of the county. 17

G. 2, *c.* 38, *s.* 5. And the same, in corporations or franchises not having more than six justices, nor having jurisdiction or authority over two or more whole parishes or wards. 1 *G.* 4, *c.* 36. But as by the recent Municipal Corporation Act, 5 & 6 W. 4, c. 76, s. 105, in all corporations within that Act, to which his Majesty shall grant a separate Court of Quarter Sessions, such Court "shall be a Court of record, and shall have cognizance of all crimes, offences, and matters whatsoever cognizable by any Court of Quarter Sessions for counties in England, and the recorder shall have power to do all things necessary for exercising such jurisdiction, notwithstanding his being sole judge, as fully as any such last-mentioned Court:" this seems to me to be a virtual repeal of the above statutes, and that the appeals above-mentioned must now in all cases be to the borough sessions, and not to the sessions of the county.

Within what Time the Appeal is to be brought.

In nearly all cases, the statute giving the appeal, limits the time within which such appeal is to be brought, and fixes the period from which that time is to be reckoned. First, as to the time limited: If the statute limit a certain number of months, &c., it has been holden that the appellant has the whole of those months, and until the sessions next after the expiration of them, to appeal. *R.* v. *JJ. of Middlesex*, 6 *M.* & *S.* 279. Where a party was convicted on the 2d of January, for an offence against a statute, which allowed him to appeal against the conviction within three calendar months; the next sessions were on the 13th January, but he did not appeal until the Easter Sessions, (which were in April, and after the three months had expired,) and the sessions then refused to hear the appeal, on the ground that he should have appealed at some sessions holden within the three months: but the Court held this decision of the sessions to be wrong; the plain meaning of the clause in the statute was, that the party should have three months to appeal, that is to say, he should be allowed three months to make up his mind whether he would appeal or not; but by the construction given to the clause by the sessions, he would have, not three months, but eleven days only, for that purpose. *Id.*

Where the statute gives a party until the "*next sessions*" to appeal, this is not usually construed to mean strictly the very next sessions, which might be impracticable; they might happen the very next day after the order or conviction, &c., when the party would have no time to prepare his case, give his notice of appeal, &c. But this term "next sessions" in appeal clauses, is construed to mean the next practicable sessions, allowing the party a reasonable time to prepare his case, get up his evidence, give notice of appeal, &c. Where an order of removal from Mold in Flint-

shire to Leek (which was at a distance of 54 miles) was made on the 24th September, but not served until the 3d October, and the sessions were holden on the 7th; no appeal being then entered, the justices at the following sessions refused to receive it: upon an application for a mandamus to the justices, to enter continuances and try the appeal, the Court held, that under the circumstances the parish of Leek had until the second sessions to enter this appeal, as it was impracticable for them to prosecute it at the sessions next immediately after the service of the order. *R.* v. *JJ. of Flintshire*, 7 *T. R.* 200. *S. P. R.* v. *JJ. of the E. R. Yorkshire*, *Doug.* 192. *R.* v. *JJ. of Sussex*, 15 *East*, 206. So where an order of removal was made on Tuesday, but not served until 12 o'clock on Saturday, and the sessions commenced on the Tuesday following; the appellants did not enter their appeal at those sessions, but at the next following sessions they tendered it, and the sessions refused to receive it, on the ground that it ought to have been entered at the first sessions after the order: the Court however held, that although the statute required the appeal to be made to the next Quarter Sessions, that must mean the next practicable sessions; the parish officers must have a reasonable time to make inquiries, that they may judge of the propriety of appealing or not; and here the appellants had one day only, namely, the Monday, for that purpose, which the Court considered insufficient. *R.* v. *JJ. of Essex*, 1 *B. & Ald.* 210. So, where an order of removal from Richmond to Mortlake, both in Surrey, was made on the 11th January, and executed on the same day; the sessions for Surrey began on the 12th, and lasted fourteen days; were then adjourned to the 2d of February, and lasted one day; and were then again adjourned to the 1st of March, when they lasted two days; and by the practice of the sessions, the appeal might have been entered at any time during the sessions, or at the first adjournment: but the appellants did not enter the appeal until the Easter Sessions; and the sessions then refused to receive it, although the appellants had given notice of appeal, and were then ready to try it. The Court now granted a mandamus to the justices, commanding them to hear the appeal; the statute never contemplated the continuance or adjournment of the sessions; and if the appellants have not a reasonable time, between the execution of the order and the first day of the sessions, to consider whether they will appeal or not, they shall have until the next following sessions for that purpose. *R.* v. *JJ. of Surrey*, 1 *M. & S.* 479. *and see R.* v. *JJ. of Sussex*, 7 *T. R.* 107. Where an order of removal was served on the 8th April, and the sessions were holden on the 15th, and by the practice of the sessions eight days' notice of appeal was required; notice of appeal was given for the July Sessions, but the sessions then refused to allow the appellants to enter the appeal or to try it, on the ground

[illegible] though they could not have given notice of appeal for the [illegible] by reason, they might have had their appeal then entered [illegible] but the Court of King's Bench said that, as entering an appeal merely for the purpose of having it adjourned, was an useless ceremony, it was unnecessary: it was sufficient to bring it on at the session at which the party by his notice was bound to try it, they therefore granted a mandamus to the justices, requiring them to try the appeal. *R. v. JJ. of Devon*, 8 *B. & C.* 641 *n. And see R. v. JJ. of Southampton, Id.* 641 *n. R. v. JJ. of Kent, Id.* 640. But where the appellants in such a case proposed to enter their appeal at the second sessions, and to respite it merely, and the sessions refused to receive the appeal: the Court held that the sessions had done rightly; the appellants had no right to pass over the first sessions; but if, having done so, they had given regular notice, and had come prepared to try at the second sessions, the Court would have relieved them; as however, they had neither appealed to the first sessions, nor were in a situation to try at the second sessions (supposing they had been allowed to enter their appeal) the Court refused a mandamus to the justices to hear the appeal. *R. v. JJ. of the W. R. Yorkshire*, 4 M. & S. 327. The cases we have now been citing, are cases of appeals against orders of removal, which, by a provision in stat. 9 G. 4. c. 7, may in all cases, if entered at the next sessions after the order, be respited until the next following session, to be then finally determined, if it appear to the sessions that reasonable notice of appeal has not been given. But in all other cases of appeals, where no such authority to respite is given, the appellant must have a reasonable time, not only to make up his mind whether he will appeal or not, but to give his notice, to get up his grievances, and to prepare his case for trial: and it has been held, before the next sessions after the [illegible] it should seem that he shall have until the next following sessions to enter and try his appeal.

[illegible] was confirmed on the 29th October, [illegible] sessions were holden on the next day: at [illegible] sessions a party assessed appealed against the [illegible] was entered and respited; at a subsequent sessions however, the Court refused to try the appeal, [illegible] appeal might have been entered at a general sessions held [illegible] quarter sessions holden [illegible] days after the quarter sessions and [illegible] sessions [illegible] the power to appeal from [illegible] and that the [illegible] 7 G. 2. c. 39. s. 4, [illegible] appeals [illegible] quarter sessions, [illegible] sessions [illegible] general [illegible] sessions [illegible] sessions, [illegible] sessions.

tradistinction to a special sessions. *R.* v. *JJ. of London*, 15 *East*, 632. On the other hand, where it appeared that in the Borough of Carmarthen there were no quarter sessions, but merely general sessions held twice a year, and the magistrates at one of these sessions refused to receive an appeal against an order of removal, conceiving that, as they had no quarter sessions, they had no authority to do so: but the Court of King's Bench held, that in places where there are no quarter sessions, the appeal may be to the next general sessions, and the sessions are bound to enter and try it. *R.* v. *JJ. of Carmarthen*, 4 *B. & Ald.* 291.

Where the appeal is required to be within a reasonable time, the question, what is a reasonable time, is for the sessions to determine, taking into consideration the circumstances of the particular case. Where no time is limited, it should seem that the sessions would not be warranted in refusing to receive the appeal, merely on the ground of its not having been entered within a reasonable time.

Secondly, as to the period from which the time limited for bringing an appeal is to be reckoned. In some cases, the statute giving the appeal expressly states this period, by stating that the appeal shall be brought within a certain time, or at the next sessions, after the order made or the judgment given, or the like. In such cases the appeal must be brought (if at all) within the limited time, reckoning from the date of the order or judgment &c., whether the party intending to appeal were a party to such order or judgment, or in fact knew of it in time, or not; for whatever hardship this may be upon the party, the statute is peremptory in this respect, and the Court can exercise no discretion upon the subject. *R.* v. *JJ. of Buckinghamshire*, 2 *M. & S.* 230. *R.* v. *JJ. of Pembrokeshire*, 2 *East*, 213. *R.* v. *JJ. of Staffordshire*, 3 *East*, 151. Where the statute states that the appeal shall be brought within a certain time, or at the next sessions, after cause of complaint shall have arisen &c. or the like, then, in order to render the period certain, from which the time limited is to be reckoned, it is only necessary to ascertain at what time the matter of complaint arose, which is the subject of the appeal. And this must depend upon the circumstances of each particular case. *See R.* v. *JJ. of Wilts*, 13 *East*, 353. *R.* v. *Nockolds*, 1 *Ad. & E.* 245. *R.* v. *JJ. of Gloucestershire*, 3 *M. & S.* 127. *R.* v. *JJ. of Devon*, 1 *M. & S.* 411. *R.* v. *JJ. of Lancashire*, 8 *B. & C.* 593. *R.* v. *JJ. of Salop*, 2 *B. & Adolph.* 145.

In other cases, the statute giving the appeal, does not fix expressly the period from which the time of limitation is to be reckoned, although perhaps it does so impliedly. As where the Act states that if any person shall find himself aggrieved by any act done, or order made &c., or the like, he may appeal within a certain time, or at the next sessions, or the like: in that case, if the person, intending to appeal, were a party to the order o.

other act by which he is aggrieved, his time for appeal begins to run immediately from the date of such order or other act. But if the order or other act were ex parte, then his time for appeal shall begin to run only from the time he first has notice of it. A few cases will illustrate this. Where by stat. 7 & 8 G. 3, c. 31, relating to the assessed taxes, it was enacted that if any person should find himself aggrieved by the judgment of any Justices, he might appeal to the next sessions; a party was convicted under this statute on the 23d June; the next sessions were on the 27th; on the 23d July his goods were seized and sold under a distress-warrant for the penalty: and on the 25th July he gave notice of appeal: the Court held that he was too late, he should have appealed to the next sessions after the conviction. And Buller, J. said, this is not like the case of an appeal against an order of removal, which is an ex parte proceeding, of which the other party cannot know any thing until the removal. But here the conviction was in the nature of a judgment in the superior Courts, and the appeal in the nature of a writ of error after judgment and before execution; the conviction, and not the execution, was the grievance of which the party had to complain. *Prince* v. *Hyde*, 1 *T. R.* 414. Where a poor rate was made on the 14th June, allowed on the 28th and published; the next sessions were holden in the beginning of July, and the appeal was to the Michaelmas Sessions: it was argued that a party is not aggrieved by a rate until he is called upon to pay it, and the appeal in this case was to the next sessions after the appellant was so aggrieved: but the Court held that the appeal must be to the next practicable sessions after publication, that being notice of the rate to all rate payers; it is by the assessment the party is always aggrieved, and it is against that he appeals; if by being refused a copy of the rate, or by the late publication of it, or the like, he cannot appeal to those sessions, then the appeal may be to the following, as to the next practicable, sessions. *R.* v. *Merionethsh.* 1 *Bott*, 279. So, where an order of removal, dated in May, 1825, was not served until August 1826, and the pauper not removed until February, 1831, (the order being until then suspended on account of the illness of the pauper;) and at the next sessions the parish appealed against the order, on the ground that it had not been served within a reasonable time: the Court held the appeal was too late; the appeal should have been to the next practicable sessions after the service of the order. *R.* v. *Penkridge*, 3 *B. & Ad.* 588. But where by a distress-warrant dated the 4th December, the amount of an assessment to the highways was levied upon the goods of a person on the 12th, and he appealed within six days (the time limited) after the 12th; and the sessions dismissed the appeal, on the ground that he should have appealed within six days after the date of the warrant: upon an application for a mandamus, the Court of King's Bench

held that he had appealed in sufficient time; it was not necessary he should appeal against the warrant, for *non liquet* that it would be proceeded upon; it was sufficient that he appealed within six days after he was actually damnified. *R.* v. *JJ. of Devon*, 1 *M. & S.* 411. So where an order of filiation, made in May, was not served until after the Midsummer Sessions, and the party appealed against it at the Michaelmas Sessions, it was holden that he was in time; for he was not bound to appeal against the order, until it was served. *R.* v. *Brown*, 2 *Salk.* 480. Where justices at Petty Sessions on the 20th June made an order for diverting a footway, and on the 4th July made another order for stopping it up; the next sessions were on the 11th July, at which no appeal was entered; but at the Michaelmas Sessions there was an appeal against both orders, which the Sessions dismissed, on the ground that the party should have appealed at the Midsummer Sessions: upon an application for a mandamus, the question was, whether the time for appealing should be reckoned from the date of the first order or the second, for if from the date of the second, as the statute required ten days notice of appeal, the party could not have appealed at the July Sessions; but the Court being of opinion that the orders were distinct, and that the party was in time to enter his appeal against the second order at the Michaelmas Sessions, granted the mandamus as to that. *R.* v. *JJ. of Hertfordshire*, 3 *M. & S.* 459.

Where a statute gave a power of appealing against a conviction within six months, upon the party entering into a recognizance &c.; and a party appealed long within the limited time, but his appeal was dismissed, on account of his not proving that he had entered into the recognizance; he again appealed to the next sessions, which were still within the six months, but the sessions refused to hear the appeal: upon an application for a mandamus, the Court of King's Bench held that the first judgment, though it disposed of the appeal on a formal objection, was conclusive, and the party could not appeal a second time. *R.* v. *JJ. of W. R. Yorkshire*, 3 *T. R.* 776.

Notice of Appeal.

In what cases.] Of the statutes which give an appeal, some expressly require that notice of appeal shall be given; others not. Those which make no mention of notice, usually require that the party intending to appeal, shall previously enter into a recognizance to enter his appeal and prosecute it with effect within a certain time; and his doing so, is a good substitute for notice; for the parties interested in knowing whether an appeal is intended, can readily ascertain that fact, by inquiring of the justice whether the party has entered into the necessary recog-

nizance. *R.* v. *JJ. of Kent*, 6 *M. & S.* 258. *R.* v. *JJ. of Essex*, 4 *B. & Ald.* 276. But where the statute requires notice, it is a condition precedent to the party's appealing, and nothing can dispense with it, but the consent of the opposite party to waive the objection; indeed the sessions have no authority to entertain the appeal unless the notice have been given. Therefore where a statute gave liberty to persons convicted of offences under it, to appeal to the next sessions against the conviction, they giving six days notice of appeal, and entering into a recognizance to prosecute the same with effect; and a party convicted under it entered into the necessary recognizance, but omitted to give the notice; upon the appeal being called on, the respondent made the objection, and the Court, entertaining doubts upon the subject, respited the appeal to the next sessions; before the next sessions the appellant gave notice of trial to the respondent for the approaching sessions, but on the appeal being then called on, the respondent renewed his objection, and the justices decided in favour of it, and dismissed the appeal: the appellant under these circumstances moved for a mandamus, which was refused; Lord Ellenborough, C. J., observed that an appeal is not a matter of common right, but of special provision, and may be granted absolutely or conditionally; here there are two conditions annexed, one of which was not complied with, and of course the appeal was never duly entered; and if not duly entered, the sessions had no authority to respite it. *R.* v. *JJ. of Oxfordshire*, 1 *M. & S.* 446. So where the sessions refused to allow an appeal against an order of filiation to be entered, because the party had not given the notice and entered into the recognizance required by statute, the Court of King's Bench held that the sessions had done rightly, although it appeared that the party applied to enter it, merely for the purpose of having it respited until next sessions. *R.* v. *JJ. of Lincolnshire*, 3 *B. & C.* 548.

The party to whom the notice is given, may waive his right to it if he will; it was upon this principle seemingly that the following case was decided:—A statute, giving an appeal against a conviction, required the magistrate, at the time of conviction, to inform the party of his right to appeal, and the party at the same time should give the magistrate a written notice of appeal, and should enter into a recognizance to try it with effect; a party being convicted, the magistrate told him of his right to appeal, and he entered into the necessary recognizance, but the magistrate did not tell him of the necessity of his giving him a written notice of appeal; and at the sessions, the justices, thinking they had no jurisdiction for want of this notice being given, refused to receive the appeal: the Court of King's Bench, however, upon application, granted a mandamus to the sessions, commanding them to receive and hear the appeal, Lord Kenyon, C. J., saying that it was the duty of the magistrate, when he in-

formed the party of his right to appeal, to inform him also of the necessity of his then giving him a written notice, otherwise the party would be deluded by the act of the justice in taking the recognizance. *R.* v. *JJ. of Leeds*, 4 *T. R.* 583. In a similar case, but where the party, upon being told of his right to appeal, declined doing so and said he thought he had better pay the penalty, the Court thought the magistrate was not to blame under the circumstances, in not stating to him the steps he should take in order to appeal, and that the sessions had done right in refusing to entertain the appeal. *R.* v. *JJ. of W. R. Yorkshire*, 3 *M. & S.* 493.

Sometimes the statute, giving the appeal, requires the sessions to receive and enter it, although no notice or an insufficient one have been given, and to adjourn the appeal to the next quarter sessions, and then finally to determine the same. There is a clause to this effect in stat. 9 G. 1, c. 7, s. 8, relative to appeals against orders of removal; and hence the ordinary practice at sessions of moving to enter and respite such appeals. And a practice has crept in, at several Courts of Quarter Sessions, of allowing this to be done in other cases, where the statute upon the subject does not warrant it; which however should be avoided.

Where the appeal is entered and respited upon the *ex parte* application of the appellant, he must in that case afterwards give the respondents such notice of trial for the sessions to which the appeal has been respited, as is required by the practice of the particular Court of Quarter Sessions; and this, although such notice would not have been necessary (not being required by the statute giving the appeal) if he had tried the appeal at the first sessions, instead of having it respited. *R.* v. *JJ. of Salop*, 2 *B. & Ald.* 694. But where an appeal against an order of removal was entered and respited at the Easter Sessions, and in the June following a copy of the order of respite was served on the respondents, no other actual notice of appeal being given; the sessions refused to hear the appeal on this ground, and confirmed the order, subject to the opinion of the Court of King's Bench upon the point: the Court however held that the notice of respite was sufficient notice of appeal; the respondents could not possibly understand it in any other light, nor could the appellants have served it for any other purpose. *R.* v. *Lambeth*, 3 *D. & R.* 340. And where an appeal is adjourned upon the application of the respondents, no further notice of trial is necessary, because by the order they have themselves obtained, they are fully apprized of the time the appeal will be tried. *R.* v. *JJ. of Lindsey*, 6 *M. & S.* 379. *See also R.* v. *JJ. of Hertfordshire*, 4 *B. & Adol.* 561, *& post. R.* v. *JJ. of the W. R. Yorkshire*, 1 *Ad. & E.* 606. And even where the appellant, after giving notice of appeal and entering it, made a special application to respite it until the ensuing sessions, and it was respited accordingly, the Court of

King's Bench held that it was not necessary for him to give a notice of trial for the next sessions, such notice not being required by the statute or by the practice of the sessions. *R.* v. *JJ. of W. R. Yorkshire*, 5 *B. & Adolph.* 667. So where upon the hearing of an appeal, the justices were equally divided, and of course no judgment was given, but the appeal was on this account respited until the following sessions: the Court of King's Bench held that it was not necessary for the appellant to give any fresh notice of trial for the following sessions, although by the practice of those particular sessions such a notice was necessary in other respited appeals. *R.* v. *JJ. of Buckinghamshire*, 6 *D. & R.* 142.

What notice.] Where the statute giving the appeal specifies the length of notice that must be given, the directions of the statute in that respect must be pursued; a shorter notice would be bad, and a longer notice shall not be exacted by the practice of the sessions. Where the statute required "ten days' notice," the Court held that it meant ten days, one day inclusive, the other exclusive. *R.* v. *JJ. of W. R. Yorkshire*, 4 *B. & Adolph.* 685. But where the statute required notice to be given "ten clear days" before the sessions, the Court held that this must be a ten days' notice, exclusive of the day of service and of the first day of the sessions. *R.* v. *JJ. of Herefordshire*, 3 *B. & Ald.* 581. Where the statute required "immediate notice" of an appeal against a conviction, a notice given seven days after the conviction was holden bad. *R.* v. *JJ. of Huntingdonshire*, 5 *D. & R.* 588.

If the statute require reasonable notice, it will be for the justices to decide whether the notice given, be, in point of time, reasonable or not. And by stat. 9 G. 1, c. 7, s. 8, after enacting that no appeal against an order of removal shall be proceeded upon at sessions, unless reasonable notice be given, adds, "the reasonableness of which notice shall be determined by the justices of the peace at the quarter sessions, to which the appeal is made." But where the statute required merely "reasonable notice," and the sessions refused to hear the appeal, because there had been no notice in writing: the Court of King's Bench held that they were not warranted in doing so; the word "reasonable" in the statute, did not indicate that the notice must be in writing, but merely that as to time or number of days it should be reasonable. *R.* v. *JJ. of Surrey*, 5 *B. & Ald.* 539. So where an appeal against an order of removal was entered and respited at the January Sessions, and notice of trial was given fifteen days before the April Sessions for those sessions; there was a rule of the sessions, however, which required that where an appeal was entered and respited notice thereof should be given to the officers of the removing parish within one month after such entry and respite; and because this notice was not given, the sessions dismissed the appeal: but upon application for a mandamus, the

Court held, that the justices had no authority to require this notice of the entry and respite; the statute required only a notice of appeal, and all the justices could do was to decide whether that notice was given in reasonable time; the Court accordingly granted the writ. *R.* v. *JJ. of Norfolk*, 5 *B. & Adolph*, 990.

Where the statute requires notice, without stating that it shall be a reasonable notice, or indicating what length of notice shall be given, the notice must be given a reasonable time before the trial of the appeal; and the justices at sessions, in this case also, are to judge whether the notice given be reasonable or not. With reference to this, and to the case above mentioned, each Court of Quarter Sessions usually lays down a general rule, stating what notice of appeal shall be given, in all cases not otherwise provided for by statute; so that the profession may be apprized of the length of notice the Court will deem to be reasonable, in either of the above cases. As the attornies for appellants, however, sometimes reside at a distance, and are not acquainted with the practice of the particular Court in this respect, these general rules, when strictly adhered to, might in some cases work great injustice, if the Court of King's Bench did not, by mandamus, interfere to prevent it. Thus, where an appeal against an order of removal was entered and respited at the April Sessions; and seven days before the following Midsummer Sessions the appellant's attorney gave notice of appeal, as formerly required by the practice of the sessions; the sessions, however, had some time before altered their practice in this respect, and made an order requiring a longer notice, but which was not known to the attorney; and because sufficient notice, according to this order, had not been given, the sessions refused to hear the appeal: upon an application for a mandamus, the Court held that, under these circumstances, it would be too much to conclude the appellants from having their case heard, and therefore granted the writ. *R.* v. *JJ. of Wiltshire*, 10 *East*, 404. So, where an appeal against an order of removal, was entered and respited at the Midsummer Sessions; and by the practice of the sessions, fourteen days notice of the appeal, exclusive both of the day of giving it and of the first day of the sessions, was required; but the attorney by mistake, imagining that one day was to be reckoned exclusive the other inclusive, served the notice a day too late; and the sessions therefore refused to hear the appeal: upon application for a mandamus to the sessions, to enter continuances and try the appeal, the Court granted it; Lord Tenterden, C. J., saying, "We think that justice will be most satisfactorily administered, by ordering the justices to enter continuances and hear this appeal; they certainly have a discretionary power to make rules for the governance of the practice at the sessions; but the case of R. v. the Justices of Wiltshire shews, that this Court, for the purposes of justice, will interfere

to control that discretion. R. v. *JJ. of Lancashire*, 7 *B. & C.* 691.

In what form, &c.] If the statute require the notice to be in writing, it must be so, unless the respondents dispense with it. *See* R. v. *JJ. of Leeds*, *ante*, *p.* 272. But if the statute do not require it to be in writing, a parol notice is in all cases sufficient; and the Sessions cannot, by any rule or adjudication of theirs, require it to be in writing. Where, upon an order of filiation being made, the putative father immediately entered into the recognizance required, and gave notice of appeal to the churchwardens and overseers; at the time of entering into the recognizance, he also gave parol notice to the justices of his intention to appeal; but because he had not given them a written notice, the Sessions refused to receive the appeal: upon an application for a mandamus, the Court held, that although notice of appeal must in that case be given to the justices, yet, as the statute did not require that notice to be in writing, a parol notice was sufficient; and they accordingly granted the writ. *R.* v. *JJ. of Salop*, 4 *B. & Ald.* 626. *See also R.* v. *JJ. of Surrey*, *ante*, *p.* 274. In prudence, however, it is best that the notice should in all cases be in writing.

Where the notice is in writing, it is usual to intitule it according to the order or conviction, &c. intended to be appealed against, as the shortest mode of describing the order, &c.; but this is not essentially necessary. It must be directed to the persons who are to be the respondents in the appeal: *see ante*, *p.* 264: if the statute direct to whom the notice must be given, it must be directed to them; if to be given to churchwardens and overseers, it is sufficient to direct it to them by their name of office, "*To the Churchwardens and Overseers of* ——;" if to be given to justices, "*To A. B. esquire, and C. D. esquire, two of his Majesty's Justices of the Peace for the County of* ——;" if to other individuals, it must be directed to them by name. Any mistake in the direction, however, may be amended by the sessions, at the time of the hearing. Thus, where an order of removal was directed to the churchwardens and overseers of the *township* of Bingley, instead of the *parish* of Bingley; and it appeared that the parish was divided into several townships, one of which was the township of Bingley, none of which however supported their own poor, overseers being appointed for the parish only; against this order of removal there was an appeal, and (upon a case stated) the question was, whether the Sessions ought not to have quashed the order, as being directed to a township for which no overseers were appointed: the Court of King's Bench held it to be an informality, which the Sessions might have amended; and they sent the order back to them for that purpose. *R.* v. *Bingley*, 4 *B. & Adolph.* 567, *n.* And

where an order of removal was directed to the churchwardens and overseers of the parish of Llywell, which parish however was divided into three hamlets, Treganmaur and two others, each supporting its own poor, and each having separate churchwardens and overseers appointed for it; the pauper and the order were in fact delivered to the overseer of Treganmaur, and that township gave notice of appeal; but when the appeal was called on at Sessions, the respondents objected to its being tried, on the ground of the variance between the notice of appeal and the order of removal, the notice being by the officers of Treganmaur, and treating the order as one for the removal of the pauper to that hamlet; and the Sessions on this ground refused to hear the appeal: upon an application for a mandamus, however, the Court of King's Bench held, that as the respondents had served the order upon the officer of Treganmaur, they had thereby estopped themselves from objecting to the appeal or notice from that hamlet, and that the Sessions therefore ought to have heard the appeal. *R.* v. *JJ. of Carmarthenshire*, 4 *B. & Adolph.* 563.

The notice also must shew, upon the face of it, that the party giving it, is the person to whom the appeal is given by the statute. If the appeal be given to a particular officer, the appellant by his notice must shew that he fills that office. If the statute gives the appeal to the party aggrieved, the notice must shew expressly or impliedly that the appellant is a party aggrieved: if that appear from so much of the order or other thing appealed against, as is set out in the notice, as in the case of an appeal against a conviction, or the like, it will be sufficient; if not, it must be expressly stated. *R.* v. *JJ. of Essex*, 5 *B. & C.* 431. *R.* v. *JJ. W. R. Yorkshire*, 7 *B. & C.* 678. *R.* v. *JJ. of W. R. of Yorkshire*, 4 *B. & Adolph.* 685. *R.* v. *Blackawton*, 10 *B. & C.* 792. *and see R.* v. *JJ. of Somersetshire*, 7 *B. & C.* 681, *n.* Where the pauper himself appealed against the order for his removal, the Court held that he could do so, if he felt himself aggrieved by it; *R.* v. *Hartfield*, *Carth.* 222. *Comb.* 478; and in such a case, it would be sufficient, in this respect, to shew that the party appealing, was the person removed by the order.

In many cases the statute requiring the notice of appeal, requires that the notice shall also state the grounds upon which the appellant intends to support his appeal. This is required in different terms by different statutes; but they usually require the same thing in substance, namely, that he shall state in his notice the objections he has to the order, &c. against which he intends to appeal. The particularity with which this is required to be done, may be collected from the following cases. Where a notice of appeal against an order of filiation, merely stated that the party intended, at the next quarter sessions, to commence and prosecute an appeal against an order whereby &c., and then stating the substance of the order, the Court of King's Bench

that, although they could not have given notice of appeal for the preceding sessions, they might have had their appeal then entered and respited: but the Court of King's Bench held that, as entering an appeal merely for the purpose of having it adjourned, was an useless ceremony, it was unnecessary; it was sufficient to enter it at the sessions at which the party by his notice was bound to try it; they therefore granted a mandamus to the justices, requiring them to try the appeal. *R.* v. *JJ. of Devon*, 8 *B. & C.* 640 *n. And see R.* v. *JJ. of Southampton*, *Id.* 641 *n. R.* v. *JJ. of Kent*, *Id.* 639. But where the appellants in such a case proposed to enter their appeal at the second sessions, and to respite it merely, and the sessions refused to receive the appeal: the Court held that the sessions had done rightly; the appellants had no right to pass over the first sessions; but if, having done so, they had given regular notice, and had come prepared to try at the second sessions, the Court would have relieved them; as however, they had neither appealed to the first sessions, nor were in a situation to try at the second sessions (supposing they had then been allowed to enter their appeal) the Court refused a mandamus to the justices to hear the appeal. *R.* v. *JJ. of the W. R. Yorkshire*, 4 *M. & S.* 327. The cases we have now been citing, are cases of appeals against orders of removal, which, by a provision in stat. 9 G. 1, c. 7, may in all cases, if entered at the next sessions after the order, be respited until the next following sessions, to be then finally determined, if it appear to the justices that reasonable notice of appeal has not been given. But in all other cases of appeals, where no such authority to respite is given, the appellant must have a reasonable time, not only to make up his mind whether he will appeal or not, but to give his notice, to get up his evidence, and to prepare his case for trial; and if he have not that, before the next sessions after the order or conviction &c., it should seem that he shall have until the next following sessions to enter and try his appeal.

Where a poor rate in London was published on the 28th October, and the Quarter Sessions were holden on the next day; at the next Quarter Sessions in January a party assessed appealed against the rate, and his appeal was entered and respited; at a subsequent sessions, however, the Court refused to try the appeal, on the ground that it ought to have been entered at a general sessions which had intervened between the two quarter sessions holden in October and January, there being four quarter sessions and four general sessions in London: but upon an application for a mandamus, the Court of King's Bench held that the appeal had been lodged in time; the stat. 17 G. 2, c. 38, s. 4, which gives the appeal to "the next general or quarter sessions," does not mean by the term "general sessions" such general sessions as are holden in London, in contradistinction to the quarter sessions; for the quarter sessions are general sessions; but it is there used as another word for quarter sessions, in con-

tradistinction to a special sessions. *R.* v. *JJ. of London*, 15 *East*, 632. On the other hand, where it appeared that in the Borough of Carmarthen there were no quarter sessions, but merely general sessions held twice a year, and the magistrates at one of these sessions refused to receive an appeal against an order of removal, conceiving that, as they had no quarter sessions, they had no authority to do so: but the Court of King's Bench held, that in places where there are no quarter sessions, the appeal may be to the next general sessions, and the sessions are bound to enter and try it. *R.* v. *JJ. of Carmarthen*, 4 *B. & Ald.* 291.

Where the appeal is required to be within a reasonable time, the question, what is a reasonable time, is for the sessions to determine, taking into consideration the circumstances of the particular case. Where no time is limited, it should seem that the sessions would not be warranted in refusing to receive the appeal, merely on the ground of its not having been entered within a reasonable time.

Secondly, as to the period from which the time limited for bringing an appeal is to be reckoned. In some cases, the statute giving the appeal expressly states this period, by stating that the appeal shall be brought within a certain time, or at the next sessions, after the order made or the judgment given, or the like. In such cases the appeal must be brought (if at all) within the limited time, reckoning from the date of the order or judgment &c., whether the party intending to appeal were a party to such order or judgment, or in fact knew of it in time, or not; for whatever hardship this may be upon the party, the statute is peremptory in this respect, and the Court can exercise no discretion upon the subject. *R.* v. *JJ. of Buckinghamshire*, 2 *M. & S.* 230. *R.* v. *JJ. of Pembrokeshire*, 2 *East*, 213. *R.* v. *JJ. of Staffordshire*, 3 *East*, 151. Where the statute states that the appeal shall be brought within a certain time, or at the next sessions, after cause of complaint shall have arisen &c. or the like, then, in order to render the period certain, from which the time limited is to be reckoned, it is only necessary to ascertain at what time the matter of complaint arose, which is the subject of the appeal. And this must depend upon the circumstances of each particular case. *See R.* v. *JJ. of Wilts*, 13 *East*, 353. *R.* v. *Nockolds*, 1 *Ad. & E.* 245. *R.* v. *JJ. of Gloucestershire*, 3 *M. & S.* 127. *R.* v. *JJ. of Devon*, 1 *M. & S.* 411. *R.* v. *JJ. of Lancashire*, 8 *B. & C.* 593. *R.* v. *JJ. of Salop*, 2 *B. & Adolph.* 145.

In other cases, the statute giving the appeal, does not fix expressly the period from which the time of limitation is to be reckoned, although perhaps it does so impliedly. As where the Act states that if any person shall find himself aggrieved by any act done, or order made &c., or the like, he may appeal within a certain time, or at the next sessions, or the like: in that case, if the person, intending to appeal, were a party to the order o.

other act by which he is aggrieved, his time for appeal begins to run immediately from the date of such order or other act; but if the order or other act were *ex parte*, then his time for appeal shall begin to run only from the time he first had due notice of it. A few cases will illustrate this. Where by stat. 24 G. 3, c. 31, relating to the assessed taxes, it was enacted, that if any person should find himself aggrieved by the judgment of any justice, he might appeal to the next sessions; a party was convicted under this statute on the 23d June; the next sessions were on the 27th; on the 23d July his goods were seized and sold under a distress-warrant for the penalty; and on the 25th July he gave notice of appeal: the Court held that he was too late, he should have appealed to the next sessions after the conviction; and Buller, J. said, this is not like the case of an appeal against an order of removal, which is an ex parte proceeding, of which the other party cannot know any thing until the removal; but here the conviction was in the nature of a judgment in the superior Courts, and the appeal in the nature of a writ of error after judgment and before execution; the conviction, and not the execution, was the grievance of which the party had to complain. *Prosser* v. *Hyde*, 1 *T. R.* 414. Where a poor rate was made on the 14th June, allowed on the 28th and published; the next sessions were holden in the beginning of July, and the appeal was to the Michaelmas Sessions: it was argued that a party is not aggrieved by a rate until he is called upon to pay it, and the appeal in this case was to the next sessions after the appellant was so aggrieved: but the Court held that the appeal must be to the next practicable sessions after publication, that being notice of the rate to all rate payers; it is by the assessment the party is always aggrieved, and it is against that he appeals; if by being refused a copy of the rate, or by the late publication of it, or the like, he cannot appeal to those sessions, then the appeal may be to the following, as to the next practicable, sessions. *R.* v. *Micklefield*, 1 *Bott*, 279. So, where an order of removal, dated in May, 1825, was not served until August 1826, and the pauper not removed until February, 1831, (the order being until then suspended on account of the illness of the pauper;) and at the next sessions the parish appealed against the order, on the ground that it had not been served within a reasonable time: the Court held the appeal was too late; the appeal should have been to the next practicable sessions after the service of the order. *R.* v. *Penkridge*, 3 *B. & Adolph.* 538. But where by a distress-warrant dated the 4th December, the amount of an assessment to the highways was levied upon the goods of a person on the 12th, and he appealed within six days (the time limited) after the 12th; and the sessions dismissed the appeal, on the ground that he should have appealed within six days after the date of the warrant: Upon an application for a mandamus, the Court of King's Bench

held that he had appealed in sufficient time; it was not necessary he should appeal against the warrant, for *non liquet* that it would be proceeded upon; it was sufficient that he appealed within six days after he was actually damnified. *R.* v. *JJ. of Devon*, 1 *M. & S.* 411. So where an order of filiation, made in May, was not served until after the Midsummer Sessions, and the party appealed against it at the Michaelmas Sessions, it was holden that he was in time; for he was not bound to appeal against the order, until it was served. *R.* v. *Brown*, 2 *Salk.* 480. Where justices at Petty Sessions on the 20th June made an order for diverting a footway, and on the 4th July made another order for stopping it up; the next sessions were on the 11th July, at which no appeal was entered; but at the Michaelmas Sessions there was an appeal against both orders, which the Sessions dismissed, on the ground that the party should have appealed at the Midsummer Sessions: upon an application for a mandamus, the question was, whether the time for appealing should be reckoned from the date of the first order or the second, for if from the date of the second, as the statute required ten days notice of appeal, the party could not have appealed at the July Sessions; but the Court being of opinion that the orders were distinct, and that the party was in time to enter his appeal against the second order at the Michaelmas Sessions, granted the mandamus as to that. *R.* v. *JJ. of Hertfordshire*, 3 *M. & S.* 459.

Where a statute gave a power of appealing against a conviction within six months, upon the party entering into a recognizance &c.; and a party appealed long within the limited time, but his appeal was dismissed, on account of his not proving that he had entered into the recognizance; he again appealed to the next sessions, which were still within the six months, but the sessions refused to hear the appeal: upon an application for a mandamus, the Court of King's Bench held that the first judgment, though it disposed of the appeal on a formal objection, was conclusive, and the party could not appeal a second time. *R.* v. *JJ. of W. R. Yorkshire*, 3 *T. R.* 776.

Notice of Appeal.

In what cases.] Of the statutes which give an appeal, some expressly require that notice of appeal shall be given; others not. Those which make no mention of notice, usually require that the party intending to appeal, shall previously enter into a recognizance to enter his appeal and prosecute it with effect within a certain time; and his doing so, is a good substitute for notice; for the parties interested in knowing whether an appeal is intended, can readily ascertain that fact, by inquiring of the justice whether the party has entered into the necessary recog-

nizance. *R.* v. *JJ. of Kent*, 6 *M. & S.* 258. *R.* v. *JJ. of Essex*, 4 *B. & Ald.* 276. But where the statute requires notice, it is a condition precedent to the party's appealing, and nothing can dispense with it, but the consent of the opposite party to waive the objection; indeed the sessions have no authority to entertain the appeal unless the notice have been given. Therefore where a statute gave liberty to persons convicted of offences under it, to appeal to the next sessions against the conviction, they giving six days notice of appeal, and entering into a recognizance to prosecute the same with effect; and a party convicted under it entered into the necessary recognizance, but omitted to give the notice; upon the appeal being called on, the respondent made the objection, and the Court, entertaining doubts upon the subject, respited the appeal to the next sessions; before the next sessions the appellant gave notice of trial to the respondent for the approaching sessions, but on the appeal being then called on, the respondent renewed his objection, and the justices decided in favour of it, and dismissed the appeal: the appellant under these circumstances moved for a mandamus, which was refused; Lord Ellenborough, C. J., observed that an appeal is not a matter of common right, but of special provision, and may be granted absolutely or conditionally; here there are two conditions annexed, one of which was not complied with, and of course the appeal was never duly entered; and if not duly entered, the sessions had no authority to respite it. *R.* v. *JJ. of Oxfordshire*, 1 *M. & S.* 446. So where the sessions refused to allow an appeal against an order of filiation to be entered, because the party had not given the notice and entered into the recognizance required by statute, the Court of King's Bench held that the sessions had done rightly, although it appeared that the party applied to enter it, merely for the purpose of having it respited until next sessions. *R.* v. *JJ. of Lincolnshire*, 3 *B. & C.* 548.

The party to whom the notice is given, may waive his right to it if he will; it was upon this principle seemingly that the following case was decided:—A statute, giving an appeal against a conviction, required the magistrate, at the time of conviction, to inform the party of his right to appeal, and the party at the same time should give the magistrate a written notice of appeal, and should enter into a recognizance to try it with effect; a party being convicted, the magistrate told him of his right to appeal, and he entered into the necessary recognizance, but the magistrate did not tell him of the necessity of his giving him a written notice of appeal; and at the sessions, the justices, thinking they had no jurisdiction for want of this notice being given, refused to receive the appeal: the Court of King's Bench, however, upon application, granted a mandamus to the sessions, commanding them to receive and hear the appeal, Lord Kenyon, C. J., saying that it was the duty of the magistrate, when he in-

formed the party of his right to appeal, to inform him also of the necessity of his then giving him a written notice, otherwise the party would be deluded by the act of the justice in taking the recognizance. *R.* v. *JJ. of Leeds*, 4 *T. R.* 583. In a similar case, but where the party, upon being told of his right to appeal, declined doing so and said he thought he had better pay the penalty, the Court thought the magistrate was not to blame under the circumstances, in not stating to him the steps he should take in order to appeal, and that the sessions had done right in refusing to entertain the appeal. *R.* v. *JJ. of W. R. Yorkshire*, 3 *M. & S.* 493.

Sometimes the statute, giving the appeal, requires the sessions to receive and enter it, although no notice or an insufficient one have been given, and to adjourn the appeal to the next quarter sessions, and then finally to determine the same. There is a clause to this effect in stat. 9 G. 1, c. 7, s. 8, relative to appeals against orders of removal; and hence the ordinary practice at sessions of moving to enter and respite such appeals. And a practice has crept in, at several Courts of Quarter Sessions, of allowing this to be done in other cases, where the statute upon the subject does not warrant it; which however should be avoided.

Where the appeal is entered and respited upon the *ex parte* application of the appellant, he must in that case afterwards give the respondents such notice of trial for the sessions to which the appeal has been respited, as is required by the practice of the particular Court of Quarter Sessions; and this, although such notice would not have been necessary (not being required by the statute giving the appeal) if he had tried the appeal at the first sessions, instead of having it respited. *R.* v. *JJ. of Salop*, 2 *B. & Ald.* 694. But where an appeal against an order of removal was entered and respited at the Easter Sessions, and in the June following a copy of the order of respite was served on the respondents, no other actual notice of appeal being given; the sessions refused to hear the appeal on this ground, and confirmed the order, subject to the opinion of the Court of King's Bench upon the point: the Court however held that the notice of respite was sufficient notice of appeal; the respondents could not possibly understand it in any other light, nor could the appellants have served it for any other purpose. *R.* v. *Lambeth*, 3 *D. & R.* 340. And where an appeal is adjourned upon the application of the respondents, no further notice of trial is necessary, because by the order they have themselves obtained, they are fully apprized of the time the appeal will be tried. *R.* v. *JJ. of Lindsey*, 6 *M. & S.* 379. *See also R.* v. *JJ. of Hertfordshire*, 4 *B. & Adol.* 561, *& post. R.* v. *JJ. of the W. R. Yorkshire*, 1 *Ad. & E.* 606. And even where the appellant, after giving notice of appeal and entering it, made a special application to respite it until the ensuing sessions, and it was respited accordingly, the Court of

King's Bench held that it was not necessary for him to give notice of trial for the next sessions, such notice not being required by the statute or by the practice of the sessions. *R.* v. *JJ. of W. R. Yorkshire*, 5 *B. & Adolph.* 667. So where upon the hearing of an appeal, the justices were equally divided, and of course no judgment was given, but the appeal was on this account respited until the following sessions: the Court of King's Bench held that it was not necessary for the appellant to give any fresh notice of trial for the following sessions, although by the practice of those particular sessions such a notice was necessary in other respited appeals. *R.* v. *JJ. of Buckinghamshire*, 6 *D. & R.* 142.

What notice.] Where the statute giving the appeal specifies the length of notice that must be given, the directions of the statute in that respect must be pursued; a shorter notice would be bad, and a longer notice shall not be exacted by the practice of the sessions. Where the statute required "ten days' notice," the Court held that it meant ten days, one day inclusive, the other exclusive. *R.* v. *JJ. of W. R. Yorkshire*, 4 *B. & Adolph.* 685. But where the statute required notice to be given "ten clear days" before the sessions, the Court held that this must be a ten days' notice, exclusive of the day of service and of the first day of the sessions. *R.* v. *JJ. of Herefordshire*, 3 *B. & Ald.* 581. Where the statute required "immediate notice" of an appeal against a conviction, a notice given seven days after the conviction was holden bad. *R.* v. *JJ. of Huntingdonshire*, 5 *D. & R.* 588.

If the statute require reasonable notice, it will be for the justices to decide whether the notice given, be, in point of time, reasonable or not. And by stat. 9 G. 1, c. 7, s. 8, after enacting that no appeal against an order of removal shall be proceeded upon at sessions, unless reasonable notice be given, adds, "the reasonableness of which notice shall be determined by the justices of the peace at the quarter sessions, to which the appeal is made." But where the statute required merely "reasonable notice," and the sessions refused to hear the appeal, because there had been no notice in writing: the Court of King's Bench held that they were not warranted in doing so; the word "reasonable" in the statute, did not indicate that the notice must be in writing, but merely that as to time or number of days it should be reasonable. *R.* v. *JJ. of Surrey*, 5 *B. & Ald.* 539. So where an appeal against an order of removal was entered and respited at the January Sessions, and notice of trial was given fifteen days before the April Sessions for those sessions; there was a rule of the sessions, however, which required that where an appeal was entered and respited notice thereof should be given to the officers of the removing parish within one month after such entry and respite; and because this notice was not given, the sessions dismissed the appeal: but upon application for a mandamus, the

Court held, that the justices had no authority to require this notice of the entry and respite; the statute required only a notice of appeal, and all the justices could do was to decide whether that notice was given in reasonable time; the Court accordingly granted the writ. *R.* v. *JJ. of Norfolk*, 5 *B. & Adolph*, 990.

Where the statute requires notice, without stating that it shall be a reasonable notice, or indicating what length of notice shall be given, the notice must be given a reasonable time before the trial of the appeal; and the justices at sessions, in this case also, are to judge whether the notice given be reasonable or not. With reference to this, and to the case above mentioned, each Court of Quarter Sessions usually lays down a general rule, stating what notice of appeal shall be given, in all cases not otherwise provided for by statute; so that the profession may be apprized of the length of notice the Court will deem to be reasonable, in either of the above cases. As the attornies for appellants, however, sometimes reside at a distance, and are not acquainted with the practice of the particular Court in this respect, these general rules, when strictly adhered to, might in some cases work great injustice, if the Court of King's Bench did not, by mandamus, interfere to prevent it. Thus, where an appeal against an order of removal was entered and respited at the April Sessions; and seven days before the following Midsummer Sessions the appellant's attorney gave notice of appeal, as formerly required by the practice of the sessions; the sessions, however, had some time before altered their practice in this respect, and made an order requiring a longer notice, but which was not known to the attorney; and because sufficient notice, according to this order, had not been given, the sessions refused to hear the appeal: upon an application for a mandamus, the Court held that, under these circumstances, it would be too much to conclude the appellants from having their case heard, and therefore granted the writ. *R.* v. *JJ. of Wiltshire*, 10 *East*, 404. So, where an appeal against an order of removal, was entered and respited at the Midsummer Sessions; and by the practice of the sessions, fourteen days notice of the appeal, exclusive both of the day of giving it and of the first day of the sessions, was required; but the attorney by mistake, imagining that one day was to be reckoned exclusive the other inclusive, served the notice a day too late; and the sessions therefore refused to hear the appeal: upon application for a mandamus to the sessions, to enter continuances and try the appeal, the Court granted it; Lord Tenterden, C. J., saying, "We think that justice will be most satisfactorily administered, by ordering the justices to enter continuances and hear this appeal; they certainly have a discretionary power to make rules for the governance of the practice at the sessions; but the case of R. v. the Justices of Wiltshire shews, that this Court, for the purposes of justice, will interfere

to control that discretion. *R.* v. *JJ. of Lancashire*, 7 *B.* & *C.* 691.

In what form, &c.] If the statute require the notice to be in writing, it must be so, unless the respondents dispense with it. *See R.* v. *JJ. of Leeds, ante, p.* 272. But if the statute do not require it to be in writing, a parol notice is in all cases sufficient; and the Sessions cannot, by any rule or adjudication of theirs, require it to be in writing. Where, upon an order of filiation being made, the putative father immediately entered into the recognizance required, and gave notice of appeal to the churchwardens and overseers; at the time of entering into the recognizance, he also gave parol notice to the justices of his intention to appeal; but because he had not given them a written notice, the Sessions refused to receive the appeal: upon an application for a mandamus, the Court held, that although notice of appeal must in that case be given to the justices, yet, as the statute did not require that notice to be in writing, a parol notice was sufficient; and they accordingly granted the writ. *R.* v. *JJ. of Salop*, 4 *B.* & *Ald.* 626. *See also R.* v. *JJ. of Surrey, ante, p.* 274. In prudence, however, it is best that the notice should in all cases be in writing.

Where the notice is in writing, it is usual to intitule it according to the order or conviction, &c. intended to be appealed against, as the shortest mode of describing the order, &c.; but this is not essentially necessary. It must be directed to the persons who are to be the respondents in the appeal: *see ante, p.* 264: if the statute direct to whom the notice must be given, it must be directed to them; if to be given to churchwardens and overseers, it is sufficient to direct it to them by their name of office, "*To the Churchwardens and Overseers of* ——;" if to be given to justices, "*To A. B. esquire, and C. D. esquire, two of his Majesty's Justices of the Peace for the County of* ——;" if to other individuals, it must be directed to them by name. Any mistake in the direction, however, may be amended by the sessions, at the time of the hearing. Thus, where an order of removal was directed to the churchwardens and overseers of the *township* of Bingley, instead of the *parish* of Bingley; and it appeared that the parish was divided into several townships, one of which was the township of Bingley, none of which however supported their own poor, overseers being appointed for the parish only; against this order of removal there was an appeal, and (upon a case stated) the question was, whether the Sessions ought not to have quashed the order, as being directed to a township for which no overseers were appointed: the Court of King's Bench held it to be an informality, which the Sessions might have amended; and they sent the order back to them for that purpose. *R.* v. *Bingley*, 4 *B.* & *Adolph.* 567, *n.* And

where an order of removal was directed to the churchwardens and overseers of the parish of Llywell, which parish however was divided into three hamlets, Treganmaur and two others, each supporting its own poor, and each having separate churchwardens and overseers appointed for it; the pauper and the order were in fact delivered to the overseer of Treganmaur, and that township gave notice of appeal; but when the appeal was called on at Sessions, the respondents objected to its being tried, on the ground of the variance between the notice of appeal and the order of removal, the notice being by the officers of Treganmaur, and treating the order as one for the removal of the pauper to that hamlet; and the Sessions on this ground refused to hear the appeal: upon an application for a mandamus, however, the Court of King's Bench held, that as the respondents had served the order upon the officer of Treganmaur, they had thereby estopped themselves from objecting to the appeal or notice from that hamlet, and that the Sessions therefore ought to have heard the appeal. *R.* v. *JJ. of Carmarthenshire*, 4 *B. & Adolph.* 563.

The notice also must shew, upon the face of it, that the party giving it, is the person to whom the appeal is given by the statute. If the appeal be given to a particular officer, the appellant by his notice must shew that he fills that office. If the statute gives the appeal to the party aggrieved, the notice must shew expressly or impliedly that the appellant is a party aggrieved: if that appear from so much of the order or other thing appealed against, as is set out in the notice, as in the case of an appeal against a conviction, or the like, it will be sufficient; if not, it must be expressly stated. *R.* v. *JJ. of Esser*, 5 *B. & C.* 431. *R.* v. *JJ. W. R. Yorkshire*, 7 *B. & C.* 678. *R.* v. *JJ. of W. R. of Yorkshire*, 4 *B. & Adolph.* 685. *R.* v. *Blackawton*, 10 *B. & C.* 792. *and see R.* v. *JJ. of Somersetshire*, 7 *B. & C.* 681, *n.* Where the pauper himself appealed against the order for his removal, the Court held that he could do so, if he felt himself aggrieved by it; *R.* v. *Hartfield*, *Carth.* 222. *Comb.* 478; and in such a case, it would be sufficient, in this respect, to shew that the party appealing, was the person removed by the order.

In many cases the statute requiring the notice of appeal, requires that the notice shall also state the grounds upon which the appellant intends to support his appeal. This is required in different terms by different statutes; but they usually require the same thing in substance, namely, that he shall state in his notice the objections he has to the order, &c. against which he intends to appeal. The particularity with which this is required to be done, may be collected from the following cases. Where a notice of appeal against an order of filiation, merely stated that the party intended, at the next quarter sessions, to commence and prosecute an appeal against an order whereby &c., and then stating the substance of the order, the Court of King's Bench

held, that the order was insufficient, because it did not state the "cause and matter" of an appeal, as required by stat. 49 G. 3, c. 68, s. 5; it was a mere description of the order, and not of the objections intended to be made to it: the Court observed, that the object of the statute was, that by the notice the respondents should be apprized of the objections intended to be made to the order, in order that they might come prepared to meet them; but under this general notice, the appellant might prove that he was not the father of the child, or that the child was not born in the parish &c., and thus oblige the respondents to come prepared to meet two or more objections, when perhaps one only was relied upon by the appellant. *R.* v. *JJ. of Oxfordshire*, 1 *B. & C.* 279. So, where a notice of appeal against overseers' accounts stated that the appellant objected to certain specified items in them, but did not state why, the Court of King's Bench held it to be insufficient, as not stating "the particular causes or grounds of appeal," as required in that case by stat. 41 G. 3, c. 23, s. 4. *R.* v. *Sheard*, 2 *B. & C.* 856. But where the grounds of appeal are set out, it is not necessary that they should be stated with that particularity that would be required in pleading them. And therefore where a man, convicted under the Vagrant Act for indecently exposing his person, appealed against the conviction, and in his notice stated as his ground of appeal, that he was "not guilty of the said offence," the Court of King's Bench held this to be sufficient; it was the same as specifically denying all the facts necessary to constitute the offence, resting his case upon this denial, and not objecting upon the ground of there being any defect in form. *R.* v. *JJ. of Newcastle-upon-Tyne*, 1 *B. & Adolph.* 933. *and see R.* v. *JJ. of Devon*, 1 *M. & S.* 411. And in a very recent case, where a man and his wife, and two children of the wife by a former husband, were removed by an order of justices, from Penryn to the parish of St. Gluvias, both in Cornwall; against which order the overseers of St. Gluvias appealed, and in their notice of appeal, after stating their grounds of appeal with respect to the husband, stated as a ground of appeal with respect to the children that they "are and each of them now is settled in the parish of Penryn;" at the Sessions, after the respondents had proved their case, the appellants were proceeding to prove the settlement of the wife's former husband at Penryn, in order to shew that the children were settled there; but the Sessions refused to allow this, as the appellants had not stated specifically in their grounds of appeal any settlement of the children's father in Penryn: upon shewing cause against a rule for a mandamus, it was argued that the statement of the grounds of appeal, now required by stat. 4 & 5 W. 4, c. 76, s. 81, must shew specifically the settlement intended to be relied upon by the appellants, whether a settlement acquired by the pauper, or a derivative settlement,

and whether a settlement by hiring and service, or by apprenticeship, or by renting a tenement, or the like, with all the particulars, in order that the respondents may inquire into the settlements stated, and be prepared to contest them; that the 79th section of the same statute obliged the respondents to disclose the whole of their case, by sending to their opponents a copy of the examination on which the order was made, and it was evidently the intention of the legislature, by this 81st section, to make the appellants do the same: but the Court held, that stating a pauper to be settled in a certain parish, was a sufficient statement of the grounds of appeal, without shewing how he was settled, or other particulars of the settlement; it was sufficient to enable the respondents to make their inquiries as to the settlement, which was all that was required. *R.* v. *JJ. of Cornwall, MS. T.* 1836.

Where the statute requires the grounds of the appeal to be stated in the notice, and they are stated accordingly, the appellant, at the trial of the appeal, will be precluded from giving evidence of, or going into, and the Sessions from examining or inquiring into, any other cause or ground of appeal, than what has been stated in the notice. This is expressly enacted by stat. 41 G. 3, c. 23, s. 4, as to appeals against poor-rates, and by stat. 4 & 5 W. 4, c. 76, s. 81, as to appeals against orders of removal; and the same is the practice in other cases, whether expressly enacted by the particular statute upon the subject or not. Where, in an appeal against a rate, the appellant took an objection to the rate for a defect appearing upon the face of it; the respondents on the other hand contended that no advantage could be taken of the objection, as it was not stated as one of the causes of appeal in the notice; but the Sessions decided otherwise, and quashed the rate: the Court of King's Bench, however, held that the Sessions had no jurisdiction to quash a rate, even for a defect appearing upon the face of it, unless that defect were specified in the notice of appeal. *R.* v. *Bromyard*, 8 *B. & C.* 240. Where in an appeal against a county-rate, certain grounds of appeal were stated in the notice, although the statute upon the subject required no such statement; and at the trial, the Sessions dismissed the appeal, on the ground that those causes of appeal were badly stated, and in fact contained no real ground of appeal: but the Court of King's Bench held, that as it was not necessary to state any grounds of appeal to all, the Sessions ought not to have dismissed the appeal, merely for a defect in the grounds thus unnecessarily stated; but if they thought that the respondents had been misled by the notice, they might have adjourned the appeal. *R.* v. *JJ. of Westmoreland*, 10 *B. & C.* 226.

How served.] It is not necessary in any case (unless rendered

so in some particular case by the express words of the statute upon the subject,) that the notice of appeal should be served personally upon the respondents; a service, by leaving the notice for them at their places of abode, will be sufficient. In appeals against poor-rates, and against overseers' accounts, the statute (41 G. 3. c. 23, s. 4,) directs the notice of appeal to be "delivered to or left at the places of abode of the churchwardens and overseers of the parish, township, vill or place, or any two of them." In the other usual cases of appeal, the statutes contain no directions upon the subject.

Entry and Adjournment.

Entry of the Appeal.] The appeal is in all cases entered with the clerk of the peace. At what time they are to be entered, depends upon the practice of each particular Court of Quarter Sessions. If the business of the Court commence with appeals, it is obvious that those which are to be tried at the present sessions, and which have not been respited from a former sessions, must be entered before or immediately at the sitting of the Court. This, however, is a matter which is regulated by the practice of every Court of Quarter Sessions, and with which the appellants' attorney can readily make himself acquainted, as I believe it always forms part of the usual advertisement of the holding of the Sessions, inserted in the country newspapers a week or two before the Sessions commence. Where the appeal is entered, merely for the purpose of having it respited until the next Sessions, as the time also for doing this is in general regulated by the practice of the Sessions, it may be entered before that time as a matter of course, and the motion to respite it may be made afterwards; but if not made before that time, you will in general be allowed to move both to enter and respite the appeal afterwards, at any time during the Sessions. Where the appeal is to be entered and respited, and the appellants' attorney resides at a distance, he usually has this done by an agent residing in or near the place where the Sessions are holden.

Where the statute, giving the appeal, makes certain acts conditions precedent to the party's appealing, such as the giving notice of appeal, entering into recognizance, &c.: the appeal cannot legally be entered, until after those conditions have been complied with. Therefore where an order of filiation was made on the 14th January, and at the next Sessions, which commenced on the 27th April, an application was made to enter and respite the appeal, but the justices refused to receive it, as no notice of appeal had been given or recognizance entered into; the Sessions were then adjourned until the 6th May, to be then holden for a different division of the county, and before that day the recognizance was entered into, and notice of appeal given,

but the justices still refused to receive the appeal: and upon an application for a mandamus, the Court refused it, saying that the Sessions had no power to receive the appeal; by the statute (49 *G.* 3, *c.* 68, *s.* 7,) no such appeal shall be "brought, received, or heard," unless the notice be given and the recognizance entered into, as therein required; and as the appeal was required to be to the next General Quarter Sessions, the appeal to the adjourned Sessions was not sufficient. *R.* v. *JJ. of Lincolnshire*, 8 *B.* & *C.* 548.

In appeals against orders of removal, it is enacted by stat. 9 G. 1, c. 7, s. 8, that if it shall appear to the justices that reasonable time of notice was not given, then they shall adjourn the said appeal to the next Quarter Sessions. And the justices must then allow the appeal to be entered at the next sessions after the service of the order, and adjourn it to the sessions following, although no notice have been given, *R.* v. *JJ. of Gloucestershire*, *Doug.* 191, and although the appellant had time enough before the Sessions to have given notice of appeal. *R.* v. *JJ. of Shropshire*, 7 *East*, 549. And where the Sessions refused to allow an appeal against an order of removal to be entered, because the notice of appeal had been served on a Sunday: the Court upon application granted a writ of mandamus commanding them to enter the appeal, for if no notice were given, they were bound to enter the appeal, and then to respite it to the following sessions. *R.* v. *JJ. of Huntingdonshire*, *Cald.* 283. Even at the second sessions after the service of the order, if the application be, not to enter and respite the appeal, but to enter and try it, the Sessions are bound to allow it to be entered. Where the Sessions in such a case refused to allow an appeal against an order of removal to be entered, on the ground that it ought to have been entered at the previous sessions, and then respited until the present sessions, the Court of King's Bench upon application granted a mandamus commanding them to enter and try the appeal, saying that entering it merely for the purpose of adjourning it was a useless act, and therefore unnecessary; it was sufficient to enter it at the sessions at which the party by his notice was bound to try it. *R.* v. *JJ. of Devon*, 8 *B.* & *C.* 640, *n.* *R.* v. *JJ. of Southampton*, 6 *M.* & *S.* 394. 8 *B.* & *C.* 641, *n.* *R.* v. *JJ. of Kent*, 8 *B.* & *C.* 639. Where the appellant gave notices of appeals against three orders for stopping up highways, but in entering them, the clerk of the peace, by mistake, they being all by and against the same parties, entered them as one appeal only; upon the trial, one appeal was disposed of on a preliminary objection to the notice, and as the same objection applied to the other two, no notice was taken of them: on a motion, however, for a mandamus to enter continuances and hear the appeals, it appearing that the preliminary objection was unfounded, and that the appellants had really intended to enter the appeals

against all the orders, the Court made the rule absolute as to all three. *R.* v. *JJ. of W. R. of Yorkshire*, 4 *B. & Adolph.* 685.

Adjournment.] Unless the statute specially provide for respiting an appeal to a subsequent sessions, it is by no means a matter of course with the Court of Quarter Sessions to do so. They may do it, if they will, even in a case where the statute directs them to hear and determine the appeal at the sessions at which it is entered; for the Court, who are to try the appeal, have an incidental authority to adjourn it, when once properly lodged, if it be necessary for the advancement of justice to do so, of which necessity that Court are the proper judges, *R.* v. *JJ. of Wilts*, 13 *East*, 352, and the Court of King's Bench will not interfere with the exercise of their discretion in this respect. *Ex parte Becke*, 3 *B. & Ad.* 704. The Court of Quarter Sessions therefore require a strong case to be made out, either by affidavit or the examination of persons upon oath, shewing that by the absence of a material witness, or for some other reason, justice cannot be fairly administered between the litigating parties, unless the trial is put off to another sessions; otherwise they will not in general adjourn an appeal. And if they do adjourn it, it may be upon such equitable terms as they may deem right. Where notice of appeal was duly given, and both parties attended at the sessions, but the appeal was not entered up to a late period of the day, and the appellants then moved that it might be entered and adjourned, on an affidavit stating the absence of a material witness; the Sessions, however, refused to allow this, unless the appellants would pay the respondents the costs of the day; which the appellants refused doing, and the appeal was not entered: upon an application for a mandamus, the Court refused it, saying, that as the appellants declined paying the costs of the day, the justices had exercised a very proper discretion in refusing the adjournment. *R.* v. *JJ. of Monmouthshire*, 1 *B. & Adolph.* 895. It may be observed, that it is only in cases where the appeal has been properly entered, that is to say, when all the preliminary steps required by the statute have been taken, such as the giving of the requisite notice &c., that the Court of Quarter Sessions can respite an appeal; if it be not duly entered, it cannot be lawfully adjourned, for the Sessions cannot acquire to themselves a jurisdiction by any act of their own. *Per Lord Ellenborough, C. J. in R.* v. *JJ. of Oxfordshire*, 1 *M. & S.* 446.

The appeal against an order of removal, admits of a different consideration; there we have seen (*ante, p.* 281,) if there be no notice of appeal, or not a sufficient one, given, when such an appeal is entered at the next sessions after the making of the order, the justices are bound by stat. 9 G. 1, c. 7, s. 8, to respite the appeal to the next sessions; and this is done by them as a matter of course, without exacting any conditions whatever. And where an order of removal, made on the 3d January, was executed on

the 4th, and on the 6th notice of appeal was given for the next sessions which were to commence on the 13th; at the Sessions this was objected to as not being a sufficient notice, (the practice of the Sessions requiring eight days' notice of appeal,) and the objection was allowed; the appellants then moved to respite the appeal until the next sessions, but the justices refused to do so, and dismissed the appeal: upon an application for a mandamus, however, the Court held that the Sessions, having determined that the notice of appeal was insufficient, were bound by stat. 9 G. 1, c. 7, to adjourn the appeal; they had no discretion in the matter. *R.* v. *JJ. of Buckinghamshire*, 3 *East*, 342.

The statute relating to appeals against rates and against overseers' accounts, (17 G. 2, c. 38, s. 4,) contains precisely the same clause as the above stat. 9 G. 1, c. 7, s. 8, as to orders of removal, namely, that if it appear to the justices that reasonable notice was not given, then they shall adjourn the said appeal to the next Quarter Sessions, and then and there finally hear and determine the same. Where a poor-rate was published on the 16th September; and at the next sessions, holden on the 16th October, an appeal against the rate was entered and respited as a matter of course, according to the practice of the Sessions; and in due time before the Epiphany Sessions notice of appeal was given, but the justices at the Sessions refused to hear the appeal: upon an application for a mandamus, the Court held, that as the Sessions in this case had allowed the appeal to be entered and respited, they were bound to hear it at the time to which it was so adjourned; but Lord Tenterden, C. J. said, "at the same time I think it would be more beneficial to the public, and more consistent with the intention of the legislature, if the justices did not adjourn appeals against rates as a matter of course; I think they should endeavour to induce parties to try their appeal at the next practicable sessions after the publishing of the rate." *R.* v. *JJ. of Wilts*, 8 *B. & C.* 380.

What we have been here speaking of, is the adjournment of appeals; as to the adjournment of the Sessions, *see ante*, p. 28.

Trial of the Appeal.

Which Party to begin.] Usually the respondent begins: he it is who makes the charge, against which the appellant appeals, and he must therefore prove it; it is not for the appellant to prove his innocence, until the charge against him has first been substantiated by the other party. In appeals against convictions, this is universally true; but in some of the other appeals, this is not always the case.

And first, as to appeals against poor-rates: the rule which appears to be generally established, is, that where the appellant objects to his being rated at all, the respondent begins; *R.* v.

Newbury, 4 *T. R.* 475; where he objects to the quantum of rate only, he himself begins; *Id. and R.* v. *JJ. of Suffolk*, 6 *M. & S.* 57; and where he appeals upon both grounds, there the respondents begin. *R.* v. *Topham*, 12 *East*, 546. *See this subject, more at large, post.*

Secondly, as to appeals against orders of removal: formerly the respondents always began. The appellant indeed might admit the respondents' *primâ facie* case of settlement in the appellant parish, in order to save the time of the Court, and useless trouble to the respondent, and in that case he virtually began himself; but this gave him no right to the general reply; the respondent was always deemed to have begun, although he did not actually do so. But now, since the recent Poor Law Amendment Act, 4 & 5 W. 4, c. 76, (*see* s. 79, 81,) it is said by some, and indeed ruled at one or two Courts of Quarter Sessions, that if the appellants in their grounds of appeal do not dispute the respondents' case as made out by the pauper's examination &c., they admit it, and the respondents are not bound to prove it; and in that case the appellants have to begin, and are entitled to the general reply. Others deny this, and say that although the appellants do not deny the respondents' case in their grounds of reply, yet the respondents are still bound to prove it; the appellants in that case perhaps would not be allowed to call witnesses to contradict those of the respondents, but that would be the whole effect of their not denying the respondents' case in their grounds of appeal; it would not relieve the respondents of their proof, nor take from them their right to the general reply. The question ultimately will have to be decided by the Court of King's Bench; and until it shall be so decided, it will be prudent for respondents in such cases to come prepared to prove the case stated in the examinations, unless they have an express written admission of it from the appellants.

In the other cases of appeal, no other general rule seems to be established except that above mentioned, namely, that the respondent begins. But there must necessarily be many exceptions to this, arising out of the particular circumstances of each case, which must in a great measure be left to the good sense and discretion of the justices at Sessions to regulate.

But whether the respondent or the appellant begins, in strictness the appellant may in many cases be called upon to prove service of his notice of appeal, before the appeal is proceeded in at all. Where the statute giving the appeal enacts, that the justices, on proof being given of the service of notice, or the entering into recognizance &c., may proceed to hear and determine the appeal, (as was formerly the case in appeals against orders of filiation, by stat. 49 G. 3, c. 68, s. 5,) there the notice, recognizance &c. must be proved by the appellant, before the appeal is at all gone into, unless the respondents chuse to admit them.

In appeals against orders of removal, the stat. 9 G. 1, c. 7, s. 8, enacts that no such appeal shall be proceeded upon in any Court of Quarter Sessions, unless reasonable notice be given," &c.—which words, although not so strong as those of the late statute, 49 G. 3, c. 68, s. 5, above mentioned, is sufficiently so to warrant the Sessions in requiring the appellant to prove the notice, before the Court enter upon the trial of the appeal. Hitherto this was never required in practice, perhaps, because the respondents, by always beginning, were deemed to waive it. But as the appellants now assume the right to begin in some cases, (*vide supra*,) perhaps the respondent in that case would be justified in putting the appellant to the proof of his notice, and the Sessions warranted in making him do so. Mr. Nolan says, that upon hearing of appeals, the first step in all cases, after the appeal is called on, is, that the appellant should prove his notice, unless it be admitted. 2 *Nol. P. L.* 439. 3*d ed.* But this is certainly not the case in practice; and it depends entirely upon the words of the particular Act giving or regulating the appeal, whether it ought to be so. But it may safely be laid down as a general rule, that in all cases where notice of appeal is necessary, if the respondent do not appear at the trial, the appellant will not be allowed to move to quash the order or other proceeding appealed against, until after he shall have first proved service of the notice of appeal. Where, upon an appeal against a rate being called on at Sessions, the appellant being then ready to prove his notice and proceed with his case, the respondents applied to put off the trial until the next Sessions, which application was granted on payment of costs, and the respondents' counsel thereupon handed a copy of the notice of appeal to the clerk of the peace, to enable him to draw up the order; at the next Sessions both parties appeared, but the respondents objected to the appeal being heard, until the appellant first proved service of the original notice of appeal, and he not being prepared to do so, the Sessions confirmed the rate: but upon application for a mandamus to the justices to enter continuances and try the appeal, the Court of King's Bench held that the respondents had acted upon the notice, so as to render any further proof of it unnecessary, and therefore the justices ought to have heard the appeal. *R. v. JJ. of Hertfordshire*, 4 *B. & Adolph.* 561.

Proceedings at the Hearing.

We have already (*ante p.* 24, 25,) sufficiently noticed the proceedings at the hearing of an appeal, the address of counsel for the respondents and appellants, the evidence on both sides, the reply, &c. See also upon the subject of evidence generally, *ante, p.* 126, *&c.*; the examination of witnesses, *ante, p.* 151;

the cross-examinations, *ante*, p. 153; and evidence in reply, *ante*, p. 154. It may be necessary to mention, that there is no objection to either party supporting his case by additional or even different evidence, to that by which he supported it before the justice whose order or conviction, &c. is appealed against. *See R. v. Commissioners of Excise*, 3 *M. & S.* 137. This is constantly done in appeals against convictions. Also in appeals against orders of removal, it is the constant practice for the respondents, in proof of the settlement in the appellant parish, to adduce additional evidence to that stated in the examinations, and sometimes to prove it by totally different evidence. But where, in a local Act relating to the poor of a borough, an appeal against a poor rate was given in the first instance to the Borough Sessions, and the party, if dissatisfied with their decision, might have his "further appeal" to the Sessions of the county: it was holden, that the party in such a case could not urge any other grounds of appeal than those he used at the Borough Sessions. *R. v. JJ. of Suffolk*, 1 *B. & Ald.* 640; *and see R. v. Jefferys*, 1 *B. & C.* 604. And in all cases, if, by the statute giving the appeal, an appellant be required to state the grounds of his appeal in his notice, he will not be allowed to go into or give in evidence any other ground of appeal than such as is stated in his notice. See *ante*, p. 279. It may be necessary to mention, that a bill of exceptions will not lie at Sessions, upon the trial of an appeal. *R. v. Preston upon the Hill, Burr. S. C.* 77.

Amendment.] By stat. 5 Geo. 2, c. 19, s. 1, reciting that great expenses had been occasioned by reason that the judgments and orders of justices had been quashed or set aside at the Sessions, "upon exceptions or objections to the form or forms of the proceedings," without examining the truth and merits of the matter in question between the parties,—it is enacted, that "upon all appeals to be made to the justices of the peace at their respective General or Quarter Sessions to be holden for any county, riding, city, liberty or precinct, within that part of Great Britain called England, against judgments or orders given or made by any justices of the peace as aforesaid, such justices so assembled at any General or Quarter Sessions shall, and they are hereby required from time to time, within their respective jurisdictions, upon all and every such appeals so made to them, to cause any defect or defects of form, that shall be found in any such original judgments or orders, to be rectified and amended, without any cost or charge to the parties concerned, and after such amendment made shall proceed to hear, examine and consider the truth and merits of all matters concerning such original judgments or orders, and likewise to examine all witnesses upon oath, and hear all other

proofs relating thereto, and to make such determinations thereupon as by law they should or ought to have done, in case there had not been such defect or want of form in the original proceeding.

Where, upon the trial of an appeal against an order of removal, it was objected that the order was directed to the churchwardens and overseers of the *parish* of Llanenchymedd, whereas it was not a parish but a vill, and there were no churchwardens: the Sessions amended the order in these respects, as being mistakes in form merely; and the Court of King's Bench held that they had authority to do so by the above statute. *R.* v. *Amlwch*, 4 *B.* & *C.* 757. So, where in an order for the removal of a pauper and his family from Luggershall to Harrow, the pauper's last place of settlement was by mistake adjudged to be at Luggershall instead of Harrow, but upon appeal against this order, the Sessions ordered it to be amended, by inserting Harrow instead of Luggershall: afterwards, in the Court of King's Bench, it was objected, that this was a defect in substance, and therefore not amendable by the statute; but the Court seemed to think it a mistake in form, being merely an error of the clerk who filled up the order; and on a subsequent day, the order of the Sessions was confirmed by consent. *R.* v. *Harrow on the Hill*, 2 *Bott*, 706. So, where an order of removal was directed to the churchwardens and overseers of the *township* of Bingley, instead of the *parish* of Bingley, (it appearing that there were several townships within the parish of Bingley, of which the township of Bingley was one, but the parish maintained its poor collectively, and there were no separate overseers for the township); the Sessions upon appeal confirmed the order, subject to the opinion of the Court whether, being directed to the township instead of the parish, it could be supported: the Court, after taking time to consider the point, held that this was a mistake in form only, which might have been amended at the Sessions, and they directed the order to be sent back to the Sessions, that the amendment might be made. *R.* v. *Bingley*, 4 *B.* & *Adolph.* 567, *n.* But where an order of removal was objected to, because it was directed to the churchwardens and overseers of the parish of B. in the county of Warwick, and to the churchwardens and overseers of the county of the city of Coventry, and the magistrates described themselves as justices of the county aforesaid, (without saying of which county, and Coventry being the last antecedent,) the Court held it bad, because it did not therefore appear upon the face of the order that the justices had jurisdiction; and Lord Kenyon, C. J. regretted that justices had no power to amend in such cases as this, it being a defect in substance, and not in form merely. *R.* v. *Chilverscoton*, 8 *T. R.* 178. And in a similar case, two

years after that, (*R.* v. *Moor Critchell*, 2 *East*, 66,) his lordship expressed the like regret. So where, in an order of removal, it was omitted to state that it was made on the complaint of the parish officers, it contained no adjudication that the pauper was actually chargeable, and it omitted to state that the justices who made it were justices of the county in which the removing party was situate: all these the Sessions deemed mistakes in form, and ordered them to be amended; but the Court of King's Bench held them to be errors in substance, which the Sessions had no authority by the above Act to amend, and they therefore quashed the order of Sessions. *R.* v. *Great Bedwin*, *Burr. S. C.* 163. 2 *Str.* 1150.

Judgment.] At the Sessions for a county, &c. after the case is closed on both sides, the justices deliberate on their judgment; and if there be a difference of opinion amongst them, and it be at all doubtful on which side the majority is, it is then decided by vote. We have seen already, (*ante*, *p.* 11,) that justices shall not act in determination of an appeal from any order, matter or thing relating to any parish, township, or place in which they are rated or chargeable with the "taxes, levies or rates" within such parish, &c.; 16 G. 2, c. 18, s. 1; nor should they vote or take any part in any other appeal, in which they individually have a personal interest. If upon voting, it be found that they are equally divided, the appeal must be adjourned until the next Sessions, and then again be tried. *See R.* v. *JJ. of Westmoreland*, 2 *Sess. Ca.* 193. But where upon an appeal against an order of removal, the justices being equally divided in opinion on a question of fact, on which the settlement of the pauper depended, and which ought to have been proved by the respondents, the Sessions, thinking that the respondents were bound to establish their case to the satisfaction of a majority of the Court, quashed the order, instead of adjourning the appeal: upon an application for a mandamus, the Court, without deciding whether the Sessions had done rightly in not adjourning, held that as they had actually decided the case, this Court could not interfere. *R.* v. *JJ. of Monmouthshire*, 4 *B. & C.* 844. So, where upon the hearing of an appeal, after the magistrates had deliberated on their judgment, the chairman of the Sessions pronounced the judgment that the order of removal be confirmed; but one of the magistrates who voted for the respondents, understanding that the order had been made by him, begged to withdraw his vote; and as by taking away his vote, there was no longer a majority for confirming the order, the clerk of the peace was directed to enter a judgment for quashing it; shortly after the Sessions, it being perceived that by taking away this vote, the remaining votes were equally divided, an application was made to the

chairman to rectify the mistake, and that instead of the judgment for quashing the order, an adjournment merely should be entered, but this was refused: upon an application for a mandamus to the justices to rehear the appeal, the Court held, that as a judgment had been entered, and not altered during the Sessions, they had no authority to interfere. *R.* v. *JJ. of Leicestershire*, 1 *M. & S.* 442. Where, upon the hearing of an appeal, the Court were equally divided, and they therefore adjourned the appeal to the next Sessions; the appellants afterwards moved in the Court of King's Bench for a certiorari to remove the order of adjournment and the order of removal, on the ground that one of the magistrates, who had voted for the respondents, was a rated inhabitant of the respondent parish, and that therefore the Sessions, instead of adjourning the appeal, should have quashed the order of removal: but the Court held that, supposing the order of adjournment to be erroneous, they had no jurisdiction, as a Court of Error, to review it, and they refused the writ. *R.* v. *JJ. of Monmouthshire*, 8 *B. & C.* 137. Where, upon an appeal against an order of removal, the justices were equally divided, and the appeal was accordingly respited to the next Sessions; and at the next Sessions the justices confirmed the order without hearing the appeal, upon the ground that the appellant had given no fresh notice of trial, which was required by the practice of the Sessions: but the Court of King's Bench held, that where an appeal is thus respited or adjourned at the instance of the justices, no fresh notice of appeal was necessary; a rule for a mandamus to the justices, requiring them to enter continuances and hear the appeal, was therefore made absolute. *R.* v. *JJ. of Buckinghamshire*, 6 *D. & R.* 142. However, it is not only in cases where the justices are thus equally divided, but in all cases where the justices wish time for deliberation, they may adjourn an appeal; *R.* v. *King's Langley*, 1 *Ld. Raym.* 481. 2 *Salk.* 605. *Comb.* 365; but this is seldom done, for the same justices possibly may not attend at the next Sessions.

In appeals against orders of removal, the Sessions can only give judgment, that the order be confirmed or quashed; they cannot add to it that the pauper shall be removed to some other parish, *R.* v. *Oswell & Woking*, 2 *Salk.* 472, or taken back by the removing parish, *R.* v. *Milverton*, 7 *Mod.* 10, or add to it any other original order. *R.* v. *Bond*, 2 *Show.* 503.

In appeals against rates, they may either confirm or quash the rate, or they may order it to be amended. 41 *G.* 3, *c.* 23, *see post*. As to the judgments in other appeals, they shall be mentioned in their proper places hereafter.

The justices may alter their judgments, at any time during the same Sessions. Where upon hearing an appeal against an order of removal, the respondents not appearing, the order was

quashed ; but afterwards, during the same Sessions, the respondents were let in to try the appeal, upon payment of costs; and upon the trial the order was confirmed : all these orders being removed by certiorari, it was moved now to quash the latter order of Sessions, by which the order of removal was confirmed, on the ground that the Sessions, having once made the order for quashing the order of removal, could not afterwards make another order to confirm it ; but the Court denied this, and said that the Sessions had authority to alter their judgments at any time during the same Sessions. *St. Andrew's Holborn* v. *St. Clement's Danes*, 2 *Salk.* 494, 606. *See Battersea* v. *Westham*, 5 *Mod.* 396, *cont.*

Where an order of Sessions, quashing an order of removal, was removed into the Court of King's Bench, and it was objected that it was not stated in it whether the order of removal was quashed for mere form or upon the merits, for if the latter it would be a discharge to the parish for ever ; but the Court held, that the justices were not bound to state the reasons of their judgment, and in practice never did so. *South Cadbury* v. *Braddon*, 2 *Salk.* 607.

As to a special case, *see ante*, p. 46.

Costs.] Costs, if granted, form part of the judgment of the Court. It depends, however, upon the statute giving the appeal, whether the Sessions can award costs or not ; and it is better therefore to defer the consideration of this subject until we come to treat of appeals in particular cases. Even in cases where the Sessions have authority to award costs, it is not in all cases that they do so ; and in this respect the practice of the different Courts of Quarter Sessions differs very much.

Section 2. *Appeal against an Order of Removal.*

In what Cases.] By stat. 13 & 14 Car. 2, c. 12, s. 1, upon complaint of the churchwardens or overseers of the poor of any parish that any poor persons have come to settle in the parish, [and that such poor person hath actually become chargeable to the parish, 35 *G.* 3, c. 101, *s.* 1,] it shall be lawful for any two justices of the peace, whereof one to be of the quorum, by their warrant, to remove and convey such person to the parish where he was last legally settled. *See* 1 *Arch. P. L.* 9. 2 *Id. pl.* 48—59, 88—93. And by the same statute, s. 2, it is provided, that " all such persons who think themselves aggrieved by any such judgment of the said two justices, may appeal to the justices of the peace of the said county, at their next Quarter Sessions, who are hereby required to do them justice, according to the merits of their cause."

And by stat. 3 W. & M. c. 11, which first established the settlements by hiring and service, by apprenticeship, by executing an annual public office, and by being charged with and paying the public taxes or levies of the parish, and enacted that they should be adjudged good settlements,—it was provided and enacted by sect. 9, that "if any person or persons shall find him, her or themselves aggrieved by any determination which any justice or justices of the peace shall make in any of the cases abovesaid, the said person or persons shall have liberty to appeal to the next General Quarter Sessions of the Peace, to be held for the said county, riding or division, city or town corporate, who, upon hearing of the said appeal, shall have full power finally to determine the same."

Where the pauper himself appealed against the order for his removal; and afterwards in the Court of King's Bench, it was objected that the appeal was given to the parish only, and not to the pauper: but the Court held that the pauper might appeal, if he thought himself aggrieved by the order. *R.* v. *Hartfield, Carth.* 222. *Comb.* 478.

It may be necessary to mention, that there is no appeal against an order of relief. *R.* v. *JJ. of Devon,* 4 *M. & S.* 421. *R.* v. *North Shields, Doug.* 331. *Cald.* 68.

To what Sessions.] By stat. 8 & 9 W. 3, c. 30, s. 6, "the appeal against any order for the removal of any poor person from out of any parish, township or place, shall be had, prosecuted and determined at the General or Quarter Sessions of the Peace for the county, division or riding, wherein the parish, township or place, from whence such poor person shall be removed, doth lie, and not elsewhere." After the passing of this statute, in all cases where the respondent parish was situate in a borough, which was not a county of itself, the appeal must have been, not to the borough Sessions, but to the Sessions of the county or riding in which the borough, or rather the respondent parish, was situate. But since the late Municipal Corporation Act came into force, in all cases where the respondent parish is situate within a borough, to which a separate Court of Quarter Sessions has been granted, the appeal against an order of removal must now be to the Quarter Sessions of the borough. *See ante, p.* 266.

The appeal must be to the next Quarter Sessions of the Peace; 13 & 14 C. 2, c. 12, s. 2. 3 W. & M. c. 11, s. 9, *supra;* that is to say, the next practicable Sessions after the service of the order. The substance and result of all the cases upon the subject is this: the appeal may be entered and tried at the first sessions after the service of the order; or it may be entered and respited at the first sessions, and tried at the second; or it may

be entered and tried at the second Sessions, if it were impracticable to try it at the first.

It may be entered and tried at the first Quarter Sessions after the service of the order, if the appellants wish it, and have given the requisite notice of appeal. For it is only in a case where no notice of appeal, or an insufficient notice, has been given, that the justices at Sessions are authorized by stat. 9 G. 1, c. 7, s. 8, to respite it. *Vide post.* Where the wife and family of a prisoner, under sentence for larceny, were removed, and the order of removal served, on the 22d August, and afterwards on the 5th September notice of appeal was given for the next Sessions; but the removing parish, finding that a certain examination of the prisoner could not be received in evidence, it having been taken after conviction, procured and served a supersedeas under the hands and seals of the magistrates who made the order, requiring the other parties to deliver up the order to be cancelled; at the next Sessions, however, the appellants tendered their appeal and proposed to have it tried; but the justices refused to receive it, saying that the order was completely put an end to by the supersedeas: upon an application for a mandamus, the Court held that it was perfectly discretionary with the Sessions, under such circumstances, to receive the appeal or not, as might best answer the purposes of justice; if, for instance, the removing parish refuse to pay the costs of maintenance, the Sessions ought to receive the appeal, in order to enforce payment. *R.* v. *JJ. of Norfolk*, 5 *B. & Ald.* 484.

Or the appeal may be entered at the first Quarter Sessions after the service of the order, and then respited to the next following Sessions. For by stat. 9 G. 1, c. 7, s. 8, after enacting that no appeal against an order of removal shall be proceeded upon, unless reasonable notice of the appeal be given, it is provided, that if it shall appear to the justices "that reasonable time of notice was not given, then they shall adjourn the said appeal to the next Quarter Sessions, and then and there finally hear and determine the same." Where an order of removal was made in November; and an application was made at the Epiphany Sessions to enter and respite an appeal against it, which the Sessions refused, as no notice of appeal had been given: the Court of King's Bench held, that they ought to have received it, and granted a mandamus requiring them to do so. *R.* v. *JJ. of Gloucestershire, Doug.* 191. So, where the Sessions refused to receive an appeal at the first Sessions, because the notice of appeal had been served on a Sunday: a rule *nisi* for a mandamus to the justices to enter continuances and try the appeal, was obtained, on the ground that, even if no notice had been given, the justices ought to have allowed the appeal to have been entered and respited it until the next Sessions; and no cause being shewn, the rule was made absolute. *R.* v. *JJ. of Huntingdonshire, Cald.* 283. So, where an order of removal,

made on the 3d January, was executed on the 4th, and on the 5th notice of appeal was given for the next Sessions, which were to commence on the 13th; this was objected to, as not being a sufficient notice, according to the practice of the Sessions, which required eight days' notice, and the objection was allowed; the appellants then moved to respite the appeal unto the next Sessions, which the justices refused to do, and dismissed the appeal: but upon application the Court of King's Bench granted a mandamus to enter continuances and try the appeal, holding that the Sessions, having determined that the notice of appeal was insufficient, were bound by the statute to adjourn the appeal, they having no discretion in the matter. *R.* v. *JJ. of Buckinghamshire*, 3 *East*, 342. So, where an appeal against an order of removal was entered at the next Sessions after the making of the order, and it was then moved to respite it, no notice of appeal having been given; but the Court of Quarter Sessions refused this, as the appellants had sufficient time, between the service of the order and the Sessions, to have given notice of appeal: upon a motion for a mandamus, the Court held that the statute was compulsory upon the Sessions in such a case to receive and adjourn the appeal. *R.* v. *JJ. of Shropshire*, 7 *East*, 549. *see R.* v. *JJ. of N. R. Yorkshire*, 3 *T. R.* 150. *cont.* But where due notice of appeal was given for the first Sessions, and both parties attended at the Sessions, but the appeal was not entered up to a late period of the day, and then the appellants moved that it might be entered and adjourned, on an affidavit stating the absence of a material witness; but the Sessions refused to allow this, unless the appellants would pay the respondents the costs of the day; and the appellants refusing this, the appeal was not entered: and upon a motion for a mandamus, the Court refused it, saying that as the appellants had declined paying the costs of the day, the justices had exercised a very proper discretion in refusing the adjournment. *R.* v. *JJ. of Monmouthshire*, 1 *B. & Ad.* 895. In this last case, it must be observed that due notice of trial had been given, and the appeal, therefore, could not be respited under the above clause of the statute; but, if respited at all, it must have been by virtue of that discretionary power, vested in the Sessions, in common with all other Courts, of adjourning any case before them, and which they may do on such terms as they think proper.

Or the appeal may be entered and tried at the second Sessions, if it were impracticable to try it at the first Sessions. Where an order of removal was made on the 22d September, but the pauper was not removed until the 5th October, and the Sessions (which were holden at a distance of 60 miles from the parish to which the pauper was removed) commenced on the 6th: the Court held that, under these circumstances, it was not necessary

to enter the appeal at the October Sessions, but it might be entered at the Epiphany Sessions; the words "next Sessions" in the statute, must be understood to mean the next possible Sessions; and it was impossible in this case to lodge the appeal on the 6th October. *R.* v. *JJ. of E. R. Yorkshire, Doug.* 192. So, where an order of removal from Mold in Flintshire, to Leek, which is at the distance of 54 miles, was made on the 24th September, but not served until the 3d of October, and the Sessions were holden on the 7th; no appeal having been entered at those Sessions, the Court refused to receive it at the following Sessions, and a mandamus was applied for to compel the justices to enter continuances and try the appeal: the Court held that, under the circumstances, the parish of Leek had until the second Sessions to enter their appeal, as it was impracticable for them to prosecute it at the Sessions immediately after the service of the order. *R.* v. *JJ. of Flintshire*, 7 *T. R.* 200. So, where an order of removal was made on Tuesday, but not served until twelve o'clock on Saturday, and the Sessions commenced on the Tuesday following; the appellants did not enter their appeal at those Sessions, but at the next Sessions afterwards they tendered it, and the justices refused to receive it, on the ground that it ought to have been entered at the first Sessions after the order: but the Court of King's Bench held, that although the statute required the appeal to be made at the next Quarter Sessions, yet that must mean the next practicable Sessions; the parish officers must have a reasonable time to make inquiries, that they may judge of the propriety of appealing or not; and here the appellants had but one day, namely, the Monday, for that purpose, which the Court considered insufficient. *R.* v. *JJ. of Essex*, 1 *B. & Ald.* 210. So, where an order of removal, made on the 2d January, was served on the 7th, and the Sessions commenced on the 14th; as by the practice of the Sessions eight days' notice of appeal was required, the appeal was not entered at the Epiphany Sessions, but in due time before the Easter Sessions notice of appeal was given, and the appellants at those Sessions offered to enter and respite the appeal; but the Sessions would not permit it, on the alleged ground that the appellants ought to have entered and respited the appeal at the preceding Sessions: the Court of King's Bench were of opinion, that as the respondents, by their delay in serving the order, had prevented the appellants from trying their appeal at the Epiphany Sessions, the appellants should be at liberty to try it at a subsequent Sessions, and therefore granted a mandamus to the justices to receive and enter the appeal. *R.* v. *JJ. of Southampton*, 6 *M. & S.* 394. 8 *B. & C.* 641, *n.* So, where an order of removal from Lenham to Pluckley was made on the 7th April, served on the 8th, and the Sessions commenced on the 15th; when the order was served, the officers of Pluckley said they

would appeal; to which the officers of Lenham observed, that nothing could be done at the next Sessions, as there was not then time to give eight clear days' notice of trial, which the practice of the Sessions required; the officers of Pluckley did not appeal to the next Sessions, but gave due notice of appeal for the Midsummer Sessions, and then applied to enter and try the appeal, which the Sessions refused, on the ground that the appeal ought to be entered and respited at the Easter Sessions: upon an application for a mandamus, the Court said that it was reasonable that the appellants should be let in to try their appeal, as they might have been misled by what the officers of Lenham had said when they served the order; but independently of that, it appeared to the Court to be wholly unnecessary to enter and respite the appeal at the first Sessions, when it could not then be tried. *R.* v. *JJ. of Kent*, 8 *B. & C.* 639. So, where an order of removal was served on the 8th April, and the Sessions were to be holden on the 15th, and by the practice of the Sessions eight days' notice of appeal was required; notice of appeal was given for the July Sessions, but the justices then refused to allow the appellant to enter or to try it, on the ground that, although the appellants could not have given notice of appeal for the preceding Sessions, they might have had their appeal then entered and respited: but the Court of King's Bench held that, as entering an appeal merely for the purpose of having it adjourned was an useless act, it was unnecessary; it was sufficient to enter it at the Sessions at which the party by his notice was bound to try it; they therefore granted a mandamus to the justices, requiring them to enter continuances and try the appeal. *R.* v. *JJ. of Devon*, 8 *B. & C.* 640, *n.* This point had formerly been ruled otherwise. *See R.* v. *JJ. of Herefordshire*, 3 *T. R.* 504. *R.* v. *JJ. of Wilts*, 2 *Bott*, 717.

But if the appeal be thus entered at the second sessions, it is not within the clause in stat. 9 G. 1, c. 7, s. 8, mentioned *ante*, *p.* 292; and the Sessions, in that case, will not allow it to be respited until the following Sessions, merely on the ground of there having been no notice, or no sufficient notice, of appeal given. And, therefore, where an order of removal from a township in the West Riding of Yorkshire to the parish of St. Luke, Middlesex, was made on the 3d January, executed on the 12th, and the Sessions for the West Riding were holden on the 18th; the parish of St. Luke did not appeal at the Epiphany Sessions, but at the Easter Sessions they moved to enter and respite the appeal, and the Sessions then refused to receive it: the Court of King's Bench held that they had done rightly, and refused a madamus to the justices to enter and respite the appeal. *R.* v. *JJ. of W. R. of Yorkshire*, 4 *M. & S.* 327.

Where an order of removal is suspended, by reason of the sickness of the pauper or any of his family, (*see stat.* 35 *G.* 3,

c. 101, *s.* 2. 49 *G.* 3, *c.* 124, *s.* 1, 3,) "the time for appealing against such order shall be computed, according to the rules which govern other like cases, from the time of serving such order, and not from the time of making such removal under and by virtue of the same." 49 *G.* 3, *c.* 124, *s.* 2. *see R.* v. *St. Mary-le-bone*, 13 *East*, 51. *R.* v. *Bradford*, 9 *East*, 97. *R.* v. *Alnwick*, 5 *B. & Ald.* 184. *R.* v. *Penkridge*, 3 *B. & Adolph.* 538.

It is to be observed, that by stat. 13 & 14 C. 2, c. 12, s. 2, the appeal is given to the "next Quarter Sessions;" and by 3 W. & M. c. 11, s. 9, it is given to the "next General Quarter Sessions;" and by 8 & 9 W. 3, c. 30, s. 6, it shall be prosecuted and determined at "the General or Quarter Sessions;" and by 9 G. 1, c. 7, s. 8, the justices "at the Quarter Sessions" shall judge of the reasonableness of the notice: yet, where it appeared that in the borough of Carmarthen, which is a county of itself, there were no Quarter Sessions, but merely General Sessions held twice a year, and the justices at those sessions refused to receive an appeal against an order of removal, conceiving that, as there were no Quarter Sessions for the borough, they had no authority to try it: the Court of King's Bench held, that in all cases where there are no Quarter Sessions of the Peace, the party aggrieved may appeal to the next Sessions, and the Sessions are bound to enter and try the appeal. *R.* v. *JJ. of Carmarthen*, 4 *B. & Ald.* 291. Where Quarter Sessions are holden by adjournment in different parts of the county, it is no objection that the party seeks to enter the appeal at an adjourned Sessions, instead of the original Sessions, if it be allowed by the practice of the Sessions. *R.* v. *JJ. of Sussex*, 7 *T. R.* 107. But, although an appellant may thus enter his appeal at an adjourned Sessions, he is not bound to do so. And, therefore, where an order of removal from Richmond to Mortlake, both in Surrey, was made on the 11th January, and executed the same day; the Sessions for Surrey began on the 12th January, and lasted fourteen days, were then adjourned to the 2d February, and lasted one day, were then again adjourned to the 1st March, and they lasted two days; and by the practice of the Sessions the appeal might have been entered at any time during the Sessions, or at the first adjournment; but the appellants did not enter their appeal until the Easter Sessions, and the Sessions then refused to hear it, although the appellants had given notice of appeal, and were then ready to try it: upon application for a mandamus, the Court granted it, holding that the statute never contemplated the continuance or adjournment of the Sessions; and if appellants have not a reasonable time between the service of the order and the first day of the Sessions, to consider whether they will appeal or not, they shall have until the Sessions next after to appeal. *R.* v. *JJ. of Surrey*, 1 *M. & S.* 479.

Notice of Appeal, and the grounds thereof.] By stat. 9 G. 1, c. 7, s. 8, "no appeal or appeals from any order or orders of removal of any poor person or poor persons whatsoever, from any parish or place to another, shall be proceeded upon in any Court of Quarter Sessions, unless reasonable notice be given by the churchwardens or overseers of the poor of such parish or place who shall make such appeal, unto the churchwardens or overseers of the poor of such parish or place from which such poor person or persons shall be removed, the reasonableness of which notice shall be determined by the justices of the peace at the Quarter Sessions to which the appeal is made; and if it shall appear to them that reasonable time of notice was not given, then they shall adjourn the said appeal to the next Quarter Sessions, and then and there finally hear and determine the same."

The statute requires "reasonable" notice to be given; and the justices at Sessions are to judge whether the notice given be reasonable or not. *Supra.* And in order to save the trouble of a separate decision in each particular case, the Courts of Quarter Sessions usually lay down a rule as to what notice they will require in such cases, or, generally, in all cases of appeal not otherwise provided for by statute: some Sessions require eight days' notice, some ten, some fourteen, &c.; some require so many days, exclusive of the day of giving the notice and of the first day of the Sessions, or (which is the same thing) require so many clear days; others require so many days, one day exclusive the other inclusive; and indeed the notices required at the different Sessions, vary so much in this and other respects, that almost the first thing the appellant's attorney should do, after he is acquainted with the order of removal having been served, is, to ascertain what notice is required by the Court of Quarter Sessions, within whose jurisdiction the removing parish or township is situate, if he be not already acquainted with the practice in this respect. If, from any mistake, however, the notice given be not sufficient, and the justices on that account refuse to hear the appeal, the Court of King's Bench will in some cases interfere by mandamus, in order that justice should be done between the parties, and the case heard upon its merits. Where an appeal against an order of removal was entered and respited at the April Sessions; and the appellants' attorney gave notice of appeal, seven days before the following Midsummer Sessions, according to the former practice of the Court; the Sessions, however, had some time before altered their practice in this respect, and made an order requiring a longer notice, but which was not known to the attorney; and because sufficient notice, according to this order, had not been given, the Sessions refused to hear the appeal: upon application for a mandamus, the Court held that, under these circumstances, it would be too much to

conclude the appellants from having their case heard, and they therefore granted the writ. *R.* v. *JJ. of Wiltshire*, 10 *East*, 404. So, where an appeal against an order of removal was entered and respited at the Midsummer Sessions; and, by the practice of the Sessions, fourteen days' notice of appeal, exclusive both of the day of giving it and of the first day of the Sessions, was required; but the attorney, thinking that it was one day inclusive the other exclusive, by mistake gave the notice one day too late, and the Sessions, therefore, refused to hear the appeal: upon application for a mandamus, the Court granted it, saying that, under the circumstances, justice would be most satisfactorily administered by ordering the justices to enter continuances and hear this appeal. *R.* v. *JJ. of Lancashire*, 7 *B. & C.* 691. But in a more recent case, decided before Patteson, J. in the Bail Court, where notice being given of an appeal which had been entered and respited as of course at the preceding Sessions, and that notice being insufficient according to the rule of the Sessions upon the subject, the justices refused to hear the appeal: upon an application for a mandamus to the justices to enter continuances and hear the appeal, Patteson, J. refused it; he said that the stat. 9 G. 1, c. 7, s. 8, was applicable only to cases where notice is given for the first Sessions, and that it was perfectly discretionary with the justices at sessions what notice they would require in cases of respited appeals; the practice of the Sessions in this case, of requiring fourteen days' notice, did not seem to him to be illegal, or so absurd as to require the Court to overthrow it; it was a practice laid down by the Sessions, and it was for them to exercise their discretion and grant indulgence in such cases if they would, but the Court would not interfere. *R.* v. *JJ. of Monmouthshire*, 1 *Harris. & W.* 111.

But although a notice of appeal, given according to the rule or practice of the particular Court of Quarter Sessions, will be sufficient to enable the appellant to try his appeal, it may not be sufficient to prevent the pauper from being removed to the appellant parish. By the recent Poor Law Amendment Act, 4 & 5 W. 4, c. 76, s. 79, after directing that the pauper shall not be removed, until after twenty-one days after a notice of his being chargeable, and a copy of the order of removal, and a copy of the examination on which the order was made, shall have been sent to the overseers of the parish, to whom such order shall be directed, it is provided that "if notice of appeal against such order of removal shall be received by the overseers of the parish from which such poor person is directed in such order to be removed, within the said period of twenty-one days, it shall not be lawful to remove such poor person until after the time for prosecuting such appeal shall have expired, or, in case such appeal shall be duly prosecuted, until after the final determination of such appeal."

Also, as the same statute (s. 81) requires that a statement of the grounds of appeal shall be sent or delivered to the overseers of the removing parish, fourteen days at least before the first day of the Sessions, if such statement form a part of the notice of appeal, the notice must be given accordingly; or if the rule of the Sessions require a longer notice, then in conformity with the rule of the Sessions. *Vide infra.*

It must be given by the "churchwardens *or* overseers of the poor" of the parish or place, who make the appeal, to the "churchwardens *or* overseers of the poor" of the parish or place from which the pauper was removed. In practice it is given by the churchwardens *and* overseers, if a parish appeal, or by the overseers only if a township appeal; and it is directed to the churchwardens *and* overseers of the removing parish, or to the overseers only if it be a township. Where the order of removal was directed to the churchwardens and overseers of the parish of Llywell, which parish, however, was divided into three hamlets, Treganmawr and two others, each supporting its own poor, and each having churchwardens and overseers appointed for it; the pauper and the order were in fact delivered to the overseers of Treganmawr, and that township gave notice of appeal; but when the appeal was called on at Sessions, the respondents objected to its being tried, on the ground of the variance between the notice of appeal and the order of removal, the notice being by the officers of Treganmawr, and treating the order as one for the removal of the pauper to that hamlet; and the Sessions on that ground refused to hear the appeal: the Court of King's Bench, however, on an application for a mandamus, held that the justices ought to have heard the appeal; for as the respondents had served the order upon the officers of Treganmawr, they had thereby estopped themselves from objecting to the appeal or notice by that hamlet. *R.* v. *JJ. of Carmarthenshire*, 4 *B. & Adolph.* 563. The parish of Bishop Wearmouth is divided into seven townships, one of which is the township of Bishop Wearmouth, another the township of Bishop Wearmouth Panns; each of the townships supports its own poor, and has separate overseers, and no overseers are appointed for the parish; a pauper belonging to the township of Bishop Wearmouth Panns was removed by an order, which by mistake was directed to the churchwardens and overseers of the parish, and when the pauper was presented to the overseer of the township, he admitted that he was settled in the township, but as the order was not directed to the officers of the township, he refused to receive him, unless the removing parish would forego some expenses of maintenance which they claimed; this was refused, and the officer of the removing parish took the order and the pauper to the churchwarden of the parish, and delivered them to him, who immediately lodged the pauper in the workhouse of the township of Bishop Wearmouth:

this latter township having appealed, it was contended before the Court of King's Bench that they could not legally do so, as they were not aggrieved by the order, not being mentioned in it; but the Court held that, as the order was directed to a parish of the same name with the township, the latter might reasonably apprehend that, unless they appealed, they might (on the authority of *R.* v. *Kirkby Stephen*) be estopped afterwards from shewing that the pauper was not settled in their township; and therefore they were parties aggrieved within the meaning of the statute. *R.* v. *Bishop Wearmouth*, 5 *B. & Adolph.* 942. *and see R.* v. *JJ. of Denbighshire*, 1 *B. & Adolph.* 616. In the case of Kirkby Stephen above mentioned, it appeared that the parish of Kirkby Stephen contained ten townships, each maintaining its own poor, of which the township of Kirkby Stephen was one; a pauper, together with an order of removal directed to the churchwardens and overseers of the parish, were delivered to an overseer of the township of Kirkby Stephen, and that township did not appeal against the order: the Court of King's Bench held, that the order, being unappealed against, was conclusive against the township of Kirkby Stephen; the direction to the parish must mean the township, the latter maintaining its own poor, the former not; and if the township wished to take advantage of the misdirection, it should have appealed. *R.* v. *Kirkby Stephen*, 2 *Bott*, 675. And in a more recent case, such a misdirection to the officers of a township, within a parish of the same name, instead of to the officers of the parish, was holden not to be even matter of appeal, but the order ought to have been amended at the Sessions. *R.* v. *Bingley*, 4 *B. & Adolph.* 567, *n.*

Where the notice of appeal required by the statute was duly given, of an appeal respited from the preceding Sessions, but a rule of the Sessions required also that where an appeal was entered and respited, notice thereof should be given to the officers of the removing parish within one month after such entry and respite; and because such notice was not given, the Sessions dismissed the appeal; but upon application for a mandamus, the Court held that the justices had no authority to require this notice of the entry and respite; the statute required only a notice of appeal, and all the justices could do was to decide whether that notice was given in reasonable time. *R.* v. *JJ. of Norfolk*, 5 *B. & Adolph.* 990. On the other hand, where an appeal was entered and respited, and a copy of the order of respite served on the officers of the removing parish, but no other actual notice of appeal was given: the Court of King's Bench held, that this copy of the order of respite was sufficient notice of appeal; the respondents could not possibly understand it in any other light, nor could the appellants have served it for any other purpose. *R.* v. *Lambeth*, 3 *D. & R.* 340. Where by the practice of the Sessions at Preston, in Lincolnshire, ten days'

notice of appeal was required, and the same as to respited appeals, unless there was some agreement between the parties to the contrary; the trial of an appeal having been put off on the application of the respondents, on account of the absence of a material witness, they objected at the next Sessions to its being tried, because the appellants had not given the ten days' notice: but upon an application for a mandamus, the Court held, that as the trial was put off until the next Sessions at the request of the respondents, this was in effect an undertaking on their part to try at the next Sessions without notice; and they accordingly granted the writ. *R. v. JJ. of Lindsey*, 6 *M. & S.* 379.

As to the statement of the grounds of appeal: By the recent Poor Law Amendment Act, 4 & 5 W. 4, c. 76, s. 81, in every case where notice of appeal against an order of removal shall be given, "the overseers or guardians of the parish appealing against such order, or any three or more of such guardians, shall, with such notice, or fourteen days at least before the first day of the Sessions at which such appeal is intended to be tried, send or deliver to the overseers of the respondent parish, a statement in writing, under their hands, of the grounds of such appeal; and it shall not be lawful for the overseers of such appellant parish to be heard in support of such appeal, unless such notice and statement shall have been so given as aforesaid;" nor shall the appellant, on the hearing of the appeal, give evidence of any other grounds of appeal, than those set forth in such statement. In a recent case, the Court of King's Bench have decided that it is a sufficient compliance with what is required by this section, if the appellants, as their ground of appeal, state that the pauper is settled in the parish of A., or the township of B., without stating how he acquired his settlement, whether by hiring and service, or by apprenticeship, or by renting a tenement, &c. &c. or whether his settlement be derivative or in his own right. *R. v. JJ. of Cornwall, ante, p.* 278, 279. *and see the other cases there mentioned.*

The following may be the form of the notice of appeal:

To the Churchwardens and Overseers of the Poor of the Parish of ——, in the County of ——.

This is to give notice to you and every of you, that we, the churchwardens and overseers of the poor of the parish of ——, in the county of ——, do intend, at the next Quarter Sessions of the Peace to be holden for the said county of ——, to commence and prosecute an appeal against an order of A. B. esquire, and the Reverend C. D. clerk, two of his Majesty's justices of the peace of the said county of ——, for and concerning the removal of E. F. and Ann, his wife, to our said parish of —— aforesaid. And that the ground of such appeal is, that the said E. F. and

Ann, his wife, in the said order mentioned, are settled in the parish of ——, *in the county of* —— *aforesaid.* [This statement of the ground of appeal, is in conformity with the case of R. *v.* JJ. of Cornwall, above mentioned; but if it be deemed desirable to state the grounds with full particularity, it may be done thus:] "*And that the grounds of such appeal are, that there was in fact no such hiring or service for a year, as in the examination in this case is stated, the said hiring having been two days after Martinmas, to serve until the Martinmas following. And after the said hiring and the service under the same, namely, about two days before Martinmas,* 1829, *the said E. F. hired with one G. H. of* ——, *in the parish of* ——, *in the county of* ——, *for one year until the Martinmas,* 1830, *and served him accordingly. And also that the said E. F., after he had so served the said G. H. as last aforesaid, at Christmas,* 1830, *rented a house and garden, at* ——, *in the parish of* ——, *in the county of* ——, *from G. H. of that place, at the rent of* 10*l. a year, and occupied the same under such yearly renting and hiring from that time until* ——, *and paid the rent due for the same during the whole of that time:*" [so stating all the settlements or grounds of appeal you intend to insist upon at the trial.] "*And take notice, that at the trial of the said appeal, we, on behalf of the said appellant parish, mean to avail ourselves of all or some one or more of the said grounds, in support of the said appeal. Witness our hands this* —— *day of* ——, 1837.

I. K. } *Churchwardens.*
L. M. }
N. O. } *Overseers of the Poor.*
P. Q. }

If the grounds of appeal, instead of being included in the notice, be on a separate paper, they may be written in this form:

To the Churchwardens and Overseers of the Poor of the Parish of Cottingham, in the East Riding of the County of York.

In the matter of an appeal, wherein

The Churchwardens and Overseers of the Poor of the Parish of Southcoates, are the Appellants,

and

The Churchwardens and Overseers of the Poor of the Parish of Cottingham, are the Respondents.

Take notice that the ground of the above appeal is [&c. stating them as above.]

Care must be taken, if possible, not to include any ground of appeal, which may turn out to be frivolous or vexatious; as in such case the appellants may probably be ordered to pay the

respondents their costs occasioned by such ground of appeal, even although the order be quashed. *See* 4 & 5 *W.* 4, *c.* 76, *s.* 83, *and post.*

Proceedings at the Hearing.] If, when the appeal is called on, either party be not in a situation to proceed with it, on account of the absence of a material witness or otherwise, he may apply to the Court to adjourn the appeal to another Sessions, upon an affidavit of the facts, or by examining witnesses upon oath in open Court, in support of the application. And it is perfectly discretionary with the justices whether they will grant the application or not. Where upon an appeal against an order of filiation being called on at Sessions, the appellant applied to postpone the trial, upon an affidavit of the absence of a material witness, and the non-appearance of another of his witnesses on being called upon his subpœna; but the Sessions refused the application, and confirmed the order: upon an application for a mandamus, the Court held that, as this was a question peculiar for the Sessions, they would not interfere. *Ex parte Becke*, 3 *B.* & *Adolph.* 704. And if they grant such an application, they may do so upon such terms as they may think proper; they usually require the party applying, to pay the costs of the day to the opposite party. And where the appellants made an application to enter and adjourn an appeal, in a case where the adjournment was not a matter of course, and the justices refused it unless they would pay the respondents costs of the day, which the appellants declined to do, and the appeal consequently was not entered: the Court of King's Bench, upon application for a mandamus, refused to grant it, saying, that as the appellants declined paying the costs of the day, the justices had exercised a very proper discretion in refusing the adjournment. *R.* v. *JJ. of Monmouthshire*, 1 *B.* & *Adolph.* 895.

Before the parties enter upon the appeal, the respondents may require the appellants to prove their notice; the statutes (9 *G.* 1, *c.* 7, *s.* 8, *ante*, *p.* 297. *and* 4 & 5 *W.* 4, *c.* 76, *s.* 81, *ante*, *p.* 301,) seem to require this. It is not, however, usual in practice to do so, if the notice in fact be regular. And where the respondents attend at the Sessions for which notice has been given, and move that the appeal be adjourned to a subsequent Sessions, they cannot at such subsequent Sessions call upon the appellants to prove their original notice of appeal; for at the previous Sessions they acted upon it, and thereby impliedly admitted it. *See R.* v. *JJ. of Hertfordshire*, 4 *B.* & *Adolph.* 561; *and see ante*, *p.* 285, 273, *and the cases there mentioned.*

Formerly the respondents were always entitled to begin; and if the appellants, at the trial, chose to admit a *primâ facie* case on the part of the respondents, and in fact began, yet the case was always treated as if the respondents' counsel had begun, and he was always entitled to the general reply. *See*

Appeal against a [illegible]

R. v. JJ. of [illegible]

however, that [illegible]

respondents a [illegible]

4 & 5 W. 4, c. 76, s. 81, [illegible]

such statement do [illegible]

the examinations, they [illegible]

are not bound to prove it; and [illegible]

a right to begin. The [illegible]

this doctrine is, that the [illegible]

the statement of the grounds [illegible]

nature of pleadings, and that [illegible]

admits. But I doubt the [illegible]

documents are more in the nature of [illegible]

examination in the nature of particulars [illegible]

ment in the nature of [illegible]

opposite party of any [illegible]

the parties giving them, to the "grounds of [illegible]

stated in them respectively. If it were [illegible]

I think the statute would have expressed it. [illegible]

says, that the appellants shall not be heard in [illegible]

appeal, unless they have given notice of appeal [illegible]

of the grounds of it. This, however, does not [illegible]

argument much: the orders for particulars [illegible]

nearly the same effect; the order for particulars [illegible]

all proceedings in the action until they are given; [illegible]

particulars of set-off, precludes the defendant from [illegible]

evidence under his plea, unless the particulars are [illegible]

nothing more than a penalty upon the party, for [illegible]

which the statute directs. The statute adds, "that [illegible]

be lawful for the respondent or appellant parish, on the [illegible]

of any appeal, to go into or give evidence of any other [illegible]

of removal, or of appeal against any order of removal, [illegible]

set forth in such respective order, examination or [illegible]

aforesaid." This is binding upon each party, but does not [illegible]

to me to dispense with the proof it, and to [illegible]

stated in the examination; he may fail in the proof [illegible]

is nothing in the statute which appears to me to prevent the [illegible]

appellants from having the full benefit of such failure, although [illegible]

possibly they themselves may not be allowed to "go into or give [illegible]

evidence" upon the subject. But it is useless to discuss the [illegible]

matter further; probably some case will shortly be decided upon [illegible]

the point by the Court of King's Bench; and until that take [illegible]

place, each Court of Quarter Sessions will adopt a practice it may take of the [illegible]

this respect, according to the particular view [illegible]

subject.

If the respondents begin, their counsel states their case, and [illegible]

produces evidence or calls witnesses to prove it. And here it [illegible]

may necessary to observe, that although by the above statute the [illegible]

respondents are precluded from going into or giving evidence of any grounds of removal, or, in other words, of any other settlements, but those stated in the examinations, yet they are not thereby precluded from calling other witnesses than those examined, nor does the statute oblige them to call the witnesses who were examined; but it seems they may prove their "grounds of removal" or settlement, in any manner they please, without reference to the examination. When the respondents' counsel has closed his case, the appellants' counsel either controverts such case by observation and argument; and if he be satisfied to rest his case there, the case on both sides is closed: or he opens a new case, and calls witnesses, &c. to prove it; in which case the respondents' counsel will be entitled to the general reply. But if the respondents' counsel wish to call witnesses in disproof of any new settlement the appellants may have set up, he may do so; the appellants' counsel in that case has a right again to address the Court, confining his observations to the witnesses thus called and their testimony; and the respondents' counsel then is entitled to the general reply. Where, upon the hearing of an appeal, the counsel for the appellants, admitting a *primâ facie* case for the respondents, opened a case of a subsequent settlement elsewhere, and proved it; the counsel for the respondents, instead of calling witnesses to disprove that case, and then replying, replied in the first instance, and then proposed to call witnesses; but the Sessions refused to allow him to do so, and decided the case for the appellants: upon a motion for a mandamus to the Sessions, to enter continuances and rehear the appeal, the Court of King's Bench held, that as the appeal was actually heard, they could not interfere, unless a case were stated by the Sessions. *R.* v. *JJ. of Carnarvon*, 4 *B. & Ald.* 86.

If the appellants' counsel be entitled to begin, the like order is preserved, the appellants' counsel being entitled to the general reply if the respondents' counsel call witnesses, &c.

As to amendment of defects in form, *see ante, p.* 286.

As to the evidence in an appeal of this kind, it is better to treat of it separately, as it will occupy too much space to be included under this head.

Evidence.

The subject of evidence generally, as well applicable to appeals, as to criminal cases, has been already treated of, *ante, p.* 126—155. We have seen there, that the rated inhabitants of a parish or township, &c. have been rendered competent witnesses either for or against it, in an appeal relating to the settlement of a pauper in their parish, by stat. 54 G. 3, c. 170, s. 9. This was necessary in appeals between parishes or townships, &c. because all the rated inhabitants of the parishes, &c.

on both sides are deemed parties to the appeal. And for this reason it is, that in an appeal against an order of removal, the declaration of a rated inhabitant of the appellant or respondent parish, is deemed good evidence against his parish. Thus, where upon the trial of an appeal against an order of removal, the respondents proposed to give in evidence the declaration of the master of the pauper's husband, as to a hiring, the master being a rated inhabitant of the appellant parish; this the Sessions refused to allow, as the respondents might call the master and examine him: the Court of King's Bench, however, held that the evidence was properly admissible, as rated parishioners are deemed parties to the appeal; if what they have said were mere idle conversation, it would have little weight; the Court therefore remitted the case back to the Sessions to be reheard. *R.* v. *Whitley Lower*, 1 *M. & S.* 636. So, where the respondents, in order to prove the settlement of the pauper's father in the appellant parish, called the father himself as a witness, who refused to give evidence, on the ground of his being a rated inhabitant of that parish, and therefore a party to the appeal; they then examined the pauper as to declarations made by his father, in his presence, with respect to the value &c. of land which he occupied: and the Court of King's Bench held the evidence to be admissible. *R.* v. *Hardwick*, 11 *East*, 578.

We have seen also, that the terms of a lease or other written instrument, or any other part of the contents of it, cannot be proved by parol evidence, if it be in the party's own hands, or under his control, or in the hands of any person whom he may compel by *subpœna duces tecum* to produce it. *Ante*, *p.* 138. Where, in an appeal against an order of removal, after the respondents had proved a settlement in the appellant township, the appellants proved a settlement elsewhere by renting a tenement for a year, at the rent of 10*l.* 10*s.*; to avoid this, by proving that the tenement had in fact been let to the pauper and two others jointly, the respondents called the landlord's steward to prove it, who, upon being questioned by the appellants' counsel, whether the letting was not by agreement in writing, admitted that it was; and the appellants' counsel then objected, that in the absence of the writing, no parol evidence could be given of the letting or tenancy; the Sessions, however, admitted the parol evidence, and the order was confirmed: but the Court of King's Bench held the parol evidence to be inadmissible; it was required to prove to whom the premises were let, and that could be proved only by the written instrument. *R.* v. *Rawden*, 8 *B. & C.* 708. So, where, upon the trial of an appeal against an order of removal, the pauper was called as a witness, to prove a renting of a tenement in 1827, and he admitted that the agreement for it was in writing; the parol evidence was objected to on that ground, but the Sessions overruled the objection,

and received it: but the Court of King's Bench held, that they were wrong; this was a question of settlement by renting a tenement under stat. 6 G. 4, c. 57, s. 2, and to bring the case within that statute, it was necessary to prove the rent and the term for which the tenement was let, and these could be proved only by the written instrument. *R.* v. *Merthyr Tidvil*, 1 *B. & Adolph.* 29. But where it was merely proposed to prove the occupation of a tenement and the annual value of it, as conferring a settlement under stat. 13 & 14 C. 2, c. 12, s. 1, the Court held that it might be done by parol testimony, although the tenant held under a contract in writing; for it was not necessary in this case to prove the terms of the tenancy, but merely the fact of the tenancy and the value of the tenement, which might be proved by parol testimony. *R.* v. *Holy Trinity, Hull*, 7 *B. & C.* 611. As to the manner of raising the objection, *see ante*, *p.* 141, 142.

But where a written instrument has been destroyed or lost, then upon proof of that fact, we have seen that the parties will be allowed to give secondary evidence of its contents, by an examined copy or even parol evidence. *See ante*, *p.* 138—140. But where it appeared that the pauper held under a written instrument, not stamped; and this being lost, it was proposed to give parol evidence of that part of it which specified the rent to be paid for the tenement, in order to prove it to be of the yearly value of 10*l.*: the Sessions refused to receive the evidence; and the Court of King's Bench held that they had done rightly; for it was attempting to give parol evidence of the contents of a written instrument, which, if produced, could not be received in evidence for want of a stamp. *R.* v. *Castle Morton*, 3 *B. & Ald.* 588.

We have seen also, that if a written instrument be in the hands of the opposite party, and after being served with a notice to produce it at the trial, he refuse to do so, you may give secondary evidence of its contents. *See ante*, 140, 141.

The examination of a person upon oath, relating to his settlement, cannot be given in evidence, for the reason stated, *ante*, *p.* 143; and, *à fortiori*, what he has said upon the subject, where he was not upon his oath, cannot be evidence. Where the pauper, before his removal, was examined on oath as to his settlement by two magistrates, and proved a settlement by hiring and service in Nuneham Courtney; after notice of appeal and before the next Sessions, he absconded and could not be found; and upon proof of these facts, the Sessions received the examination in evidence, and confirmed the order: the Court of King's Bench, however, quashed both orders, on the ground that the evidence was inadmissible. *R.* v. *Nuneham Courtney*, 1 *East*, 373. In a previous case, where the pauper after his examination had become insane, the Court were divided as to whether his examination could be given in evidence, upon an appeal

against an order for his removal; Lord Kenyon, C. J. and Grose, J. holding that it could not, Buller, J. and Ashurst, J. holding that it could. *R.* v. *Eriswell*, 3 *T. R.* 707. Where, upon an appeal against an order of removal, the respondents called the pauper, who was the widow of one John Hill, deceased, and she gave evidence of what she heard her deceased husband say as to his settlement; they also put in the examination of the deceased before two magistrates as to his settlement; and the Sessions upon this evidence confirmed the order: but the Court of King's Bench held the evidence to be inadmissible, and quashed both orders. *R.* v. *Ferry Frystone*, 2 *East*, 54. So, where a pauper, in her examination before the magistrates, stated that she heard her husband say that he was settled in Abergwilly by hiring and service; but on the trial of the appeal she denied having heard her husband say so; upon which an examination of the husband as to his settlement in Abergwilly was put in, and the Sessions thereupon confirmed the order: the Court of King's Bench, however, on the authority of the last case, quashed both orders. *R.* v. *Abergwilly*, 2 *East*, 63.

There is one exception, however, to this last rule, namely, with respect to the examination of soldiers as to their settlements, which is always introduced into the Annual Mutiny Act, and which is usually worded thus: "That any justice in the United Kingdom, within whose jurisdiction any soldier, having a wife or child, shall be billetted, may summon such soldier before him in the place where he is billetted, (which summons he is hereby directed to obey,) and take his examination in writing, upon oath, touching the place of his last legal settlement in England, and such justice shall give an attested copy of such examination to the person examined, to be by him delivered to his commanding officer, to be produced when required; which said examination and such attested copy, shall be at any time admitted in evidence as to such last legal settlement before any justice or at any general or quarter sessions, although such soldier be dead or absent from the kingdom; provided that in case any soldier shall be again summoned to make oath as aforesaid, then, on such examination or such attested copy thereof being produced by him, or by any other person on his behalf, such soldier shall not be obliged to take any other oath with regard to his legal settlement, but shall have a copy of such examination, or a copy of such attested copy of examination, if required." *See R.* v. *Warminster*, 3 *B. & Ald.* 121. *R.* v. *Warley*, 6 *T. R.* 534. Where, upon the hearing of the appeal, the respondents' attorney produced a paper, purporting to be the examination of the pauper's husband, a soldier, under the Mutiny Act, which he said he received from the overseer; but no evidence was given of the signatures of the justices, or that they were justices of the county; the Sessions, however, confirmed the order: but the

Court of King's Bench held that this examination, as it was not properly authenticated and the possession of it accounted for, ought not to have been received in evidence. *R.* v. *Bilton with Harrowgate*, 1 *East*, 13. So, where, instead of an attested copy, an examined copy, but signed by the justice, was given in evidence, the Court of King's Bench held that it clearly was not evidence. *R.* v. *Clayton-le-Moors*, 5 *T. R.* 704. So, where a soldier was examined as to his settlement under the Mutiny Act; and after his death, the examination being offered in evidence, in proof of his widow's settlement, it was objected to, because it did not appear, either on the face of the examination or *aliunde*, that the soldier was quartered in a place where the justices had jurisdiction; but the Sessions admitted the evidence, and confirmed the order: the Court of King's Bench held that the examination was not evidence, for the reason stated in the objection, and quashed the order of Sessions. *R.* v. *All Saints, Southampton*, 7 *B. & C.* 785.

Also as to prisoners: By stat. 59 G. 3, c. 12, s. 28, "it shall be lawful for any justices of the peace, to take in writing the examination upon oath of any person having a wife or child, who shall be a prisoner in any gaol or house of correction, or in the custody of the keeper of any such gaol or house of correction, or who shall be in the custody of any constable or other peace officer by virtue of any warrant of commitment, touching the place of his or her last legal settlement; and such examination shall be signed by such justice taking the same, and shall be received and admitted in evidence as to such settlement before any justices, for the purpose of any order of removal, so long only as the person so examined shall continue a prisoner."

For every other matter relating to the evidence generally, upon the part either of the appellant or the respondent, the reader is referred to the fourth section of the second chapter of this work, *ante*, *p.* 126, &c.

There are some topics of evidence, however, peculiar to this subject, which it is necessary to mention here more particularly: namely, first, the certificate of the churchwardens and overseers of a parish, &c., certifying that a person residing in another parish is legally settled in their parish; secondly, relief given by a parish to persons residing out of it; thirdly, orders of removal unappealed against: the first an express admission, the second and last implied admissions, of a settlement. To these I shall add the law as to the effect of a former order appealed against, and confirmed or quashed, as evidence of a settlement. We shall consider these now in their order.

Certificate.] Formerly, if a poor person came to inhabit in a parish, &c., which was not his place of settlement, he might, at any time within forty days, be removed by the order of two jus-

tices. 13 & 14 *C.* 2, *c.* 12, *s.* 1. As this had the effect of preventing poor persons from going out of their own parish to seek for work, it was enacted by stat. 8 & 9 W. 3, c. 30, s. 1, that if any person should obtain from the churchwardens and overseers of a parish a certificate under their hands and seals, acknowledging him to be settled in their parish, attested by two witnesses, and allowed by two justices, and directed to the churchwardens and overseers of some other parish, then, upon delivering such certificate to the churchwardens or overseers of the latter parish, he might reside there, irremoveable, until he should become actually chargeable. These certificates became very common, and continued so until by stat. 35 G. 3, c. 101, s. 1, it was enacted, that no poor person should be removed from the parish or place where he was inhabiting, until he should be actually chargeable to it; and certificates being thereby rendered useless, the practice of granting them was discontinued. But as a certificate was an admission, by the certifying parish, of the settlement of the party or parties named in it, it was used in evidence as such, and indeed as an admission of every matter stated in it, as between the certifying parish and the parish to whose officers it was directed, during the whole time that such certificates were usually granted, and long after the practice of granting them ceased; *see* 1 *Arch. Poor Law*, 28, 29. 2 *Id. pl.* 267—318; and as they are still evidence, and sometimes, though very rarely, occur now in practice, it is right that I should state shortly the law relative to them.

The following is the form of the certificate and allowance:—

To the Churchwardens and Overseers of the Parish of ——, *in the County of* ——.

We the churchwardens and overseers of the poor of the parish of ——, *in the county of* ——, *do hereby certify, own, and acknowledge, that A. B. shoemaker, and Ann his wife, and J. B. their son, are inhabitants legally settled in our parish of* —— *aforesaid. In witness whereof we have hereunto set our hands and seals this* —— *day of* ——, *in the year of our Lord* ——.

Attested by L. M.
N. O.

C. D. }
E. F. } *Churchwardens.*
G. H. }
I. K. } *Overseers of the Poor.*

We J. P. and R. S. esquires, two of his Majesty's justices of the peace in and for the said county of ——, *do allow the above-written certificate. And we do also certify that L. M., one of the witnesses who attested the same, hath this day made oath before us the said justices, that he the said L. M. did see the churchwardens and overseers of the poor of the parish of* —— *aforesaid, whose names and seals are hereunto subscribed and set, severally sign*

and seal the same; and that the names L. M. and N. O., who are the witnesses attesting the said certificate, are respectively of their own proper hands-writing. Given under our hands and seals, this —— day of ——.

J. P.
R. S.

First. This certificate must be "under the hands and seals of the churchwardens and overseers of the poor of the parish, township, or place, or the major part of them, or under the hands and seals of the overseers of the poor of any other place where there are no churchwardens." 8 & 9 *W.* 3, *c.* 30, *s.* 1. In small parishes, where two persons act both as churchwardens and overseers, certificates signed and sealed by them, are sufficient. 51 G. 3, c. 80, s. 1. So, where a certificate granted by a township, hamlet, or chapelry, is signed by a person styling himself churchwarden or chapelwarden of such township, &c., and who acted as such, the certificate shall be valid, although such person was in fact sworn in as churchwarden for the whole parish in which such township &c. is situate. 54 *G.* 3, *c.* 107, *s.* 1. So, if executed by the overseers of the poor of any township, hamlet, or place, and the churchwarden or churchwardens, chapelwarden or chapelwardens, acting for or appointed in such township &c., the certificate shall be deemed as valid as if it were executed by such overseers and the churchwarden or churchwardens of the parish within which such township &c. is situate. *Id.* s. 2. And by stat. 1 & 2 G. 4, c. 32, s. 1, all certificates theretofore executed by one churchwarden or chapelwarden of any parish, township, hamlet, chapelry, or place, for which two churchwardens or chapelwardens had formerly been appointed, shall be deemed valid notwithstanding.

Secondly. The execution by the churchwardens and overseers must be "attested respectively by two or more credible witnesses." 8 & 9 *W.* 3, *c.* 30, *s.* 1. And in all cases of certificates granted after the 24th June, 1730, the attesting witnesses, or one of them, are required to make oath before the justices who allow the same, that they saw the churchwardens and overseers, whose names and seals are thereunto set, severally sign and seal the certificate, and that the names of the attesting witnesses are of their own proper handwriting. 3 *G.* 2, *c.* 29, *s.* 8.

Thirdly. The certificate must be "allowed and subscribed by two or more justices of the peace of the county, city, liberty, borough or town corporate, within which the parish or place, from whence such certificate shall come, shall lie." 8 & 9 W. 3, c. 30, s. 1. Those justices shall also certify the oath taken by the attesting witness; "and every such certificate so allowed, and oath of the execution thereof so certified, by the said jus-

tices of the peace, shall be taken, deemed and allowed, in all Courts whatsoever, as duly and fully proved, and shall be taken and received as evidence, without other proof thereof." 3 *G.* 2, *c.* 29, *s.* 8.

For the law upon this subject generally, and as to the gaining of settlements by certificatumen, *see* 1 *Arch. Poor Laws*, 26—29, 32, 40, 55, 73. 79, 82. 2 *Vol. pl.* 244—319, 390, 450, 485, a., 486, 487, 722, 928, 985, 986, 1020, 1030, 1056, 1076, 1079, 1082, 1436, 1437, 1446.

Relief.] If a parish or township relieve a pauper, whilst that pauper is residing in another parish or township, this is deemed an implied admission on the part of the relieving parish or township, that the pauper is settled in their parish or township; it is *primâ facie* evidence, from which, if unexplained, the Sessions may conclude that the settlement is there. Where, upon the trial of an appeal against an order of removal from Leeds to Stanley, the appellants proved that the pauper's grandfather came to Stanley with a certificate from the parish of Ostett in 1727; and in answer to this, the respondents proved that the appellants had at different times relieved the pauper and his family whilst residing at Leeds and Wakefield; and the Sessions, thinking this a sufficient answer to the *primâ facie* case made out by the certificate, confirmed the order: the Court of King's Bench held that the Sessions had drawn the right conclusion; from 1727 there was ample time for the father of the pauper, as well as the pauper himself, to have been emancipated; and if that were not so, it was not likely that Stanley would have relieved the pauper whilst residing in other parishes. *Rex* v. *Stanley cum Wrenthorpe*, 15 *East*, 350. So, where upon the trial of an appeal against an order of removal from Alverthorpe to Wakefield, the respondents proved that the appellants had, for nearly forty years, relieved the father of the pauper's husband, and several members of his family, whilst they resided in another township; on the part of the appellants, it was merely proved that the pauper's husband was born at Alverthorpe; and the Sessions confirmed the order: the Court of King's Bench held, that as there was evidence on both sides, each party having made out a *primâ facie* case, it was for the Sessions to decide upon it, and they had done so. *R.* v. *Wakefield*, 5 *East*, 335. *See also R.* v. *Barnsby*, 1 *M.* & *S.* 377. So, where it appeared that the pauper, whilst residing at Mansfield, applied for relief to the overseer of Edwinstowe, who happened to be at Mansfield on a market day, and he gave her 3*s.* as relief, and told her if she wanted further relief, she should apply to him at Edwinstowe, and he would give it to her; she went accordingly a fortnight afterwards, but the same and another overseer refused her relief, saying she must throw herself upon the parish of Mansfield;

she did so, was removed to Edwinstowe, and Edwinstowe appealed; at the trial of the appeal these facts were proved, and no evidence being given on the other side to rebut the presumption arising from them, the Sessions held that the pauper was settled at Edwinstowe, and confirmed the order: afterwards, in the Court of King's Bench, it was objected that as the relief was given by the overseer whilst out of his own parish, when he had no opportunity of ascertaining whether the pauper was settled in his parish or not, it ought not to be admitted as evidence of the settlement; but the Court held that it was evidence of the settlement, and it was competent for the Sessions to form the conclusion from it which they had done, although probably the Court would have done otherwise. *R.* v. *Edwinstowe*, 8 *B.* & *C.* 671. Where, on the other hand, the respondents proved, by the pauper and his wife, that the appellant parish had relieved them four or five times whilst they were living in the respondent parish; but the Sessions quashed the order: afterwards, in the Court of King's Bench, it was contended that the Sessions ought to have confirmed the order, inasmuch as the only legitimate conclusion that could be drawn from the evidence was, that the pauper was settled in the appellant parish; but the Court refused to disturb the decision of the Sessions, saying, that although the evidence would have warranted the Sessions in coming to a different conclusion, yet they were not bound to do so. *R.* v. *Yarwell*, 9 *B.* & *C.* 894.

But relief by a parish or township, whilst the pauper is residing in the same parish or township, is no evidence of settlement at all. Where upon the trial of an appeal against an order of removal, the pauper proved that when he buried his first wife, he applied to and received relief from the overseers of Chadderton, and that his mother, who was since dead, told him that she lay in at Chadderton, and that the overseers then relieved her; the Sessions, thinking this sufficient evidence of a settlement at Chadderton, confirmed the order: but on a case being stated for the opinion of the Court of King's Bench, that Court held it was no evidence at all of a settlement; what the mother had said as to her settlement, was not admissible in evidence, even although she were since dead; and mere relief is no evidence of a settlement, unless the party were residing out of the parish at the time, which was not stated in the case. *R.* v. *Chadderton*, 2 *East*, 27. So, where upon the trial of an appeal from Ashford to Chatham, it was proved that the pauper's husband resided at Chatham, and was frequently relieved by the parish officers whilst residing there, was received into the workhouse when sick, died in the workhouse, and was buried at the expense of the parish: the Court of King's Bench held that this was no evidence of a settlement in Chatham; relieving a pauper whilst residing in the same parish, is no evidence of a settle-

ment there, however often relief may have been given. *R.* v. *Chatham*, 8 *East*, 498. So, where a widow and her children, residing at Coleorton, were relieved there for a long period, and one of her children put out apprentice by the parish; but the mother at the same time received relief for herself and her family from the adjoining parish of Thringstone: the Sessions having holden that the settlement was in Coleorton; the Court of King's Bench quashed the order of Sessions, saying that the relief in Coleorton was no evidence whatever of a settlement, as the pauper was residing there at the time. *R.* v. *Coleorton*, 1 *B. & Adolph.* 25. *And see R.* v. *Trowbridge*, 7 *B. & C.* 252.

Order of Removal unappealed against.] If an order of removal, upon which a pauper has been removed, be not appealed against, it is conclusive evidence of the pauper's settlement at that time. Therefore, where a pauper was removed by order to Chalbury, and Chalbury, instead of appealing against it, obtained another order for the removal of the pauper to Chipping Farringdon, and had him removed accordingly: the Court held that this could not be done; the first order was good against all the world, until reversed. *Chalbury* v. *Chipping Farringdon*, 2 *Salk.* 488. *and see Malendine* v. *Hunsdon*, *Fol.* 273, *S. P.* So, where a pauper and his family were removed by order from Sutton St. Mary to Liverington, and there was no appeal against the order; in four months afterwards they were again removed, by an order, from Liverington to Sutton St. Nicholas; Sutton St. Nicholas appealed, but the Sessions confirmed the order: it was admitted in argument, in the Court of King's Bench, that the order unappealed against was final as to the settlement at that time, but it was suggested, that the Court, in favour of the order of Sessions, would presume that the paupers had gained a subsequent settlement in the appellant parish; but the Court held, that the time which intervened between the two orders, was too short to raise such a presumption. *R.* v. *Leverington*, *Burr. S. C.* 276. So, where the pauper in May hired for a year in Birmingham, and served until the April following, when he was removed by order to Kenilworth; this order was not appealed against, but the pauper in three or four days afterwards returned to his master in Birmingham, and completed his year's service; the Court of King's Bench held, that the order being unappealed against, was conclusive that the settlement was in Kenilworth; it put an end to the contract of hiring. *R.* v. *Kenilworth*, 2 *T. R.* 598. But where it appeared that the pauper had rented and occupied for several years a tenement in Fillongley, of the yearly value of more than 10*l.*; and in April, 1786, whilst he still occupied the tenement, he was removed by order to Kinwalsey; he returned however to Fillongley the same evening, and, without any fresh agreement with his landlord, continued to occupy the

tenement for three-quarters of a year longer, when he was again removed to Kinwalsey, and that hamlet then appealed against the order: the Court of King's Bench held, that although the first order, being unappealed against, was conclusive as to the pauper's settlement at that time, yet there was nothing to prevent the pauper returning to Fillongley, provided he did not return in a state of pauperism; nor did the removal rescind the contract between the pauper and his landlord; and therefore when he returned and occupied the tenement under the old agreement, he thereby gained a new settlement. *R.* v. *Fillongley*, 2 *T. R.* 709. The distinction between these two last cases is this: in the first, there must have been a new hiring, and a service for a year under it, in order to gain a new settlement; but in the last, it was sufficient, in order to gain a new settlement, that he occupied the tenement for forty days with the permission of his landlord. Both cases establish the same proposition, that an order of removal unappealed against, is conclusive as to the settlement of the pauper up to that time, but does not prevent him gaining any other settlement afterwards.

And it is conclusive, not only as to the settlement, but also as to every other material matter stated in the order. Therefore, where the pauper, Jane Moor, and one G. Wise, were removed from Newbury to Euborn, by the names of G. Wise and Jane his wife, and the order was not appealed against; the overseers of Euborn, however, finding that the woman was not Wise's wife, had her removed by the name of Jane Moor to Silchester, and Silchester appealed: the Court of King's Bench held that Euborn, by not appealing, was now estopped from saying that the woman was not the wife of Wise, or that both were not settled in that parish. *R.* v. *Silchester, Burr. S. C.* 551. *R.* v. *Berkswell*, 2 *Bott*, 69, *S. P.* *R.* v. *North Featherton*, 1 *Sess. Ca.* 154, *S. P.* So, where upon the trial of an appeal against an order of removal from Midsomer Norton to Binegar, the appellants proved that the pauper, Elizabeth Savage, and one Joseph Savage, had formerly been removed from Kilmursdon to Midsomer Norton, by an order which described them as "Joseph Savage and Betty his wife," which order was not appealed against; the repondents then proved circumstances, from which it appeared. that a marriage, which had taken place between these two, was a nullity, and they proved a subsequent hiring and service by the panper Elizabeth in Binegar: the question was, whether it was competent to the respondents to go into that evidence, after proof of the order unappealed against; and the Court held, that the order unappealed against was conclusive as to the fact of the marriage, and that the respondents were thereby estopped

from giving evidence to impeach it. *R.* v. *Binegar*, 7 *East*, 377. So, where two justices, by their order, removed Sarah, "the wife of J. Griffin," and their five children, from Cheshunt to Hinksworth, and there was no appeal against this order; afterwards, two other justices, by their order, removed J. Griffin, Sarah his wife, and their five children, back from Hinksworth to Cheshunt, and Cheshunt appealed; the Sessions quashed the order as to the wife and children, and confirmed it as to the man: but the Court of King's Bench held, that the first order was conclusive as to the then place of settlement, not only of the wife and children, but of the husband also, for their settlement must be presumed to be his. *R.* v. *Hinkworth*, *Cald.* 42. *Doug.* 46, *n.* So, where the pauper, Emanuel Smith, who resided in Acton Trussell under a certificate from Rudgeley, married in 1760, but separated from his wife in 1787; in 1799 the wife was removed from the parish of St. George, Hanover Square, to Acton Trussell, by an order describing her as Elizabeth Smith, widow, and this order was not appealed against; and in 1800 both Smith and his wife were removed by order from Acton Trussell to Rudgeley, and Rudgeley appealed: the Court of King's Bench held, that the former order for the removal of the wife alone, being unappealed against, was conclusive as to the settlement of both husband and wife; by that order she was called "widow," which implied that her husband's last place of settlement was Acton Trussell, and if that were not the fact, that parish should have appealed. *R.* v. *Rudgeley*, 8 *T. R.* 620. *And see R.* v. *Towcester*, 2 *Bott*, 679.

And it is equally conclusive as to the settlement of those who have to derive their settlement from the parties named in the order afterwards, and before such parties gain a new settlement. And therefore, when Thomas Hankin and Hester his wife were removed by order in 1731 from Nympsfield to Woodchester, which was not appealed against; and in 1741, Hankin, with three children which he had by his wife, (who was since dead), were removed from Nympsfield to Woodchester, as before, and Woodchester appealed; upon the trial of the appeal, the appellants offered evidence to prove that Hankin was not lawfully married to his wife Hester, having then another wife living; but the Sessions refused to receive the evidence, and confirmed the order: and the Court held that they were right in doing so, as the first order unappealed against was conclusive of the fact of Hankin and Hester being husband and wife, and consequently of the legitimacy of their children. *R.* v. *Woodchester*, *Burr. S. C.* 191. 2 *Str.* 1172. *R.* v. *St. Mary*, *Lambeth*, 6 *T. R.* 615, *S. P.* But an order for the removal of parents, unappealed against, has no effect upon

the settlement of any of their children, who were emancipated at the time the order was made, and were not named in it. *R.* v. *Southowram*, 1 *T. R.* 353. *But see R.* v. *Catterall*, 6 *M. & S.* 83. *post*, *p.* 319.

And it is thus conclusive, not only as between the two parishes to the officers of which it is directed, but as against all others. Upon an appeal against an order for the removal of a pauper from East Moulsey to Corsham, it was proved by the appellants that the pauper's late husband had been removed by order from Charlton to Garsden, and that order had never been appealed against: it was contended that this was no evidence against East Moulsey, which had not been a party to the former removal, and ought not therefore to be concluded by the laches of Garsden, in respect of it; but the Court of King's Bench held, that the order unappealed against, was conclusive evidence of a settlement in Garsden, not only as between Charlton and Garsden, but all other parishes. *R.* v. *Corsham*, 11 *East*, 388. *and see Chalbury* v. *Chipping Farringdon*, 2 *Salk.* 488, *ante*, *p.* 314. So, where the pauper, whose husband had resided at Barking under a certificate from Ealing, left Barking and resided in the parish of St. Matthew, Bethnal Green; from that however she was sent back by an order of removal to Barking, which order was not appealed against; but Barking having afterwards removed her to Ealing, Ealing appealed: and the Court of King's Bench held, that, as the order of removal to Barking was unappealed against, it was conclusive. *R.* v. *Ealing*, 2 *Bott*, 678. So, where the pauper was removed by order from Brandsay to Alderton, Alderton appealed, and the order was quashed; he was then removed by order from Brandsay to Felingtowe, and Felingtowe did not appeal, but had him removed by order to Alderton, and Alderton appealed: it was contended that, in favour of this third order, it must be presumed that the pauper gained a settlement in Alderton since the second removal; but the Court of King's Bench said they could presume no such thing; the second order being unappealed against, was conclusive of a settlement at that time at Felingtowe, and if the pauper gained a subsequent settlement, it should be shewn. *Alderton* v. *Felingtowe*, 2 *Bott*, 691.

If the order, however, be so defective as to be void, it cannot be thus deemed conclusive of the settlement. Where, upon an appeal against an order of removal from Sow to Chilverscoton, the appellants proved a previous removal of the pauper from Bedworth to Sow, which order was unappealed against; the respondents objected that this order to Sow was void, as it was directed to the churchwardens and overseers of the parish of B. in the county of Warwick, and to the churchwardens and overseers of the county of the city of Coventry, and the magistrates described themselves as justices of the county aforesaid; and

taking them to be justices of Coventry, that being the last antecedent, they had no jurisdiction, and the order was void: And of this opinion were the Court of King's Bench, who held that the order for this defect was void, and not merely voidable, and could therefore be objected to, although not appealed against. *R.* v. *Chilverscoton*, 8 *T. R.* 178. So, where a pauper was removed from Swalcliffe to Ascott, a large village, part of the parish of Whichford, and not maintaining its own poor separately from the parish; Ascott did not appeal; the pauper finding his way back again to Swalcliffe, was then removed to Stourton, and Stourton appealed: it was objected, that as the order of removal to Ascott was unappealed against, that was conclusive of the pauper being settled there, instead of at Stourton; and the Court of King's Bench held that it would be so, if Ascott were a vill supporting its own poor separately from Whichford; but as that was not the case, a removal to Ascott was a mere nullity, and it was therefore the same as if no such order had been made. *R.* v. *Swalcliffe*, *Cald.* 248. *see* *R.* v. *Kirkby Stephen*, *Burr. S. C.* 664, 2 *Bott*, 675. *ante*, *p.* 300.

Also, if the order were abandoned or not acted upon, and on that account not appealed against, it is not conclusive of the settlement. Thus, where a pauper was removed by an order from Llanrhydd to Ruthin, and the latter gave notice of appeal; but upon the day of the Sessions, and before the appeal was entered, Llanrhydd agreed to abandon the order and take back the pauper; Llanrhydd then removed the pauper to Denbigh, who appealed, and objected that as the order of removal to Ruthin had not been appealed against, it was conclusive of the settlement being there: the Court of King's Bench however held, that the parish which obtained the order might abandon it; in which case it would not conclude the other parish, which probably, were it not for the abandonment, would have appealed against it. *R.* v. *Llanrhydd*, *Burr. S. C.* 638.

Order appealed against and confirmed.] If an order of removal be appealed against and confirmed, this is conclusive of the settlement, not only as against the appellant parish, but as between other parishes. Where a pauper was removed by order from Harrow to Ryslip, and Ryslip appealed, but the order was confirmed; Ryslip had him then removed to Hendon: but the Court of King's Bench held, that as the Sessions, by confirming the former order, had decided that the pauper was last legally settled in Ryslip, Ryslip was thereby estopped from saying that he was then settled elsewhere. *Harrow* v. *Ryslip*, 2 *Salk.* 524. So, where a pauper was removed by order to B., and B. appealed, but the order was confirmed; then B. had him removed by order to C.: but the Court of King's Bench held, that this could not be done; they said that, although an order of removal reversed

is final only as between the parties, yet an order of removal confirmed is final as to all the world. *Little Bitham* v. *Somerby*, 1 *Str.* 232. And in *Mynton* v. *Stoney Stratford*, (2 *Salk.* 527,) it was ruled by Holt, C. J. and the Court, that if on appeal the order be discharged, that is binding only between the parties; but if confirmed, it is conclusive to all persons as well as the parties, because it is an adjudication that the appellant parish is the place of the pauper's last legal settlement. Where, in 1810, the pauper's father gained a settlement in Catterall, by renting a tenement, the pauper not then being emancipated; in 1814, (after the pauper was emancipated, but before he had acquired any settlement in his own right) the father was removed by order from Claughton to Inskip, and Inskip appealed, but failing in proof of the settlement in Catterall, the order was confirmed; in 1816, the pauper and his wife and family were removed from Preston to Catterall, and Catterall appealed: afterwards in the Court of King's Bench, it was contended for Preston, that the former order for the removal of the father, being confirmed, was conclusive as to the father only, but not as to the son, who was emancipated at the time; but the Court held, that as it was not pretended that the son had any settlement in his own right, and as it must now be taken that Inskip was the settlement of the father, the order of removal, which was confirmed, must be considered as conclusive with respect to the son also. *R.* v. *Catterall*, 6 *M.* & *S.* 83.

Order appealed against and quashed.] An order of removal, if quashed, and the decision be upon the point of settlement, is conclusive as between the appellant and respondent, but does not bind other parishes. *See Little Bitham* v. *Somerby*, *and Mynton* v. *Stoney Stratford*, *supra*. Where, upon an appeal against an order of removal from Bishops Walton to Farham, the order was quashed; after which, two justices again removed the pauper from Bishops Walton to Farham: but the Court of King's Bench held, that the first order being quashed, was conclusive as between the parties, unless indeed it were quashed for want of form only. *R.* v. *Bishops Walton*, *Foley*, 275. So, where the pauper was removed by order from Foston to Carleton, and Carleton appealed, and the order was quashed; two justices afterwards, by order, had him removed again from Foston to Carleton: but the Court of King's Bench held that this could not be without shewing some new settlement gained since the last order. *Foston* v. *Carleton*, 1 *Str.* 567. *R.* v. *Braddenham*, *Burr. S. C.* 394, *S. P.* *R.* v. *Leigh*, *Cald.* 59. *Doug.* 46, *S. P.*

On the other hand, where a pauper was removed by order from St. Michael's to Kingston Bowsey, and Kingston Bowsey appealed, and the order was quashed; the pauper afterwards having intruded into Bedingham, was removed from thence by

order again to Kingston Bowsey: it was objected that the former order of removal being quashed, was final as to the pauper's not being settled in Kingston Bowsey; but the Court of King's Bench held, that it was final only between the then contending parties, and not as to strangers, as Bedingham in this case was. *St. Michael's, Bedingham*, v. *Kingston Bowsey, Carth.* 516. 2 *Salk.* 486. *Cirencester* v. *Colne St. Aldwin's, Burr. S. C.* 17, *S. P. R.* v. *Bentley, Burr. S. C.* 425.

And where an order of removal from St. Andrew to Northaw, by mistake, stated the pauper to be legally settled in St. Andrew, and on this ground the order was quashed upon appeal; the pauper being again removed from St. Andrew to Northaw, Northaw appealed, upon the ground that the first order being quashed, was conclusive as between the parties: the Court of King's Bench held, that no doubt it would be so, if the first order had been quashed upon the merits; but here it was quashed for a defect in form merely, and therefore it did not conclude the parties. *R.* v. *St. Andrew, Holborn*, 6 *T. R.* 613. *R.* v. *Penge, Nolan Rep.* 176, *S. P. See Mungerhunger* v. *Warden, Set. & Rem.* 160. So, where the pauper, who was residing at Disworth under a certificate from Osgathorpe, was removed by order from the former to the latter before he became actually chargeable, and this order was therefore quashed upon appeal; he afterwards became actually chargeable to Disworth, and he was then again removed to Osgathorpe, and Osgathorpe appealed, upon the ground that the first order being quashed, was conclusive as between these parishes: but the Court of King's Bench held that it was not conclusive, because it appeared here that the right of Disworth to remove the pauper did not actually accrue until subsequently to the first order; the one order was therefore consistent with the other. *R.* v. *Osgathorpe, Burr. S. C.* 261. Where, upon the trial of an appeal against an order of removal, the Sessions being of opinion that there was not sufficient evidence of chargeability, refused to enter into the merits, but quashed the order generally; they were then requested to make an entry on their proceedings of the reason for quashing the order, but they refused to do so: upon an application for a mandamus directing them to make such entry, the Court refused it, saying, that the respondents were not concluded by the judgment of the Sessions, but might upon another appeal explain by evidence the particular ground on which the former order of removal was quashed. *R.* v. *Wheelock*, 5 *B. & C.* 511. But where, upon the trial of an appeal against an order of removal, the appellants tendered in evidence an order of Sessions, in an appeal between the same parishes, by which an order for the removal of the pauper's brother was quashed, and they offered to prove by parol evidence that the ground of that decision was, that the father of the pauper was not settled in the appellant

parish; but the Sessions refused to receive this evidence, and confirmed the order: and the Court of King's Bench afterwards held that the evidence was not admissible; it could only have shewn what the decision of the Sessions was, upon a matter which came collaterally, and not directly, before them, namely, the father's settlement; but a former decision cannot be given in evidence, unless it be a decision directly upon the point in issue. *R.* v. *Knaptoft*, 2 *B. & C.* 883.

Direct Evidence of the Settlement.] It is not intended here to give the law relating to the Settlement of the Poor. All the authorities upon that subject will be found in a work already published by me upon the Poor Laws. I shall here merely refer shortly to that work for those authorities, and also to my edition of the Poor Law Amendment Act, that the reader may more readily consult them.

1. Settlement by birth.
   - of legitimate children. 1 *Arch. Poor Laws*, 31, 35. 2 *Id. pl.* 362—373, 405, 1404. *Am. Act, pl.* 1493.
   - of bastards. 1 *Arch. P. L.* 32, 35. 2 *Id. pl.* 374—393, 76, 77, 78, 158, 271, 273, 276, 405, 416—419, 1414—1419. *Am. Act, pl.* 1492. 4 & 5 W. 4, c. 76, s. 71.
2. Settlement by parentage. 1 *Arch. P. L.* 35, 36. 2 *Id. pl.* 420—440, 76—80, 158, 222, 375, 392.
   - Emancipation. 1 *Arch. P. L.* 37, 38. 2 *Id. pl.* 441—470, 299. *Am. Act, pl.* 1494, 1495.
3. Settlement by marriage. 1 *Arch. P. L.* 38—40. 2 *Id. pl.* 472—485, 65, 66, 69, 70—73, 333, 336, 362, 421, 429, 431, 433. *Am. Act, pl.* 1497, 1498.
   - Marriage. 1 *Arch. P. L.* 33—35. 2 *Id. pl.* 394—419, 270, 274, 326, 331, 335, 337, 338, 375, 486, 1420—1422. *Am. Act, pl.* 1488, 1496.
4. Settlement by hiring and service. 4 & 5 *W.* 4, *c.* 76, *s.* 64, 65.
   - The hiring. 1 *Arch. P. L.* 40—47. 2 *Id. pl.* 486—624, 82, 128, 431, 444, 457, 465, 473, 476, 1423—1430, 1434, 1435. *Am. Act, pl.* 1499, 1501, 1503, 1505, 1506, 1508, 1509, 1510.
   - The service. 1 *Arch. P. L.* 47—49. 2 *Id. pl.* 625—646, 103, 519, 532, 533, 534, 537, 541, 546, 550, 552, 553, 555, 579, 603, 605, 622, 1432, 1433. *Am. Act, pl.* 1507.
     - Dispensation, dissolution, &c. 1 *Arch. P. L.* 49—53. 2 *Id. pl.* 647—691, 82—84, 224, 228, 552—555, 573, 597, 597 *a*, 643, 645, 1430. *Am. Act, pl.* 1504.
   - Residence in the parish. 1 *Arch. P. L.* 53, 54. 2 *Id. pl.* 692—714, 532, 533, 535, 601, 631, 642, 1431. *Am. Act, pl.* 1500, 1502.

Fraud, its effect upon the settlement. 1 *Arch. P. L.* 54. 2 *Id. pl.* 224, 553, 556, 659, 665, 680, 689, 690, 715.

5. Settlement by apprenticeship.
   The binding. 1 *Arch. P. L.* 55—57. 2 *Id. pl.* 716—786, 230, 509, 511, 512, 802—805, 879, 1423, 1424, 1436—1439, 1444—1446. *Am. Act, pl.* 1511, 1512, 1515, 1521, 1523—1526, 1529. Stat. 3 & 4 W. 4, c. 63. 4 & 5 W. 4, c. 76, s. 61, 67.
   Stamp. 1 *Arch. P. L.* 57—62. 2 *Id. pl.* 787—801, 105, 726, 743, 744, 745, 749, 877, 878, 1440. *Am. Act, pl.* 1513, 1514, 1517, 1519, 1528.
   The inhabiting and service under it. 1 *Arch. P. L.* 62—66. 2 *Id.* 806—876, 126, 128, 722, 754, 1437, 1441—1443. *Am. Act, pl.* 1516, 1520, 1522, 1527, 1530.
6. Settlement by Renting a Tenement.
   As to the tenement.
   under stat. 13 & 14 C. 2, c. 12, s. 1. 1 *Arch. P. L.* 66—72. 2 *Id. pl.* 880—919, 921, 922, 924—956, 966—979, 715, 1447, 1451, 1454. *Am. Act, pl.* 1532, 1533, 1540.
   under stat. 59 G. 3, c. 50. 1 *Arch. P. L.* 66, 68—72. 2 *Id. pl.* 46, 920, 923, 957—961, 980, 981, 1448—1452, 1454, 1456. *Am. Act, pl.* 1534, 1537, 1543, 1545.
   under stat. 6 G. 4, c. 57. 1 *Arch. P. L.* 67—72. 2 *Id. pl.* 958, 962—965, 1453. *Am. Act, pl.* 1534, 1536—1538, 1541, 1543—1545.
   under stat. 1 W. 4, c. 18. *Am. Act, pl.* 1535, 1538, 1539, 1542, 1546. 4 & 5 W. 4, c. 76, s. 66.
   As to the party entitled to the settlement. 1 *Arch. P. L.* 72—74. 2 *Id. pl.* 138, 473, 881, 914, 915, 928, 942, 945, 946, 949, 971, 972, 978, 982—988.
   As to the residence required. 1 *Arch. P. L.* 74, 75. 2 *Id. pl.* 989—998, 58, 67, 698, 885, 932, 933, 950, 976, 1450.
   Fraud, its effect upon the settlement. 1 *Arch. P. L.* 75, 76. 2 *Id. pl.* 58, 161, 1453, 1455.
7. Settlement by estate. 1 *Arch. P. L.* 76. 2 *Id. pl.* 1000—1007. 4 & 5 *W.* 4, *c.* 76, *s.* 68.
   estate by descent, devise, &c. 1 *Arch. P. L.* 77—79. 2 *Id. pl.* 1006, 1008—1056, 66, 299, 301, 304, 434, 455, 947, 1000—1005, 1457, 1459, 1460. *Am. Act, pl.* 1547—1555, 1557.
   estate bought by pauper. 1 *Arch. P. L.* 80—82. 2 *Id. pl.* 1057—1076, 135, 281, 295, 297, 422, 428, 1008, 1012, 1015, 1032, 1043, 1050, 1056. *Am. Act, pl.* 1550, 1554, 1556.
8. Settlement by serving office. 1 *Arch. P. L.* 83, 84. 2 *Id. pl.*

1077—1100, 127, 299, 303, 304, 471, 1461, 1462. *Am. Act, pl.* 1558—1560. 4 & 5 *W.* 4, *c.* 76, *s.* 64.

9. Settlement by paying rates, &c. 1 *Arch. P. L.* 85—87. 2 *Id. pl.* 1101—1139, 125, 349, 710, 1047, 1463. *Am. Act, pl.* 1561. *and see Id. p.* 3, 4.

It may be necessary to add, that if the Sessions receive any evidence which they should not, or refuse evidence which they ought to receive, and decide the appeal, the Court of King's Bench will not, nor can they, interfere, unless the Sessions grant a case for their opinion. *R.* v. *Frieston*, 5 *B. & Adolph.* 597.

Judgment.

The Sessions, by their judgment, can merely confirm or quash the order of removal; they cannot, for instance, make it a part of their judgment that the pauper shall be taken back to the removing parish, *R.* v. *Milverton*, 7 *Mod.* 10. *R.* v. *Oswell and Woking*, 2 *Salk.* 472, or the like. Costs, however, form part of their judgment, if they award them. In determining the appeal, we have seen (*ante, p.* 11, 288,) that justices who are rated to the poor in either parish, shall not vote; they are not even to vote upon the question, whether a case shall be granted or not. If the justices be equally divided, they must adjourn the appeal to the next Sessions, and let it be then reheard and decided; *see ante, p.* 288, 289; or they may adjourn it, for the purpose of more fully considering their judgment. *R.* v. *King's Langley*, 1 *Ld. Raym.* 481. 2 *Salk.* 605. They are not bound to give any reasons for their judgment; *South Cadbury* v. *Braddon*, 2 *Salk.* 607; and in Quarter Sessions for counties, they seldom do. But in boroughs, the recorder frequently states the reasons for his judgment, as fully as the judges of the Court of King's Bench, in their judgment on settlement cases. The judgment may be altered at any time during the Sessions. *Battersea* v. *Westham*, 5 *Mod.* 396. *St. Andrew, Holborn*, v. *St. Clement, Danes*, 2 *Salk.* 494, 606.

As to the effect of the judgment, we have seen (*ante, p.* 318,) that a judgment confirming the order of removal, is final and conclusive as to the then settlement, not only as between the parties, but all other parishes, &c. And that a judgment quashing an order of removal, is not binding on any other parishes, &c. but those which are parties to the appeal; and as between them, it is conclusive only when the decision is upon the point of settlement; but if the order be quashed for any defect of form or the like, the judgment does not conclude either party, but they may again litigate the point of settlement in question between them.

As to the amendment of orders of removal by the Sessions, and in what case it may be made, *see ante, p.* 286—288.

Costs.

Costs of the Appeal.] By stat. 8 & 9 W. 3, c. 30, s. 3, "for the more effectual preventing of vexatious removals and frivolous appeals," it is enacted "that the justices of the peace of any county or riding, in their General or Quarter Sessions of the Peace, upon any appeal before them there to be had for or concerning the settlement of any poor person, or upon any proof before them there to be made of notice of any such appeal to have been given by the proper officer to the churchwardens or overseers of the poor of any parish or place, (though they did not afterwards prosecute such appeal,) shall, at the same Quarter Sessions, award and order to the party, for whom and in whose behalf such appeal shall be determined, or to whom such notice did appear to have been given, as aforesaid, such costs and charges in the law as by the said justices in their discretion shall be thought most reasonable and just, to be paid by the churchwardens, overseers of the poor or any other person against whom such appeal shall be determined, or by the person that did give such notice as aforesaid."

And by stat. 4 & 5 W. 4, c. 76, s. 82, upon every such appeal, "the Court before whom the same shall be brought, shall and may, if they think fit, order and direct the parish, against whom the same shall be decided, to pay to the other such costs and charges as may to such Court appear just and reasonable, and shall certify the amount thereof; and in case the overseers of the poor of the parish liable to pay the same, shall, upon demand, and upon the production of such certificate, refuse or neglect to pay the same, the amount thereof may be recovered from such overseer, in the same manner as any penalties or forfeitures are by this Act recoverable." *See Id. s.* 99. *and see the form of the Certificate, Arch. P. L. Amend. Act, p.* 10.

And by sect. 83, "if either of the parties shall have included in the order or statement, sent as hereinbefore (*see ante, p.* 301,) directed, any grounds of removal or of appeal, which shall, in the opinion of the justices determining the appeal, be frivolous or vexatious, such party shall be liable, at the discretion of the said justices, to pay the whole or any part of the costs incurred by the other party in disputing any such grounds, such costs to be recovered in the manner hereinbefore directed as to the other costs incurred by reason of such appeal." *See Arch. P. L. Amend. Act, p.* 124, *n.*

Upon a mandamus being awarded, requiring justices to grant costs, in an appeal, to the party in whose favour it had been determined, the Court, after reading the return, held that it was reasonable the justices should have the power of judging whether costs should be allowed or not; and they therefore quashed the writ. *R. v. JJ. of the County of Nottingham,* 1 *Sess. Ca.* 422.

Costs of Maintenance.] By stat. 9 G. 1, c. 7, s. 9, "for the preventing vexatious removals," it is enacted, that, "if the justices of the peace shall, at their Quarter Sessions, upon an appeal before them there had concerning the settlement of any poor persons, determine in favour of the appellant that such poor persons was or were unduly removed, that then the said justices shall, at the same Quarter Sessions, order and award to such appellant so much money as shall appear to the said justices to have been reasonably paid by the parish or other place, on whose behalf such appeal was made, for or towards the relief of such poor person or persons, between the time of such undue removal, and the determination of such appeal." Upon an application for a mandamus, requiring the justices at Sessions to order the respondents to pay to the appellants the costs of maintenance of the pauper, the order of removal having been quashed upon appeal: the Court held that the Sessions were bound by this statute to do so, and granted the writ. *St. Mary's, Nottingham*, v. *Kirklington*, 2 *Sess. Ca.* 67. *See R.* v. *Great Chart*, *Burr. S. C.* 194. *R.* v. *JJ. of Norfolk*, 5 *B. & Ald.* 484.

As the pauper is not now actually removed, until after the expiration of twenty-one days from the making of the order, and as the respondent parish incurs the expense of relieving him during that time, it was thought right, by stat. 4 & 5 W. 4, c. 76, s. 84, to enact, "that the parish to which any poor person, whose settlement shall be in question at the time of granting relief, shall be admitted or finally adjudged to belong, shall be chargeable with and liable to pay the cost and expense of the relief and maintenance of such poor person, and such cost and expense may be recovered against such parish, in the same manner as any penalties or forfeitures are by this Act recoverable: Provided always, that such parish, if not the parish granting such relief, shall pay to the parish by which such relief shall be granted, the cost and expense of such relief and maintenance, from such time only as notice of such poor person having become chargeable shall have been sent by such relieving parish, to the parish to which such poor person shall be so admitted or finally adjudged to belong: Provided always, that no charges or expenses of relief or maintenance shall be recoverable under a suspended order of removal, unless notice of such order of removal, with a copy of the same, and of the examination on which such order was made, shall have been given within ten days of such order being made, to the overseers of the poor of the parish to whom such order is directed."

SECTION 3.—*Appeal against a Poor-Rate.*

In what cases.]—By stat 43 *Eliz.* c. 2, which authorized the making and levying a poor-rate by the churchwardens and overseers of the poor of every parish, with the consent of two justices of the peace, it is provided by sect. 6, that if any person or persons shall find themselves grieved with any cess or tax, or other act done by the said churchwardens and other persons, or by the said justices of the peace; that then it shall be lawful for the justices of the peace, at their General Quarter Sessions, or the greater number of them, to make such order therein as to them shall be thought convenient; and the same to conclude and bind all parties."

And by stat. 17 G. 2, c. 38, s. 4, it is enacted, that "in case any person or persons shall find him, her, or themselves aggrieved, by any rate or assessment made for the relief of the poor, or shall have any material objections to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any persons therein," it shall be lawful for such person or persons, "giving reasonable notice to the churchwardens or overseers of the poor of the parish, township, or place, to appeal to the next General or Quarter Sessions of the Peace for the county, riding, division, corporation, or franchise, where such parish, township, or place lies; and the justices of the peace there assembled are hereby authorized and required to receive such appeal, and to hear and finally determine the same; but if it shall appear to the said justices that reasonable notice was not given, then they shall adjourn the said appeal to the next Quarter Sessions, and then and there finally hear and determine the same."

As to an appeal against a distress for a poor-rate, *see stat.* 17 *G.* 2, *c.* 38, *s.* 7.

To what Sessions.]—In counties, ridings, &c., the appeal must be to the Quarter Sessions of the county or riding, &c., in which the parish is situate. *Supra.*

In boroughs within the late Municipal Corporation Act, to which a separate Court of Quarter Sessions is granted, the appeal is to the Quarter Sessions of the borough; *see* 5 & 6 *W.* 4, *c.* 76, *s.* 105. *and see* 43 *Eliz. c.* 2, *s.* 8; in those to which no such separate Court is granted, the appeal is to the Sessions of the county in which the borough is situate. *Id. s.* 111. Formerly, by stat. 17 *G.* 2, *c.* 38, *s.* 5, if there were not four justices in any borough or franchise, or by stat. 1 *Geo.* 4, *c.* 36, in corporations and franchises not having more than six justices of the peace, nor having jurisdiction or authority over two or more whole parishes or wards contained within them respec-

tively, the party might, if he thought fit, appeal to the Sessions of the county, or riding, or division, in which such corporation or franchise was situate; *see R. v. JJ. of Essex*, 5 *M. & S.* 513, *R. v. Taunton*, 1 *Bott*, 265; and this is still the law as to any corporations or franchises not within the late Municipal Corporation Act.

It must be to the next General Quarter Sessions, that is to say, the next practicable Sessions, after the allowance and publication of the rate. In London there are four General Quarter Sessions, and a General Sessions intervening between each; a rate was published on the 28th October, the Quarter Sessions were holden on the next day, the next Quarter Sessions were in January, and to the latter Sessions one of the parties rated appealed; the Sessions, after adjourning the appeal from time to time, at last decided that the appeal should have been entered at the General Sessions which intervened between the October Sessions and the Sessions in January, and therefore dismissed it: but upon an application for a mandamus, the Court of King's Bench held that the appeal was lodged in time; they said that the stat. 17 *G.* 2, *c.* 38, *s.* 4, which gives the appeal to "the next General or Quarter Sessions," does not mean by the term "General Sessions" such General Sessions as are holden in London, in contradistinction to the Quarter Sessions, for the Quarter Sessions are General Sessions; but it is there used as another word for Quarter Sessions, in contradistinction to a Special Sessions; the Court, therefore, held that the appellant was not bound to enter his appeal at the intervening General Sessions, and made the rule for the mandamus absolute. *R. v. JJ. of London*, 15 *East*, 632. Where a poor-rate was made in October, allowed in November, and a party rated appealed against it at the following Easter Sessions, when the appeal was dismissed with costs, on the ground of its not having been made to the next Sessions after the rate was allowed: the Court held that the Sessions were right in doing so. *R. v. Atkins*, 4 *T. R.* 12. In this last case, not only the order of Sessions, but the rate also, had been removed by *certiorari*; and the counsel for the appellant wished to take an objection to the rate, which he said appeared bad on the face of it: but the Court held that the party objecting to the rate had no right to remove it, and they therefore refused to entertain the objection. *R. v. Atkins*, 4 *T. R.* 12. Where a rate was made on the 10th December, and another on the 5th January; on the 13th January a notice of appeal against these rates was given for the Sessions to be holden on the 15th: and that appeal was dismissed, on the ground of the insufficiency of the notice, in not setting out the names of the persons said to have been improperly inserted or omitted in the rate; on the 12th April, a notice, stating the names particularly, was given for

the then next Sessions, in which it was stated that the appellants would then apply to have the appeal reheard; and on the day after new notices were given of three appeals against the same rates; on the 23d April these four appeals came on to be heard, and the Sessions dismissed the first appeal, on the ground that they had no authority to rehear an appeal dismissed at a former Sessions; but they tried the three other appeals and quashed the rates: the order of Sessions in the last three cases being removed, a motion was made to quash them, on the ground that the appeals had not been to the next Sessions after the publication of the rate; and the Court held, that although the stat. 43 Eliz. c. 2, s, 6, did not confine the appeal to the next Quarter Sessions after the publication of the rate, but allowed it to be made at any Quarter Sessions, that clause was virtually repealed by stat. 17 G. 2, c. 38, s. 4, which required the appeal to be to the next General or Quarter Sessions; they accordingly quashed the orders of Sessions. *R.* v. *Coode*, 1 *Bott*, 276. So, where a rate was made on the 14th June, allowed on the 28th, and published; the next Sessions were holden in the beginning of July, and the appeal was to the Michaelmas Sessions; it was argued, that a party is not aggrieved by a rate until he is called upon to pay it, and the appeal in this case was to the next Sessions after the appellant was so aggrieved: but the Court held, that the time for appealing must be calculated from the publication, and not merely from the time the rate is demanded, for it is by the assessment the party is aggrieved, and it is against that he appeals; if by being refused a copy of the rate, or by the late publication of the rate, or the like, he cannot appeal to those Sessions, then the appeal may be to the following, as being the next practicable, Sessions. *R.* v. *Mickleſield*, 1 *Bott*, 279. Where a rate was made on the 9th April, allowed on the 11th, and published on the 14th; as the Sessions commenced on the 15th, no appeal against the rate was then lodged, but at the Midsummer Sessions an attempt was made to enter the appeal, and the justices refused to receive it, on the ground that it ought to have been entered at the Sessions next immediately after the making of the rate: the Court of King's Bench, however, upon application, granted a mandamus to the justices to enter continuances and hear the appeal; they said that the "next Sessions" meant the next practicable Sessions after the making and publishing of the rate; and as in this case it was published only on the 14th, it was not practicable to appeal on the 15th. *R.* v. *Hendon*, 2 *D.* & *R.* 249. *and see R.* v. *JJ. of Sussex*, 15 *East*, 206, *S. P.*

It may be necessary to observe, that there is no objection to entering the appeal at an adjourned Sessions, if the practice of the Court of Quarter Sessions will warrant it, *see R.* v. *JJ. of Sussex*, 7 *T. R.* 107, although the appellant is not bound to do so. *R.* v. *JJ. of Surrey*, 1 *M.* & *S.* 479.

Notice of Appeal.] The statute (17 G. 2, c. 38, s. 4, *ante*, p. 326,) requires that "reasonable notice" shall be given; and we have seen (*ante*, p. 274,) that, in such a case, it is for the justices at Sessions to judge whether the notice given was a reasonable notice or not. For this purpose, the justices at the different Courts of Quarter Sessions usually lay down a rule or rules, either as to the notice they will require in each kind of appeal, or generally as to the notice in all appeals, where the length of notice is not specified in the statute by which the appeal is given. Care should be taken, therefore, to give the notice in strict conformity with the rule of the Sessions upon the subject, as the justices at Sessions usually exact a strict compliance with it. The statute adds, "but if it shall appear to the said justices that reasonable notice was not given, then they shall adjourn the said appeal to the next Quarter Sessions, and then and there finally hear and determine the same." Upon this clause a practice has crept in of entering appeals against rates at the next Sessions, and then respiting them as a matter of course until the second Sessions, although there may have been time sufficient to give notice of appeal and to prepare for trial previously to the first Sessions; it has arisen seemingly from a similar practice, on a similar clause in another statute, as to appeals against orders of removal. *See ante*, p. 292. This practice however, in the case of appeals against rates, does not seem to meet with the approbation of the Court of King's Bench. Where a poor-rate was published on the 16th September, and at the Sessions holden on the 16th October, an appeal against the rate was entered and respited as a matter of course, according to the practice of the Sessions; and in due time before the Epiphany Sessions notice of appeal was given, but the justices at these Sessions refused to hear the appeal: upon an application for a mandamus, the Court held that as the Sessions in this case had allowed the appeal to be entered and respited, they were bound to hear it at the time to which it was so adjourned; but Lord Tenterden, C. J. added, "at the same time I think it would be more beneficial to the public, and more consistent with the intention of the legislature, if the justices did not adjourn appeals against rates as a matter of course; I think they should endeavour to induce parties to try their appeal at the next practicable Sessions after the publishing of the rate." *R. v. JJ. of Wilts*, 8 *B. & C.* 380.

The notice of appeal must be given by the party "aggrieved by the rate or assessment," or having "any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any persons therein." 17 *G.* 2, *c.* 38, *s.* 4, *ante*, *p.* 326. And if two or more persons have a joint grievance, they may join in one appeal. Where an appeal was dismissed, because it was a joint appeal by six

appellants, the Sessions being of opinion that each should have appealed separately: the Court of King's Bench, on the authority of *R.* v. *White* (4 *T. R.* 771), held the appeal not to be objectionable on that account. *R.* v. *JJ. of Sussex*, 15 *East*, 206. And in the case referred to, the only joint grievance was, that the appellants were all rated in respect of personal property; but each was rated separately, in respect of his own property, one for his ships, another for his stock in trade, another for his furniture, another for money he had by him, another in respect of his salary, and the like. *See R.* v. *White*, 4 *T. R.* 771.

By stat. 41 G. 3, c. 23, s. 4, the notice of appeal "shall be in writing, and shall be signed by the person or persons giving the same, or his, her, or their attorney, on his, her, or their behalf; and such notices of appeal shall be delivered to, or left at the places of abode of, the churchwardens and overseers of the poor of the parish, township, vill or place, or any two of them; and the particular causes or grounds of appeal shall be stated and specified in such notice."

And by sect. 6, "if any person or persons shall appeal against any rate or assessment made for the relief of the poor, because any other person or persons is or are rated or assessed in such rate or assessment, or is or are omitted to be rated or assessed therein, or because any other person or persons is or are rated or assessed in any such rate or assessment at any greater or less sum or sums of money than the sum or sums at which he, she, or they ought to be rated or assessed therein, or for any other cause that may require any alteration to be made in such rate or assessment with respect to any other person or persons, then and in every such case the person or persons so appealing for the causes aforesaid, or any of them, shall give such notice of appeal in writing as hereinbefore mentioned, not only to the churchwarden or overseers of the poor, or any two or more of them, but also to the other person or persons so interested or concerned in the event of such appeal as aforesaid." Where upon an appeal against a rate, the appellant attempted to give in evidence that one Peach, as tenant to Lord Sondes, was possessed of 140 acres of land in the parish, for which no person was rated; but this was objected to, as there was no evidence of service of notice of the appeal upon Peach; and the Sessions, holding this to be a valid objection, confirmed the rate: the Court of King's Bench held that the Sessions were right, and confirmed their order. *R.* v. *Sir Richard Brooke de Capel Brooke, Bart.*, 9 *B. & C.* 915.

It is provided, however, by sect. 5, "that with the consent of the overseers, signified by them or their attorney, in open Court, and with the consent of any other person interested therein, the said Court of Sessions may proceed to hear and

decide upon such appeal, although no notice thereof shall have been given in writing; and also that, with the like consent, such Court may hear and decide upon grounds of appeal, not stated, or misstated, in such written notice, where any notice shall have been given in writing."

The following may be the form of the notice of appeal.

County of A. to wit: To the Churchwardens and Overseers of the Poor of the parish of B. in the said county of A., and to [here name the persons to whom it may be necessary to give notice, under stat. 41 G. 3, c. 23, s. 6, supra.]

Take notice, that I, C.D, being rated as an inhabitant and occupier of certain lands and tenements in the said parish of B., in a certain rate and assessment intituled, "An assessment for the necessary relief," [&c. setting out the title of the rate,] *"do intend at the next General Quarter Sessions of the Peace, to be holden in and for the said county of A., at E. in the said county, to appeal"* [or if the appeal have been already entered and respited, *"to try a certain appeal by me the said C. D. as appellant, lodged and entered at the last General Quarter Sessions of the Peace, holden at E. aforesaid, in and for the county aforesaid] against the said rate or assessment; and that the particular causes and grounds of such appeal are [that I am not an occupier of any land, house, tithes impropriate, propriation of tithes, coal mine, or saleable underwood in the said parish; also that F. G. and H. I. are in the said rate or assessment respectively underrated in respect of the yearly value of their respective messuages, lands, tenements, and premises by them occupied in the said parish of B.; and also that I the said C. D. am in the said rate or assessment, overrated in respect of the yearly value of the lands, tenements, and premises by me occupied in the parish aforesaid; and also that it doth not appear, in and by the said rate or assessment, in respect of what property the said rate is made and assessed upon me the said C. D.,"* [so stating all the causes of appeal you intend to insist upon at the hearing]: *"And take notice, that at the trial of the said appeal, I mean to avail myself of all or some one or more of the said causes and grounds, in support of the said appeal. Witness my hand, this day of* 1836. *C. D.*

Proceedings at the Hearing.] As soon as the appeal is called on, and before it is entered upon, the respondents may call upon the appellant to prove service of his notice of appeal. If he fail in doing so, the Court in strictness have no authority to proceed in the appeal, as it is made by the statute seemingly a condition precedent to the appellant's appealing. *See* 17 *G.* 2, *c.* 38, *s.* 4, *ante, p.* 326. Or if he fail in proving service of it upon any of the individuals, whom in his notice he states

to be under-rated, &c., he will not be allowed to go into that part of his case. *R.* v. *Sir R. Brooke de Capel Brooke, Bart.*, 9 *B. & C.* 915, *ante, p.* 330. But where, upon an appeal against a rate being called on at Sessions, and the appellant being then ready to prove his notice and proceed with the case, the respondents applied to put off the trial until the next Sessions, which application was granted on payment of costs, and the respondent's counsel handed a copy of the notice of appeal to the clerk of the peace, to enable him to draw up the order; at the next Sessions both parties appeared, but the respondents objected to the appeal being heard, until the appellant first proved service of the original notice of appeal, and he not being prepared to do so, the Sessions confirmed the rate. But upon an application for a mandamus to enter continuances and try the appeal, the Court of King's Bench held, that the respondents had acted upon the notice so as to render any further proof of it unnecessary, and therefore the justices ought to have heard the appeal. *R.* v. *JJ. of Hertfordshire*, 4 *B. & Adolph.* 561.

It is now a generally received practice at most Courts of Quarter Sessions, that if the appeal be upon the ground that the appellant has no rateable property at all in the parish, the respondents begin; if upon the ground that he is overrated, or (which amounts to the same thing) that another is underrated, the appellant begins; if on both grounds, the respondents begin. Where in an appeal against a rate, the grounds of appeal stated in the notice were, that the appellant was not an inhabitant of the parish or the occupier of property there, and as to certain tolls (mentioned in the notice), if he were rateable for them at all, he was not rateable for them to the amount at which he had been rated; at the trial the respondents merely put in and proved the rate, and there rested their case, and refused to give evidence in support of their assessment; and the justices thereupon quashed the rate: the Court held that the respondents should have gone into their case, and proved that the appellant had rateable property in the parish; for the appellant should not be called upon in the first instance to prove a negative: and *Heywood* as *amicus curiæ* informed the Court, that at the Yorkshire Sessions, where more appeals of this kind were lodged than in any other county, if the appellant objected to be rated at all, it was the practice for the respondents to begin; but if he objected to the quantum only, then the onus lay upon him. *R.* v. *Newbury*, 4 *T. R.* 475. And where upon an appeal against a rate, on the ground that the party was overrated, the appellants being called upon to begin, refused to do so, although such was the practice of the Sessions, and the Sessions therefore dismissed the appeal: upon an application for a mandamus to the justices to hear the appeal, the

Court refused it, saying that they would not question the propriety of the practice of the Sessions, upon such a point of form as this. *R.* v. *JJ. of Suffolk*, 6 *M. & S.* 57. But where, in an appeal against a rate, it appeared that the appellant was rated as the occupier of property of the annual value of 250*l.*, and he had stated in his notice, as the grounds of his appeal, first, that he had no rateable property in the parish; and secondly, that he had not rateable property to the amount at which he was rated; at the trial of the appeal, the respondents proved that the appellant was possessed of property in the parish to the amount of 6*s.* 8*d.* and more, and there they rested their case, alleging that as they had proved the appellant to have some rateable property in the parish, it was for him to prove that he was overrated; and the Sessions being of that opinion, and the appellant not going into evidence, they confirmed the appeal: but the Court of King's Bench held, that where the question is upon the quantum of the rate, the officers making it must show some probable ground for the amount at which they have charged the party; it would be a monstrous thing to rate a man at 250*l.* prove something beyond 6*s.* 8*d.*, and then leave him to pare down the assessment to the amount it ought to be; the mischief would be enormous; a small occupier might be rated at once in the round sum of 1000*l.*, and left to struggle his way out of that charge as he could. *R.* v. *Topham*, 12 *East*, 546. Where in an appeal against a poor-rate at Hull, one of the grounds of appeal was, that the owners of ships registered at Hull, and trading to and from that port, and within the port at the time the rate was made, were omitted to be rated; and at the trial of the appeal the appellants proved the fact, and proved that profit had been derived from them in the preceding year, but they could not show the amount: the Court of King's Bench held it to be sufficient, as the onus did not lie upon the appellants to give the Sessions the means of amending the rate; it was the duty of the parish officers to include all rateable property in the rate, and they should have taken the means to ascertain its value. *R.* v. *Hull Dock Company*, 3 *B. & C.* 515, 5 *D. & R.* 395.

Supposing the respondents to have the right to begin, their counsel opens their case, remarks upon the case of the appellant, as far as it appears from the notice of appeal, and calls his witnesses.

As to the law upon the subject of poor-rates, *see* 1 *Arch. P. L.* 88—97 *k.* 2 *Id. pp.* 1140—1337. *Arch. P. L. Amend. Acts*, 250—256.

The appellant's counsel then addresses the Court, and states and proves the case mentioned in his notice of appeal. And he should take care to confine himself to the grounds of appeal mentioned in his notice; for by stat. 41 G. 3. c. 23, s. 4, upon the hearing of an appeal against a rate, "the Court of General or

And by sect. 6, after directing that the appellant shall give notice of appeal to such other persons as he means to contend are omitted or underrated in the rate, as already mentioned (*ante*, *p.* 330,) it is enacted that it shall be lawful for the Court of General or Quarter Sessions of the Peace, on the hearing of such appeal, to order the name or names of such other person or persons to be inserted in such rate or assessment, and him, her, or them to be therein rated and assessed at any sum or sums of money, or to order the name of such other person or persons to be struck out of such rate or assessment, or the sum or sums at which he, she, or they is or are rated or assessed therein, to be altered in such manner as the said Court shall think right; and the proper officer of the said Court shall forthwith add to or alter the rate or assessment accordingly." And by sect. 8, if the Sessions thus order the name of any person to be struck out, or the sum at which he is assessed to be reduced, if it appear that he has already paid the sum, they shall order it to be repaid to him by such churchwarden or overseer.

As to a special case, *see ante*, *p.* 46.

Costs.] In an appeal against a rate, the justices "may award and order to the party, for whom such appeal shall be determined, reasonable costs, in the same manner that they are empowered to do in case of appeals concerning the settlement of poor persons," by stat. 8 & 9 W. 3, c. 30. (17 G. 2, c. 38, s. 4.) *See ante*, *p.* 324. Where notice of appeal against a rate was given, but countermanded a day before the Sessions, an application was made to the Sessions for costs, but they refused to grant them, thinking they had no authority to do so, as the appeal had not been entered; and they refused to hear evidence of the respondents being unnecessarily put to great expense: upon a motion for a mandamus, it was argued that as the statute gave the Sessions the same power as to costs in appeals against rates, that they had under the statute of William as to costs in appeals against orders of removal; and as under the statute of William, costs may be given, not only where the appeal is determined, but also where merely notice has been given, the justices in this case had authority to grant the respondents their costs; but the Court said, that the reference to the statute of William, in stat. 17 G. 2, c. 38, only relates to the mode in which the costs are to be recovered, but that by the very words of the stat. 17 G. 2, c. 38, s 4, the determination of the appeal was made a condition precedent to the power to grant costs; they therefore refused the mandamus. *R.* v. *JJ. of Essex*, 8 *T. R.* 583. But where an appeal against a rate was entered and respited; and at the next Sessions was again respited at the instance of the appellant; and four days before the third Sessions, the respondents gave the appellant notice that they gave up all opposition to the appeal;

and at the Sessions, the rate was accordingly quashed upon motion, and the Court granted the appellant his costs: afterwards, in the Court of King's Bench, it was objected, that although the appeal was entered, it was not determined, and therefore the Sessions had no authority by the statute to grant costs; but the Court held, that the appellant proving his notice of appeal, as he must have done, and the Sessions allowing that appeal, was a determining of it, within the fair meaning and construction of the statute, and that the Sessions therefore had authority to allow costs. *R.* v. *Cawston*, 4 *D.* & *R.* 445. Where a mandamus was directed to justices, to allow costs to a party in whose favour an appeal had been determined, the Court, upon the return of the writ, held, that it was reasonable the justices should have the power of judging whether costs should be allowed or not; and therefore quashed the writ. *R.* v. *JJ. of the County of Nottingham*, 1 *Sess. Ca.*, 422.

SECTION 4.—*Appeal against the Appointment of Overseers of the Poor.*

In what Cases, and by whom.] By stat. 43 Eliz. c. 2, s. 1, four, three, or two substantial householders of every parish are to be nominated yearly in Easter week, or within one month after Easter, under the hand and seal of two or more justices of the peace of the same county, as overseers of the poor of such parish; which was extended to townships and vills, by 13 & 14 C. 2, c. 12, s. 21. And by 43 Eliz. c. 2, s. 6, it is provided, that if any person or persons shall find themselves grieved with any act done by the said justices of peace, then it shall be lawful for the justices of the peace at their General Quarter Sessions, or the greater number of them, to make such order therein as to them shall be thought convenient; and the same to conclude and bind all parties.

The overseer appointed may of course appeal against the appointment, as a person grieved by an act of the justices. And it has been holden that the parishioners also, as parties grieved within the meaning of the statute, may appeal against the appointment. *R.* v. *Forrest*, 3 *T. R.* 38. *See also R.* v. *JJ. of St. Alban's*, 3 *B.* & *C.* 698.

To what Sessions.] The stat. 43 Eliz. c. 2, s. 6, above-mentioned, fixes no time within which the appeal is to be brought. It is said in some works upon this subject, that this section of the statute of Elizabeth has been impliedly repealed by the stat. 17 G. 2, c. 38, s. 4, already mentioned in the last section, and that the appeal must be to the next Sessions, and notice of appeal given, &c., under the latter Act. The latter clause is no doubt a repeal of the former, as far as respects appeals against

rates, and against overseers' accounts; and as far also as respects the appointment by justices of an overseer, instead of one who has died, or removed from the parish, or become insolvent during his year of office; but what it has to do with the original appointment of overseers, in the ordinary course, at Easter, I am at a loss to find out. The 17 G. 2, c. 38, after making regulations, in the two first sections, as to overseers swearing to their accounts, and handing them over to their successors, and enabling justices to commit them in case of their refusal to do so, by sect. 3, enables justices to appoint another overseer instead of any overseer who shall die, or remove from the parish, or become insolvent, during the year of office; and by sect. 4, enacts, that "in case any person shall find him, her, or themselves aggrieved by any rate or assessment made for the relief of the poor, or shall have any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any person therein, or shall have any material objection to such account as aforesaid, or any part thereof, or shall find him, her, or themselves aggrieved by any neglect, act, or thing, done or omitted by the churchwardens and overseers of the poor, or by any of his Majesty's justices of the peace," he may appeal to the next General or Quarter Sessions, giving reasonable notice to the churchwardens and overseers of the poor, &c. This clearly has reference (as far as relates to this subject) merely to the appointments under the third section, and not to the ordinary original appointments, for the year of office, under the statute of Elizabeth. But in these latter cases, the appeal must be brought during the year of office, for it would be useless to bring it afterwards; and it may be prudent to lodge and try it at the next practicable Quarter Sessions, in order to avoid any question as to the authority of the justices to take cognizance of it, on the grounds above-mentioned. The appeal is of course to the Sessions for the county, riding, division, or borough, within which the parish is situate.

Notice of Appeal.] The notice should be such as is required by the particular Sessions, to which the appeal is intended to be. In those cases within stat. 17 G. 2, c. 38, s. 4, that section requires "reasonable notice;" and although the statute of Elizabeth does not require notice at all, yet as there are no recognizances or other proceedings from which an intention to appeal would otherwise be indicated to the respondents, the Sessions would require reasonable notice also in appeals under the statute of Elizabeth; and reasonable notice in both cases, would be deemed to mean the notice required by the rules of the Sessions. It is not necessary to state any grounds of appeal in the notice. In cases under the statute of Elizabeth, the notice, I think, should be directed and served upon the justices who made the appoint-

ment; in cases under 17 G. 2, c. 38, s. 4, as that statute requires the notice to be given to the churchwardens and overseers, it must be so directed and served accordingly, but I think it should also be directed to, and served upon, the justices, as it is an appeal against their act.

Proceedings at the Hearing, &c.] The proceedings at the hearing, are the same as in the other cases of appeal. The judgment is, that the nomination and appointment be quashed or confirmed. In cases within 17 G. 2, c. 38, s. 4, the Sessions have authority to award costs to the party in whose favour the appeal is determined; *see ante, p.* 336; in cases under the statute of Elizabeth, they have not.

SECTION 5.—*Appeal against the Allowance of Overseers' Accounts.*

In what Cases, and by whom.] By stat. 43 El. c. 2, s. 2, churchwardens and overseers of the poor were bound annually to make and yield up to two justices of the peace, an account of all monies received by them, &c.; and by stat. 17 G. 2, c. 38, s. 1, they are bound annually, within fourteen days after their year of office expires, to deliver to their successors in office, a true account in writing, verified on oath or affirmation before one or more justices of peace, and fairly entered in a book, and signed by such churchwardens or overseers, "of all sums of money by them received, or rated and assessed and not received; and also of all goods, chattels, stock and materials that shall be in their hands, or in the hands of any of the poor in order to be wrought; and of all monies paid by such churchwardens and overseers so accounting, and of all other things concerning their said office." And by stat. 50 G. 3, c. 49, s. 1, reciting these statutes, and reciting that it was expedient that two or more justices should be empowered to examine and correct, and to allow and approve every such account before the same shall be signed and attested,—it is enacted, that "in all cases where any such account is required to be made and yielded, and to be signed and attested as aforesaid, by virtue of the said last recited Act, every such account shall be submitted by the churchwardens and overseers to two or more justices of the peace of the county, dwelling in or near the parish or place to which such account shall relate, at a Special Sessions for that purpose to be holden within the fourteen days appointed by the said last recited Act for delivering in such account; and such justices shall and they are hereby authorized and empowered, if they shall so think fit, to examine into the matter of every such account, and to administer an oath or affirmation to such churchwardens and overseers of the truth of such account, and to disallow and strike

out of every such account all such charges and payments as they shall deem to be unfounded, and to reduce such as they shall deem to be exorbitant, specifying upon or at the foot of such account every such charge or payment and its amount, so far as such justices shall disallow or reduce the same, and the cause for which the same was disallowed or reduced; and it shall be lawful for such two or more justices and they are hereby required to signify their allowance and approbation of any such account under their hands, and to sign and attest the caption of the same at the foot of such account, in manner directed by the said last recited Act." *See also* 4 & 5 *W.* 4, *c.* 76, *s.* 47.

And by stat. 17 G. 2, c. 38, after providing for the churchwardens and overseers accounting, as above-mentioned, it is enacted by sect. 4, "that in case any person or persons shall have any material objection to such account as aforesaid, or any part thereof, or shall find him, her, or themselves aggrieved by any neglect, act, or thing done or omitted by the churchwardens and overseers of the poor, or by any of his Majesty's justices of the peace: it shall and may be lawful for such person or persons, in any of the cases aforesaid, giving reasonable notice to the churchwardens or overseers of the poor of the parish, township, or place to appeal to the next General or Quarter Sessions of the peace, for the county, riding, division, corporation, or franchise, where such parish, township, or place lies; and the justices of the peace there assembled are hereby authorized and required to receive such appeal, and to hear and finally determine the same."

It is not necessary that the accounts should have been examined and allowed at a Special Sessions, under stat. 50 G. 3, c. 49, above-mentioned, to give the Sessions jurisdiction of an appeal by a person objecting to the accounts; and where the justices at Sessions, thinking they had no jurisdiction on this account, dismissed the appeal, the Court of King's Bench, upon application, granted a mandamus to them to enter continuances and try it, saying that they were quite satisfied the Sessions had jurisdiction, and ought to have tried it. *R.* v. *JJ. of Colchester*, 5 *B. & Ald.* 535. *See R.* v. *Bartlett*, 1 *Bott*, 306. Such an examination at Petty Sessions would be necessary, in the case of an appeal by overseers, against the disallowance of items in their accounts, for it would be the very foundation of the appeal. *Vide post.*

Although the 17 G. 2, c. 38, s. 4, above mentioned, gives the appeal to any person having a material objection to the accounts, or person aggrieved, &c., in the alternative, yet the appellant must in fact be a parishioner, or some person interested in the matter of the objection, (although it is not necessary that this should appear on the face of the notice of appeal;) for if it appear in evidence that he is a mere stranger, the Sessions may refuse to hear him. *Per Lord Tenterden C.J., R.* v. *JJ. of*

Somersetshire, 7 *B. & C.* 681. But where overseers' accounts were appealed against by a parishioner, who was rated in only one of three rates during the respondents' year of office, but was rated immediately after it, and continued to be rated from that time until the appeal; and it was objected that he could not appeal, inasmuch as he was probably objecting to items of expenditure paid out of funds to which he did not contribute: but the Court held that he could, for he had an interest in the expenditure of the funds in the hands of the overseers, inasmuch as his own assessment would be larger, in proportion as the balance they ought to have was reduced by illegal payments. *R.* v. *Gwyer & Manley*, 4 *Nev. & M.* 158. Where of two overseers, one served as acting overseer the first six months, the other the last six months, and kept separate accounts for their respective periods; one appealed against the accounts of the other; and the Court of King's Bench held that he might do so. *R.* v. *JJ. of Gloucestershire*, 1 *B. & Adolph.* 1.

To what Sessions.] Formerly appeals against overseers' accounts were regulated by stat. 43 Eliz. c. 2, s. 6, and that did not limit the time for bringing it. But it has been holden that this section of the statute of Elizabeth, as regards appeals against overseers' accounts, was virtually repealed by the stat. 17 G. 2, c. 38, s. 4, above-mentioned; and that the appeal must now be to the next Sessions after the allowance, as required by that statute. *See ante*, p. 337, 338. *R.* v. *JJ. of Worcestershire*, 5 *M. & S.* 457. *R.* v. *JJ. of Berkshire, Bott*, 308. And this means the next practicable Sessions after the allowance. Therefore where the accounts were allowed on the very last day for giving notice of appeal for the next Sessions, and it did not appear that the allowance was known even then to the appellant, the Court held that the appellant was not bound to enter his appeal at the next Sessions, but might enter and try it at the following Sessions. *R.* v. *JJ. of Dorsetshire*, 15 *East*, 200.

By stat. 17 G. 2, c. 38, s. 4. already mentioned (*ante*, p. 326,) it is enacted, that, when the appeal is lodged at the next Sessions, "if it shall appear to the said justices that reasonable notice was not given, then they shall adjourn the said appeal to the next Quarter Sessions, and then and there finally hear and determine the same." Where the accounts, though allowed on the 27th March, were not delivered to the new overseers until the first day of the next Sessions; the appeal was entered at the Midsummer Sessions, and, no notice of appeal having been given, was then respited to the Michaelmas Sessions (although the respondents opposed it;) and at these latter Sessions the justices quashed the allowance: upon a motion to quash this order of Sessions, on the ground that they could only respite, where the appellant had not time to give notice of appeal for the

Sessions, the Court said they could not interfere; it was quite clear that the appellant was not bound to appeal at the Easter Sessions; and at the Midsummer, it was for the justices, and not for the Court, to decide whether they ought to respite the appeal to Michaelmas. *R.* v. *Thackwell*, 4 *B.* & *C.* 62. *See R.* v. *JJ. of Wilts*, 8 *B.* & *C.* 390.

Formerly appeals against overseers' accounts, as well as against rates, for a parish within a borough, might be to the county Sessions; *see ante*, p. 326; but since the Municipal Corporation Act, 5 & 6 W. 4, c. 76, the appeal is to the borough Sessions. *See ante*, p. 326.

Notice of Appeal.] The same statutes (17 G. 2, c. 38, s. 4. and 41 G. 3, c. 23, s. 4, 5.) which regulate the notice in appeals against rates, also regulate it in appeals against overseers' accounts; and I have little more, therefore, to do, than to refer the reader to what has been already stated upon the subject, *ante*, p. 329. The stat. 17 G. 2, c. 38, s. 4, requires that a "reasonable notice" shall be given; and the Courts of Quarter Sessions require, in such a case, that the notice should be in conformity with their respective rules upon the subject of notice in appeals generally. *See ante*, p. 329, 275. It must be in writing, and signed by the party giving the same, or his attorney; and the particular causes or grounds of appeal shall be stated in it. 41 G. 3, c. 23, s. 4. Where the notice stated that the appellant "would object to the following items or charge of payments in the said accounts, that is to say," and then set out the items objected to, but did not state why he objected to them, the Court held the notice to be bad. *R.* v. *Mayall*, 3 *D.* & *R.* 388. *R.* v. *Sheard, et al.* 2 *B.* & *C.* 856. It is not necessary, however, to state in it that the appellant is a parishioner, or otherwise aggrieved, because the statute (17 G. 2, c. 38, s. 4,) gives the appeal, not merely to a party aggrieved, but to any person having a material objection to the accounts. *R.* v. *JJ. of Somersetshire*, 7 *B.* & *C.* 681, *n.* At the trial, however, we have seen, (*ante*, p. 340,) that the appellant must show that he is a parishioner or otherwise interested in the accounts; for a mere stranger cannot appeal. *Id.* The notice must be delivered to or left at the places of abode of the churchwardens and overseers of the poor of the parish, &c., or any two of them; 41 G. 3, c. 23, s. 4. *and see* 17 *G.* 2, *c.* 38, *s.* 4; and should in strictness be directed to the churchwardens and overseers; but where it was directed to and served upon the overseers only, and not the churchwardens, the overseers being the only parish officers who had received or disbursed money, and the accounts being made up and passed in their names only, the Court held it to be sufficient, although the appeal, as entered, was in form against the churchwardens and overseers. *R.* v. *JJ. of Norfolk*, 2 *B.* & *Adolph.*

944. Both statutes (17 G. 2, c. 38, s. 4, and 41 G. 3, c. 23, s. 4,) require the notice to be given to the "churchwardens and overseers;" they mean evidently the persons whose accounts are appealed against, and who probably are no longer churchwardens or overseers at the time the notice is given.

But by the stat. 41 G. 3, c. 23, s. 5, "with the consent of the overseers, signified by them or their attorney in open Court," the Sessions may hear the appeal, although no notice have been given, or hear and decide upon grounds of appeal not stated in the notice. Where the notice of appeal was bad on the face of it, as stating merely the items objected to, but not the grounds of objection to them; but it appeared that on the day before the trial, the attornies for both parties signed a written consent to admit that the payments objected to were made, and that three of them were for debts contracted by former overseers; the Sessions held this to be a waiver of the objection to the notice, and tried the appeal: But the Court of King's Bench held that the consent was no waiver, as it was not made by the respondents' attorney in open Court, as directed by this statute; and that as this consent, coupled with the defective notice, did not together amount to a sufficient notice, the Sessions had no right to try the appeal. *R.* v. *JJ. of Somersetshire*, 2 *B.* & *C.* 856. 4 *D.* & *R.* 480.

Proceedings at the Hearing.] When the appeal is called on, the respondents, in strictness, may call upon the appellant to prove his notice of appeal, in the same way as in an appeal against the rate. *See ante*, p. 331. The trial then proceeds.

I believe it is usual at most Sessions for the respondents to begin: by the notice of appeal, they are apprized of the items objected to, and of the grounds of objection to them; if the appellant by his notice say, that the payments charged were not in fact made, the respondents may prove that they were; if the appellant object to their legality on certain grounds, the respondents may shew that the objection does not apply, or is unfounded in point of law. The respondents' counsel addresses the Court upon these topics, and then calls his witnesses.

The appellant's counsel, on the other hand, opens his case, argues the points of law arising in it, and calls witnesses, if necessary, to prove it. If he call witnesses, the respondents' counsel is of course entitled to the general reply.

Inhabitants of the parish, although rated to the poor, are competent witnesses for either party. 54 *G.* 3, *c.* 170, *s.* 9. *See ante*, p. 146, 147.

As to the payments which an overseer may legally make, and which, if made, must of course be allowed him in his accounts, it is material to consider the subject at some length.

1. All sums necessarily expended by them in the maintenance

of the poor, in pursuance of stat. 43 Eliz. c. 2, or other statutes upon the subject, shall be allowed to them. *See* 43 *Eliz. c.* 2, *s.* 1. 22 *G.* 3, *c.* 83, *s.* 8. 41 *G.* 3, *c.* 9, *s.* 2.

2. All payments which they are obliged to make by any statute, such, for instance, as their parish's proportion of the county rate, (*see* 12 *G.* 2, *c.* 29, *s.* 2,) the premiums paid by them with parish boys when apprenticed to the sea service, (2 & 3 *A. c.* 6, *s.* 2,) or the like, shall be allowed to them.

3. All sums paid by them to the constable, in pursuance of stat. 18 *G.* 3, *c.* 19, *s.* 3, 4.

4. The expenses of litigating settlements, *Per Ashurst, J., R.* v. *Essex*, 4 *T. R.* 595, and such other law expenses as have been properly incurred, *R.* v. *Micklefield*, 1 *Bott*, 91, shall be allowed to them. But where a pauper, guilty of riotous conduct towards an overseer, being given in charge to a constable, was rescued; and the rescuer being indicted and acquitted, the overseer paid the costs of the prosecution, and charged them in his accounts: the Court held that these costs could not be charged to the parish by the overseer, as expenses incurred by him in the execution of his office. *R.* v. *Bird et al.* 2 *B.* & *Ald.* 522.

5. The salary of the assistant overseer (if any have been appointed,) under stat. 59 G. 3, c. 12, s. 7, shall be allowed to them. But an overseer cannot charge for a salary to himself: and therefore, where, upon appeal against an overseer's accounts, on the ground that a salary had been allowed to him, and was charged in the account, and the Sessions allowed it: the Court of King's Bench held, that no such charge could legally be made, saying, that an overseer has no right to a salary for his services; it being suggested, however, that this was really not a salary, but a sum paid to him in respect of the maintenance of the poor, the Court quashed the order of Sessions, and remitted the case to the Sessions to rehear the appeal. *R.* v. *Glyde*, 2 *M.* & *S.* 323, *n.* Even where, in a very extensive parish, 21 miles in circumference, containing 13,000 inhabitants, and the poor rates annually amounting to upwards of 8000*l.*, the common law vestry, who managed the affairs of the parish, came to a resolution not to employ an assistant overseer, on account of the then embarrassed state of the parish, but directed the overseers to call in what assistance they should stand in need of, and they also resolved that a collector should be paid a poundage for collecting the rates; the overseers accordingly employed and paid persons for making out the poor rates and copies, and making up the accounts, and they paid the collector his poundage: these items being objected to on appeal, and the Sessions having disallowed

them, the Court of King's Bench held that the Sessions were right in doing so; it had been often determined that overseers cannot be allowed a salary, neither can they employ others at a salary at the public expense; and as to the vestry having directed it, they had no authority by law to do so. *R.* v. *Gwyer & Manley*, 4 *Nev. & M.* 158.

6. Where an overseer has advanced his own money for the maintenance, &c. of the poor, he may repay himself out of any money he afterwards receives on account of the poor, during his year of office; *Per Holt, C. J. Tawney's case*, 2 *Salk.* 531; or the succeeding overseers may levy such sums as remained due to him from the rate payers, at the expiration of his office, and reimburse him out of the amount; 17 G. 2, c. 38, s. 11; and may, out of any money they may collect in pursuance of any rate by them made for the relief of the poor, reimburse him for any sum he may have advanced during a time when there was no rate, or whilst an appeal was depending which affected the whole rate, or upon the hearing of which the whole rate might have been quashed. 41 *G.* 3, *c.* 23, *s.* 9. *See Tawney's case*, 2 *Salk.* 531. *R.* v. *Rotherhithe*, 8 *Mod.* 338. But where an overseer, appointed for four successive years, made no rate in the three first years, but during that time advanced the necessary sums expended out of his own money: the Court held that he could not make a rate in the fourth year, for the purpose of reimbursing himself the money so advanced by him in the other three; they said that overseers should not include several years in their accounts, but should confine them entirely to that year in which they are directed by law to be passed. *R.* v. *Goodcheap*, 6 *T. R.* 159.

Lastly, by the Poor Law Amendment Act, (4 & 5 W. 4, c. 76, s. 89,) "All payments, charges and allowances, made by any overseer or guardian, and charged upon the rates for the relief of the poor, contrary to the provisions of this Act, or at variance with any rule, order or regulation of the said Commissioners made under the authority of this Act, shall be and the same are hereby declared to be illegal, any law, custom or usage to the contrary notwithstanding; and every justice of the peace is hereby required to disallow, as illegal and unfounded, all payments, charges or allowances, contrary to the provisions of this Act, or to any such rule, order or regulation of the said Commissioners, which shall be contained in any account of any overseer of the poor or guardian, which shall be presented for the purpose of being passed or allowed."

The following are the Rules, or rather Instructions of the Poor Law Commissioners, for the Allowance of Overseers' Accounts:

"Poor Law Commission Office, Somerset House,
1st March, 1836.

To the Churchwardens, Overseers, and other Officers required to account for the Expenditure of the Poor Rates.

1. By the order for keeping, examining, and auditing accounts, issued by the Commissioners under the authority of the Poor Law Amendment Act, it is required that the accounts of each separate parish, and also the accounts of every Union, shall be made up quarterly, and duly audited.

2. Under the late mode of administration, much money was unequally collected, or was altogether omitted to be collected, and much was improperly expended. Either from ignorance or neglect, many illegal practices have crept into the administration of relief, which, from their notoriety and general prevalence, have been supposed to be legal, and have frequently been continued in perfect confidence of their correctness. The Commissioners are aware that many of the charges thus illegally defrayed out of the poor-rates were incurred for useful public purposes, but all such illegal charges they are bound to disallow; and they have accordingly issued directions to the auditors to disallow them in the quarterly audit of the accounts. The Commissioners have directed the following Instructions to be issued, to prevent you from incurring such charges unwittingly, and to save you from the consequences of their disallowance. Some of these instructions may not be strictly applicable to individual parishes governed under the provisions of local Acts. The nature of such modifications as may be necessary in each case cannot be here specified, but will readily suggest themselves to persons acquainted with the provisions of the Acts in question.

3. Under the law as it stood previously to the passing of the Poor Law Amendment Act, the churchwardens and overseers were alone answerable for the whole of the expenditure for the relief of paupers; and the accounts of masters of workhouses, and other subordinate officers, were necessarily included in the accounts of the churchwardens and overseers. Under the Poor Law Amendment Act, the obligation to account is extended to every officer or other person to whom money, or any goods, stock, or other property is intrusted; and the account must be regularly rendered for goods or stock as well as for money.

4. Formerly it was generally understood that the order of a magistrate or other superior authority, to any parish officer, was to be implicitly obeyed without any examination of its validity, and that the order of itself exonerated the officer to whom it was directed, from all legal responsibility; but, by the 96th section of the Poor Law Amendment Act, it is enacted that thenceforth, from the passing of the statute, 'no overseer shall be liable to any prosecution or penalty for not carrying into execution any

illegal order of such justices or guardians; any law or statute to the contrary notwithstanding.' As the accounts of every officer may be disallowed, so every officer, whilst he is bound to obey all orders which are legal, is equally bound to disobey all orders which are illegal, and will be personally answerable in either case.

5. On entering upon your office, you must obtain from your predecessors the balances of rates and other monies in their hands, and also ascertain whether there are any charges relating to the past year unliquidated. You must bear in mind that the law protects the present rate-payers from being charged with expenses incurred by former officers; and that, as a general rule, no items which relate to a past year, can properly be brought into the account for the current year. The exceptions to this rule are, where the preceding officers have, from unavoidable circumstances and not from neglect, been unable to collect the rates, in which case they may be reimbursed for any advances made by them to the extent of the arrears of rates to be collected. Another admissible exception is, where the preceding overseers may have advanced sums of money during a time when no rate could have been enforced; as, where an appeal has been depending, by which the whole of the rate was affected, in which case the succeeding overseers may reimburse their predecessors in office. So, again, where a legal charge has accrued so late as to render it impossible to make and collect a rate of which the former overseers might have been reimbursed, in which case it is lawful for the succeeding overseers to pay the charge.

6. It should be observed that, by the 47th section of the Poor Law Amendment Act, 'All balances due from any guardian, treasurer, overseer, or assistant overseer, or other person having the control and distribution of the poor-rate, or accountable for such balances, may be recovered in the same manner as any penalties and forfeitures are recoverable under this Act; provided, nevertheless, that no such proceeding shall discharge the liability of the surety of any such treasurer, overseer, or other person as aforesaid.'

7. All penalties and forfeitures under this Act may be levied by distress and sale of goods and chattels, by warrant under the hands of two justices; and in case such forfeitures be not forthwith paid, the justices may order the offender to be kept in custody until return can conveniently be made to the distress-warrant, unless the offender shall give sufficient security for his appearance on the return-day of the warrant; but if, upon the return of the warrant, there appears that no sufficient distress can be had, the offender may be committed to the common gaol or house of correction, to remain without bail or mainprize, unless such penalties and all reasonable charges be sooner paid.

8. By the Act 43d of Eliz. c. 2, s. 1, the churchwardens and

overseers are directed to raise, weekly or otherwise, competent sums of money for the relief of the poor. By the 4th section, the same officers are armed with powers to enforce the payment of such money and 'of all arrearages.' But the parish officers having been allowed a discretion, in point of time, for the collection of rates, abusive practices have crept in, under which the collections have been made at much longer intervals than those intended by the legislature. By neglecting to make frequent collections, large amounts have been required at each contribution from the rate-payer, and many persons who would have had no difficulty in paying smaller sums at more frequent intervals, have become defaulters. Through the length of these intervals, payment has also been frequently avoided, by the removal of the rate payers out of the parish. It has also been a mal-practice of churchwardens and overseers, to favour some rate-payers by allowing them to continue in arrear for former rates, while more recent rates were in course of collection. By these neglects and mal-practices, the persons who pay the rates regularly have been unduly burdened, and much money has often been lost to the parish. It has, moreover, been a practice to harass particular individuals with collections, before the regular collection is made from the rate-payers generally.

9. To abate the evils which have thus grown up, and to limit the discretionary power under which they have been generated, it is now provided that the accounts shall be audited quarterly, and it will hereafter be requisite that you should regularly and impartially collect the rates, and pay all expenses incurred, and as far as practicable confine the quarterly accounts to the charges of the quarter.

10. It is proper to caution you that the quarterly audit now directed does not dispense with the usual yearly audit, and that any illegal charges which may escape the notice of, or be allowed by the auditors, at the quarterly audit, may nevertheless be disallowed or reduced by the justices at the yearly audit. The jurisdiction of the Court of Quarter Sessions, on appeals from the allowances or disallowances of the yearly accounts of overseers by the justices, remains in force, and the penalties to which overseers neglecting to account, or to deliver over balances, or parish property, were made liable by former Acts, may still be imposed by justices of the peace.

11. By the statute 43d of Elizabeth, the overseers or collectors of rates are bound to collect, equally, the rates from all persons. It is only upon the authority of justices that any individual occupier can be excused from the payment of rates. If, therefore, you find any person occupying a tenement, who from poverty is incapable of paying his rates, the only course you can legally take is to submit the case to the magistrates, with evidence of the fact of inability—such as his being only in partial employment

—his having suffered from calamities—and his living in a state of privation of the ordinary comforts or conveniencies. Proof must be given of a state approaching to pauperism on the part of any occupier, to exempt him from the payment of the rates. Having upon such evidence, and not upon the mere assertion of the party, received the magistrates' order to excuse the party from the payment of the rate assessed upon him, you must preserve such order; for unless you are enabled to produce it as a voucher, you may be compelled to pay the amount which you would otherwise have been called upon to collect.

12. The only other deductions allowed to be made in the collection of the rates are, where property, not subject to the rate, has been assessed by mistake, as where property is exempted, or where it is unoccupied; also where persons have removed within the interval reasonably allowed for the collection of the rate, and have thus escaped payment in the regular course; but in every such case you are bound to collect the arrear thus accruing, and if necessary to resort to legal means for recovering the amount. You must be prepared with evidence to establish the grounds for these deductions from the full amount of the rate allowed; and, until the rate already allowed has been thus fully collected, no new rate must be applied for; and if applied for in any case, the justices are bound to withhold their sanction, and to require that the whole of the old rate should be first collected and accounted for.

13. Besides the poor-rates, you are bound to collect and bring to account the monies derivable to the parish from other sources, namely—

All rents, dividends, or other funds arising from bequests vested in the parish officers for the relief of the poor.

All payments by the natural relations of paupers, or by the parents of bastard children.

All repayments of relief given by way of loan, under the 59th G. 3, c. 12, or under the Poor Law Amendment Act, &c.

All repayments, by other parishes, of the cost of relief to paupers under order of removal, or otherwise.

All earnings by paupers maintained by the parish, in or out of the house.

All penalties, fines, and forfeitures, wholly, or in part, for the use of the poor;

As well as all other monies applicable to the same use.

14. Your attention will next be required to your duties in the expenditure of the rates and other monies so collected; and herein you must bear in mind, that usage is of no legal authority in the construction of the statute of Elizabeth, by which the poor-rates are established. The law has not given to the parish officers or even to the vestry any power of charging or of taxing

as such justices shall disallow or reduce the same, and the cause for which the same was disallowed or reduced.'

18. With relation to the *unfounded* charges, the primary general rule has already been stated: namely, that all charges on the poor-rates are unfounded which are not authorized by some statute. With relation to the *exorbitant* charges, the general rule is, that all charges are exorbitant on which the overseers have paid any person for goods or services, at a higher rate than such goods or services were offered by any other competent person, or than they might be obtained for by a private individual resident within the same district.

19. The charges which must be struck out as unfounded, are those for relief given to persons who are not legally entitled to it, as not being in a state of necessity from destitution, and with relation to whom the securities prescribed by statute, or by the regulations of the Poor Law Commissioners, under the Poor Law Amendment Act, have not been complied with. By the 9th G. 1, c. 7, s. 2, it is provided that 'no officers of any parish shall (except upon *sudden* and emergent occasions) bring to the account of the parish, any monies he shall give to any poor person of the same parish, who is not registered in such book or books to be kept by the said parish, as a person entitled to receive collection; and as monies for the relief of such persons are directed not to be brought to the account, they must, if entered, be struck out. In Unions, the 'Pauper Description Book,' the 'Weekly Relief Book' for out-door paupers, and the 'Admission Book' for in-door paupers, prescribed by the Poor Law Commissioners, will supersede the collection book required by the 9th G. 1.

20. The cases of emergency which may legally be relieved, are generally cases of sudden and calamitous accident; and it is provided by the Poor Law Amendment Act, s. 54, that in parishes included in any Union, all such relief shall be given in kind, but not in money. The relief to be given will therefore be medicine, food, or clothing, as the nature of the case may be. No case can be considered a case of emergency, when there is time for the parish officers to put the pauper requiring relief upon the collection book as provided, and in general two or three days will be found to be the utmost limits of a case of emergency.

21. Those charges must be deemed unfounded and be disallowed in cases where, although it may have been lawful to give some relief, the relief actually given differs from that directed by the Poor Law Amendment Act, or by other statutes, or by the rules, orders, and regulations of the Poor Law Commissioners. By the 89th section of the Poor Law Amendment Act it is provided: 'That all payments, charges, and allowances made by any overseer or guardian, and charged upon the

rates for the relief of the poor, contrary to the provisions of this Act, or at variance with any rule, order, or regulation of the said Commissioners, made under the authority of this Act, shall be, and the same are thereby declared to be illegal; any law, custom, or usage to the contrary notwithstanding. And every justice of the peace is thereby required to disallow, as illegal and unfounded, all payments, charges, or allowances, contrary to the provisions of this Act, or to any such rule, order, or regulation of the said Commissioners, which shall be contained in any account of any overseer of the poor or guardian, which shall be presented for the purpose of being passed or allowed. Provided always, that no allowance by any justice shall exonerate or discharge such overseer or guardian from any penalty or legal proceeding to which he may have rendered himself liable by having acted contrary to the rules, orders, and regulations of the said Commissioners, or to the provisions of the Act.' It will therefore be necessary to bear carefully in mind the rules and orders of the Commissioners, as to the mode in which relief is to be given.

22. Those charges must also be disallowed, as unfounded, which are incurred independently of, or against the directions of the board of guardians, if your parish is included in a Union, or of a select vestry, or other persons exclusively authorized to give direction in the matter to which the payment relates, or to order relief under the 54th section of the Poor Law Amendment Act; since the only foundation for the charge in such cases is the order of an officer so authorized, the payment must be in obedience to that order, or the charge must be disallowed at the audit.

23. With respect to the charges more commonly found in overseers' accounts, but not authorized by any statute, they are such as follow, namely—

Charges for the performance of services, for which the law has not sanctioned any payment:—The duties of overseers are compulsory, and are required to be performed gratuitously. Those upon whom the office is imposed, are legally bound to perform the whole of the duties themselves, and are not entitled to charge for assistance. Any of the following charges are therefore entered illegally, where treated as payments for the services of constables, vestry clerks, &c.

Charges for coroners' inquests, and charges properly payable out of the church-rates, must be disallowed, as unfounded charges upon the poor-rates; so also

Charges for salaries to overseers, under the title of 'permanent overseers.'

Charges for the trouble of the overseer or other person in paying county-rates.

To the Justices who have to examine and to allow or disallow overseers' accounts, and also to those who are interested in appeals against such accounts, the following copy of the Instructions sent by the Poor Law Commissioners to the Auditors of the different Unions, will, I think, be acceptable.

"Poor Law Commission Office, Somerset House,
25th June, 1836.

To the Auditor of ——— Union.

SIR,—Although the order for keeping, examining, and auditing the accounts issued to your Union contains a general outline of your duties as auditor, yet as it is impossible in an instrument of that nature to convey such detailed explanations as are necessary for the due understanding of the subject, the Poor Law Commissioners for England and Wales deem it right to address to you this communication, with the view of relieving you from those doubts and difficulties which (from the various letters of inquiry and applications for information received by the Commissioners) appear to have embarrassed several of the auditors in the performance of their duties.

The Commissioners were well aware that the introduction of a strict and efficient system of auditing the accounts connected with the relief of the poor, in lieu of the annual examination by the magistrates, which from unavoidable circumstances has in many cases been of a formal nature, might expose the parties bound to account to some personal loss in consequence of payments made by them, which, although not authorized by law, had the sanction of usage, and which from having uniformly been made through a long course of years, might have appeared to be both legal and necessary. The Commissioners accordingly directed the inclosed instructional letter to be transmitted previous to the commencement of the last quarter, to all parochial and Union officers bound to account, containing full information as to the description of the expenditure which they are by law authorized to continue. To this letter they request your particular attention, as it will serve also for your own guidance as to the monies which it will be your duty to see brought to account; and likewise as to the description of the charges which you will be bound to disallow.

1. The first step as a preliminary to the audit, will be to forward a notice to the Union officers, for the production of the accounts; and also to direct the clerk of the Union to cause notice to be served on the several parish officers of the parishes included in the Union, who are still bound to account.

2. These notices should be sent, or served, six clear days previous to the respective days which you shall appoint for the audit of the Union and parochial accounts respectively. You

Charges for filling up Parliamentary returns (except such charges as are allowed by the 11 G. 4, and 1 W. 4, c. 30, s. 10, for making the population returns.)

Charges for loss of time in attending justices or revising barristers.

Charges for dinners, or other illegal charges usually concealed under the head of 'expenses of attendance.'

Charges for dinners and the entertainments of parish officers, often concealed under the item, 'expenses of meetings,' or otherwise.

Charges for the extirpation of vermin; for killing birds and badgers.

Charges for marrying paupers, also fees for churching women, and christening children, when not receiving relief within a workhouse; likewise excessive charges for tolling bells at paupers' funerals.

Charges for the prosecution of public offences: such prosecutions being in no way incidental to the office of overseer, unless made so by the express provision of some statute.

24. The parish officers who are bound to account for the expenditure of the parish monies, are also bound to account in a proper form. The accounts of any officer which are not made out conformably to the rules of the Poor Law Commissioners, declaring the manner in which accounts are to be kept, cannot be received.

25. Where a general balance-sheet is prepared, without the requisite detail of dates and expenditure, or where gross items are inserted which may conceal the nature of the individual charges and payments, and thus place impediments in the way of determining whether the receipts be completely accounted for, or whether any of the charges are unfounded or exorbitant, the accounts must be disallowed—and no items named 'sundries,' 'miscellaneous,' or 'incidental expenses,' can be admitted, without the whole of the details included under those heads being first fully explained on the face of the account.

26. You must also be prepared to prove that the regulations of the Commissioners, for giving notice to the rate-payers, have been observed, and that proper opportunities have been afforded to all who choose to examine the accounts; and you must also be prepared to verify upon oath the accuracy of all your charges, if required to do so.

You are requested to transfer this communication to your successors in office.

By order of the Board of Poor Law Commissioners for England and Wales,

EDWIN CHADWICK, Secretary."

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The Commissioners were well aware that the introduction of a strict and efficient system of auditing the accounts connected with the relief of the poor, in lieu of the annual examination by the magistrates, which from unavoidable circumstances has in many cases been of a formal nature, might expose the parties bound to account to some personal loss in consequence of payments made by them, which, although not authorized by law, had the sanction of usage, and which from having uniformly been made through a long course of years, might have appeared to be both legal and necessary. The Commissioners accordingly directed the inclosed instructional letter to be transmitted previous to the commencement of the last quarter, to all parochial and Union officers bound to account, containing full information as to the description of the expenditure which they are by law authorized to continue. To this letter they request your particular attention, as it will serve also for your own guidance as to the monies which it will be your duty to see brought to account; and likewise as to the description of the charges which you will be bound to disallow.

1. The first step as a preliminary to the audit, will be to forward a notice to the Union officers, for the production of the accounts; and also to direct the clerk of the Union to cause notice to be served on the several parish officers of the parishes included in the Union, who are still bound to account.

2. These notices should be sent, or served, six clear days previous to the respective days which you shall appoint for the audit of the Union and parochial accounts respectively. You

should ascertain also that notice of the day appointed for the audit of the Union accounts has been affixed to the door of the workhouse, and that the Union ledger, and the abstract of the Union accounts, have been left open in the board room of the guardians for the inspection of the rate-payers.

3. When the accounts are submitted to you, it will be your duty to see that they are made out in the form prescribed by the Commissioners. . You will observe that by the before-mentioned order for keeping, examining and auditing accounts, it is directed that the clerk to the board of guardians shall, at the common charge of the Union, provide the requisite books and forms of accounts. Where proper books have not been provided, you will give instructions for immediately supplying the deficiency, and if you deem it necessary you will report the omission to this office; and where the accounts have been erroneously entered, you will take measures for the prevention of the irregularity in future. You will bear in mind always, that a main part of your duty as an auditor, will be to examine, as part of the accounts, all returns or books ordered to be kept as a record of any operations or matters which relate to the management of the relief. You will therefore examine the pauper description lists; the medical relief lists; the register of sickness and mortality; to see that they are correctly made out, observing that these accounts are to be kept to shew the main facts upon which relief is given, and serve as the justification of the officer and the board of guardians in granting relief, and also as a record of the treatment given. You will also see that in the quarterly Union abstracts, the quantities as well as the qualities, and the prices of the goods supplied are correctly stated, and returned to the Commissioners. The officers will be responsible for any essential mis-statement contained in these accounts.

4. Having ascertained that the necessary preliminaries and forms have been observed, you will enter upon an examination of the accounts in detail. In order to facilitate such examination the Commissioners have to offer to you the following instructions and explanations; and first, as respects the parochial accounts.—In the Parochial as well as in the Union accounts you will ascertain that all sums which ought to be received, and all sums which have been actually received, are duly accounted for; and that all that is stated to have been expended has actually been expended: and you will determine whether the actual expenditure is truly stated, and has been made in conformity to the law.

5. You will observe that it forms no part of your duties as auditor, to determine questions as to the proportions or equality of the assessment; the justices at Sessions being the proper judges to decide on such points.

6. After the examination of the rate books, and the collectors'

accounts, you will next call for the terriers of lands, and inventories of stock, and see that the income from those sources, if applicable to parish purposes, is properly brought to account. You will also examine the paupers' description lists for the cases of those to whom relief has been given by way of loan; as well as of persons bound to contribute towards the support of pauper relations, and ascertain the amount of arrear, and the amount recovered, of this class of payments.

7. It is your duty to aid to the utmost in the advancement of a regular systematised and efficient management in parishes and unions; and it may be considered as evidence of improved management, when the minor sources of income, and the outlets of expenditure (which have hitherto been most frequently overlooked,) are found to be vigilantly examined and secured. See paragraph 1, of the Instructional Letter to Parish Officers.

8. In examining the accounts of the relieving officers you will not pass charges for relief given to any person whom the guardians did not previously authorize the officers to relieve, or the relief which the guardians did not confirm after it was given.

9. In auditing this description of accounts, you will keep constantly in view the orders of the Commissioners for regulating the mode in which relief may be given to the various classes of paupers. You will examine the pauper description lists, to ascertain how far the descriptions are truly and completely entered by the proper officer; and you will then compare them with the statements of the amount of relief actually given, and especially examine the cases of emergency, and the alleged grounds of deviation from the prescribed and ordinary mode of administering relief, if such shall occur.

10. As regards casual relief, from the facilities arising from neglect, consequent on the trivial nature of the items, when viewed separately, and from the too easy admission of overcharges as mistakes, considerable frauds have been heretofore committed in this description of expenditure. You will therefore let no such class of items pass without due inquiry and investigation.

11. When you find that the relief which has been given to a pauper of any class has been given in contravention of the orders and regulations of the Commissioners, you are bound to disallow such relief.

12. In examining the accounts of the master of the workhouse, you will ascertain that all the goods have been duly ordered; and you will compare the quantities of provisions consumed, with the number of paupers actually in the workhouse at different periods of the quarter, as shewn in the admission and discharge book, and you must allow no charge to pass in respect of any pauper who was not regularly admitted.

13. With regard to the books of the medical officer, you will

should ascertain also that notice of the day appointed for the audit of the Union accounts has been affixed to the door of the workhouse, and that the Union ledger, and the abstract of the Union accounts, have been left open in the board room of the guardians for the inspection of the rate-payers.

3. When the accounts are submitted to you, it will be your duty to see that they are made out in the form prescribed by the Commissioners. You will observe that by the before-mentioned order for keeping, examining and auditing accounts, it is directed that the clerk to the board of guardians shall, at the common charge of the Union, provide the requisite books and forms of accounts. Where proper books have not been provided, you will give instructions for immediately supplying the deficiency, and if you deem it necessary you will report the omission to this office; and where the accounts have been erroneously entered, you will take measures for the prevention of the irregularity in future. You will bear in mind always, that a main part of your duty as an auditor, will be to examine, as part of the accounts, all returns or books ordered to be kept as a record of any operations or matters which relate to the management of the relief. You will therefore examine the pauper description lists; the medical relief lists; the register of sickness and mortality; to see that they are correctly made out, observing that these accounts are to be kept to shew the main facts upon which relief is given, and serve as the justification of the officer and the board of guardians in granting relief, and also as a record of the treatment given. You will also see that in the quarterly Union abstracts, the quantities as well as the qualities, and the prices of the goods supplied are correctly stated, and returned to the Commissioners. The officers will be responsible for any essential mis-statement contained in these accounts.

4. Having ascertained that the necessary preliminaries and forms have been observed, you will enter upon an examination of the accounts in detail. In order to facilitate such examination the Commissioners have to offer to you the following instructions and explanations; and first, as respects the parochial accounts.—In the Parochial as well as in the Union accounts you will ascertain that all sums which ought to be received, and all sums which have been actually received, are duly accounted for; and that all that is stated to have been expended has actually been expended: and you will determine whether the actual expenditure is truly stated, and has been made in conformity to the law.

5. You will observe that it forms no part of your duties as auditor, to determine questions as to the proportions or equality of the assessment; the justices at Sessions being the proper judges to decide on such points.

6. After the examination of the rate books, and the collectors'

accounts, you will next call for the terriers of lands, and inventories of stock, and see that the income from those sources, if applicable to parish purposes, is properly brought to account. You will also examine the paupers' description lists for the cases of those to whom relief has been given by way of loan; as well as of persons bound to contribute towards the support of pauper relations, and ascertain the amount of arrear, and the amount recovered, of this class of payments.

7. It is your duty to aid to the utmost in the advancement of a regular systematised and efficient management in parishes and unions; and it may be considered as evidence of improved management, when the minor sources of income, and the outlets of expenditure (which have hitherto been most frequently overlooked,) are found to be vigilantly examined and secured. See paragraph 1, of the Instructional Letter to Parish Officers.

8. In examining the accounts of the relieving officers you will not pass charges for relief given to any person whom the guardians did not previously authorize the officers to relieve, or the relief which the guardians did not confirm after it was given.

9. In auditing this description of accounts, you will keep constantly in view the orders of the Commissioners for regulating the mode in which relief may be given to the various classes of paupers. You will examine the pauper description lists, to ascertain how far the descriptions are truly and completely entered by the proper officer; and you will then compare them with the statements of the amount of relief actually given, and especially examine the cases of emergency, and the alleged grounds of deviation from the prescribed and ordinary mode of administering relief, if such shall occur.

10. As regards casual relief, from the facilities arising from neglect, consequent on the trivial nature of the items, when viewed separately, and from the too easy admission of overcharges as mistakes, considerable frauds have been heretofore committed in this description of expenditure. You will therefore let no such class of items pass without due inquiry and investigation.

11. When you find that the relief which has been given to a pauper of any class has been given in contravention of the orders and regulations of the Commissioners, you are bound to disallow such relief.

12. In examining the accounts of the master of the workhouse, you will ascertain that all the goods have been duly ordered; and you will compare the quantities of provisions consumed, with the number of paupers actually in the workhouse at different periods of the quarter, as shewn in the admission and discharge book, and you must allow no charge to pass in respect of any pauper who was not regularly admitted.

13. With regard to the books of the medical officer, you will

have to consult them chiefly in order to see that the descriptions of the maladies of the paupers in the relieving officer's books are correct, and that the allowances of wine and diet or other special relief for the sick appearing in the books of the relieving officer or the master of the workhouse, were duly sanctioned by the medical officer, and approved by the guardians.

14. You will check the several chief accounts in the manner following:—The out relief account in the ledger, by comparing it with the subsidiary books of the relieving officer, and the weekly minutes of the settlement of the same in the minute book of the board of guardians; the in-maintenance account, by comparing it with the subsidiary relief lists and provision book of the master of the workhouse, and the weekly minutes of the settlement of the same in the minute book, and with the clothing account in the ledger; the establishment charges, by comparing all salaries and other payments necessary to be sanctioned by the Poor Law Commissioners with their orders thereon, and with the minutes of the guardians, and the bills and vouchers applicable thereto; the treasurer's account, with the minute book, and the several checks directed therein to be drawn.

15. Where the clerk is an attorney and brings in a bill for professional services, which he considers not to be expressly or impliedly remunerated by his salary, you must refer to the terms of his engagement as to his claim to such extra remuneration, for any other expenditure than his costs out of pocket. If the terms of his engagement do not include his professional services, you must regard him first solely in his capacity of clerk, and allow no extra charge for any work or services which the clerk if he had not been a professional man might have performed; and then you must consider him in his professional capacity as a person unconnected with the Union, and require that the board's authority be produced for the undertaking of the proceedings or other business which are the subject of the charge, and which would not come within his general duty as clerk.

16. Where the law has made an exemption from any charge in favour of the rate-payers, the advantage of the exemption should not be allowed to be lost through the negligence or inadvertence of the officers. Thus the appointments of paid officers of the Union; and all instruments made in pursuance of the orders of the Commissioners, are exempted from stamp duty by the 86th section of the Poor Law Amendment Act, as are indentures of parish apprentices by the Stamp Act.

17. In carrying through the audit, you will bear in mind that clearness and apparent completeness is not a proof of truth in the accounts; and whilst you pass no obscurity in them without investigation, you should not pass even an orderly stated account on trust; but should from time to time select items, indis-

criminately or otherwise, from each class of charges, and ascertain their reality and correctness.

18. You will observe generally, whether the items which you collate in the accounts intended to check each other, have reference to the same subject; and whether the dates, names, persons, places, and other circumstances properly correspond.

19. In the course of the detailed examination, you should note down in writing every error in casting; every erasure which tends to throw suspicion upon particular charges, items, or vouchers; every deficiency or irregularity in the vouchers, or in the general correctness and truth of the transactions, together with any deviation from the orders of the Commissioners, or the provisions of the law, and any expenditure of an unusual or exceptionable description.

20. Any doubts which you may deem of sufficient importance, you may refer to the Poor Law Commissioners, or to their Assistant Commissioner, who will give you their opinion and advice upon the subject.

21. The amount of all disallowances and surcharges, must be charged against the person accounting; and should there not be a balance to cover the amount in the current quarter, the difference may be carried forward against him in the succeeding quarters' account. But, ordinarily, it should be required to be paid at the time; and if not paid, it will be your duty to report the same to the Commissioners, and under their directions to take proceeding for recovering the amount, in the same manner as penalties under the Poor Law Amendment Act.

22. Where it appears to you that the accounts of any paid officer are fraudulent, or so far incompletely kept, from negligence or wilfulness, as to prove his incompetency, it will be your duty immediately to report the circumstances to the Commissioners.

23. In order to illustrate the routine of an audit, the following specimens are given of the vouchers and evidence required to sustain a few items of charge.

Items of Charges.	*Vouchers, &c. required to support the Items.*
£ 1. Buildings on account of the Union or Parish	Resolution of Board of Guardians thereon. The Poor Law Commissioners' Order or Sanction. Copy of the Contract with the Builder, &c. and the Plan. The Surveyor's Certificate of the Work executed, and that it has been done to his satisfaction. The Minute of the Board of Guardians to the same effect, at the close of the quarter.

Items or Charges.	*Vouchers, &c. required to support the Items.*
2. Furniture	Besides the usual Authorities and Vouchers, call for the Inventory, and see that the articles are duly inserted; if necessary, trace or require them to be pointed out.
3. Law expenses	The Board's Direction to the Attorney. The Attorney's Bill, (taxed, if taxable, by the proper Officer.) The Board's Order to pay the Bill. The Receipt *in full* of all demands respecting the subject-matter.
4. Bread made and consumed	Compare the quantities of Flour or Wheat purchased, with the proportion of Bread produced.
5. Articles sold	Compare the Cash Accounts with the Store Accounts.
Articles destroyed, lost, or wasted	Require a Certificate or proof of the destruction, loss or waste.
6. Salaries of Officers and Servants of the Union	Their appointment by the Board of Guardians, and the sanction of the Board of Poor Law Commissioners.

26. If there be an increase of the number of any class of Paupers, or in any branch of the expenditure, you will report thereon, and state the cause of it as far as you can ascertain, for the information of the Commissioners; as also on any decrease arising from any peculiar occurrence within the Union. You will likewise be pleased to report to them any improvements of which the mode of transacting business of the Union may appear to you to be susceptible; and generally on any matters connected with the state of pauperism in the Union, or in the district in which it is situate.

I have the honor to be, Sir,
Your very obedient Servant,
EDWIN CHADWICK, Secretary."

Judgment.] Any of the justices, who are rated as occupiers or inhabitants in the parish or township, cannot vote in determining the appeal. (16 *G.* 2, *c.* 18, *s.* 3.) And where, upon such an appeal, it appeared that one of the justices declined to join in the decision, because he was a rated inhabitant of the parish; but afterwards, upon application to the Sessions for a case, this justice and two others voted for it, and two against it, so that a case was granted: upon the case being returned on the certiorari, a motion was made to quash the certiorari, on the ground that the justice, being a rated inhabitant of the parish, could not vote even upon the question of granting a case; and the Court were of this opinion; they said the safer course was to hold, that magistrates should not interfere in any way, in cases where they are directly or indirectly interested. *R.* v. *Gudridge*, 5 *B.* & *C.* 459, 8 *D.* & *R.* 217.

The judgment, if in favour of the respondents, is, that the order of allowance be confirmed; if for the appellants, that certain items be disallowed or reduced, and that the respondents pay the amount to the present overseers. If the Court grant costs, the award of costs also forms part of the judgment. Where the Sessions upon appeal disallowed some items in the account, but omitted to order the respondents to pay it over to the then overseers: the Court of King's Bench held, that any two justices out of Sessions might enforce the payment of it, in the same manner as they would any other balance in the hands of overseers who had gone out of office. *R.* v. *Sir J. Carter et al.*, 4 *T. R.* 246. As to the present mode of enforcing payment of such balances, *see* 4 & 5 *W.* 4, *c.* 76, *s.* 47.

Costs.] By stat. 17 G. 2, c. 38, s. 4, in an appeal against overseers' accounts, the justices "may award and order to the party, for whom such appeal shall be determined, reasonable costs, in the same manner that they are empowered to do in case of appeals concerning the settlement of poor persons," by stat. 8 & 9 W. 3, c. 30. See the cases decided upon this section, with respect to appeals against rates, *ante*, *p.* 336, 337.

SECTION 6.—*Appeal against the Disallowance of Overseers' Accounts.*

In what Cases.] Before stat. 50 Geo. 3, c. 49, the justices at the General Quarter Sessions alone could disallow any of the items in an overseer's account; and this only upon an appeal against the accounts. The justices out of Sessions might refuse to allow them, but they had no authority to strike any of them out, or otherwise disallow them. By 50 G. 3, c. 49, s. 1, however, reciting the 43 Eliz. c. 2, and the 17 G. 2, c. 38, as to over-

seers' accounts, it is enacted " that in all cases where any such account is required to be made and yielded, and to be signed and attested as aforesaid, by virtue of the aforesaid last recited act, every such account shall be submitted by the churchwardens and overseers to two or more justices of the peace of the county, dwelling in or near the parish or place to which such account shall relate, at a special Sessions for that purpose to be holden within the fourteen days appointed by the said last recited Act for delivering in such account; and the justices shall, and they are hereby authorized and empowered, if they shall so think fit, to examine into the matter of every such account, and to administer an oath or affirmation to such churchwardens and overseers of the truth of such account, and to disallow and strike out of every such account, all such charges and payments as they shall deem to be unfounded, and to reduce such as they shall deem to be exorbitant, specifying upon or at the foot of such account every such charge or payment and its amount, so far as such justices shall disallow or reduce the same, and the cause for which the same was disallowed or reduced; and it shall be lawful for such two or more justices, and they are hereby required, to signify their allowance and approbation of any such account under their hands, and to sign and attest the caption of the same at the foot of such account, in manner directed by the said last recited Act."

And by section 2, " if any such churchwardens and overseers, or any of them, shall feel themselves, himself or herself aggrieved by the disallowance or reductions of any such charges or payments, and be desirous of appealing against any order in that respect made by any such two or more justices of the peace, it shall and may be lawful for him, her, or them to enter an appeal against such order, at the next General or Quarter Sessions to be holden next after the tenth day from the making of such order, he, she, or they, having first paid or delivered over to the succeeding churchwardens and overseers such sum and sums of money, goods and chattels, and other things, as on the face of the account, which shall have been submitted by him, her, or them to such two or more justices in manner aforesaid, shall appear and be admitted to be due and owing from him, her, or them, or remaining in his, her, or their hands, and having also entered into a recognizance before one or more such justice or justices, with two sufficient sureties to be approved of by such justice or justices before whom such recognizance shall be acknowledged, in not less than double the sum or value in dispute, to enter such appeal at such next General or Quarter Sessions, and abide by such order as shall at that or any subsequent Sessions be made on such appeal; and it shall and may be lawful for the justices of the peace assembled at such General or Quarter Sessions, on proof of the matters aforesaid, and on the produc-

tion of such recognizance, and proof of the same having been duly entered into, to adjourn such appeal, if they shall see occasion, or to hear the same, and to examine into and confirm or reverse such disallowance or reduction, in the whole or in part, as to such justices at such Sessions shall seem just." *See also Sect.* 6.

At what Sessions.] The appeal must be entered "at the next General or Quarter Sessions to be holden next after the tenth day from the making of the order," 50 *G.* 3, *c.* 49, *s.* 2, *supra*, that is to say, from the disallowance. As to the meaning of the terms "General *or* Quarter Sessions," *see R. v. JJ. of London*, 15 *East*, 632, *and ante*, *p.* 327. After being thus entered, the justices at Sessions may adjourn it (if they shall see occasion) or hear it. 50 *G.* 3, *c.* 49, *s.* 2, *supra*. In practice, however, it is very seldom tried at the same Sessions it is entered, but is usually respited at the first Sessions as a matter of course.

Recognizance, &c.] The appellant, before he enters his appeal, is required to do two things:

First, he must pay and deliver over to his successors in office, such sum of money, and such goods, chattels, and other things, as on the face of his account appear and are admitted to be due and owing from him, or remaining in his hands. 50 *G.* 3, *c.* 49, *s.* 2, *ante*, *p.* 362.

Secondly, he must enter into a recognizance in double the sum in dispute, conditioned to enter the appeal at the next Sessions, and to abide by such order as shall then or at any subsequent Sessions be made on such appeal. 50 *G.* 3, *c.* 49, *s.* 2. *see ante*, *p.* 362. It must be entered into before "one or more such justice or justices;" which seemingly means, that it shall be entered into before one or more of the justices who disallowed the accounts. And what is strongly confirmatory of this construction is, that the statute does not require any notice of appeal, and the recognizance may probably be the only intimation the justices may have of the party's intention to appeal.

As to notice of appeal, it is to be remarked that the statute does not require it; and the stat. 17 G. 2, c. 38, s. 4, and 41 G. 3, c. 23, s. 4, respecting notice in appeals against overseers' accounts, do not extend to this case. The cases of R. *v.* JJ. of Kent, (6 *M. & S.* 258, *and ante*, *p.* 272,) and R. *v.* JJ. of Essex, (4 *B. & Ald.* 276, *ante*, *p.* 272,) establish, that where a statute, giving an appeal, directs a recognizance to be entered into, and makes no mention of any notice of appeal, notice of appeal is not necessary; the recognizance will be deemed sufficient notice. But notwithstanding these cases, if the appeal be entered and respited, it may be prudent to give notice of appeal to the jus-

tices, and perhaps also to the present churchwardens and overseers: to the justices, because it is against their act that the party appeals; *see ante, p.* 265; and to the churchwardens and overseers, because the parish is interested in the event of the appeal, to the extent of the items disallowed.

Proceedings at the Hearing.] As soon as the appeal is called on, the appellant may be called upon to prove his having paid over the balance in his hands to the present overseers, and also his having entered into the recognizance; and care therefore should be taken that the clerk of the peace should have the recognizance in Court. After this, the trial proceeds. There are no cases, and very little practice in this particular kind of appeal, from which any rule can be deduced as to whether the appellant or respondent shall begin. The general rule in appeals, we have seen, (*ante*, p. 283,) is, that the respondent shall begin; and it will be best perhaps to adopt that rule in this particular case, especially if the justices have not stated at the foot of the account their reasons for disallowing or reducing the items in question; for the appellants may not know in what manner to sustain the items objected to, until the respondents apprize them of the objections. The respondents' case resembles the case of the appellants in the last appeal, and is managed in the same way; and the appellants in this case are in the same situation with the respondents in that. *See ante, p.* 343. As to the items which ought to be allowed, and those which ought not, *see ante, p.* 343—360.

After the case is closed on both sides, the justices consider of their judgment, and "confirm or reverse the disallowance or reduction, in the whole or in part, as to such justices at such Sessions shall seem just; and in any such case, the said justices at such Sessions may (if they shall think fit) make an order that such churchwardens and overseers shall have the costs by them incurred upon any such appeal, defrayed out of the poor-rates of such parish or place; and the order of the General Quarter Sessions, in execution of the powers given them by this Act, shall be binding on all parties.

By the 5th section of stat. 50 G. 3, c. 49, the certiorari is taken away; and therefore upon the trial of this appeal, the Sessions cannot grant a special case.

Section 7.—*Appeal against a County Rate.*

In what Cases, and by whom.] Formerly the different charges upon counties, such as the repairing of bridges, building and repairing gaols, passing vagrants, &c., were levied under separate acts of parliament, and there was no general county rate. This, besides being harassing and inconvenient, was found also to be

very expensive, the expense of collection being often more than the amount required. By stat. 12 G. 2, c. 29, therefore, in order to remedy this, it was enacted that the justices at their General or Quarter Sessions should make one general rate upon the county for all the different purposes aforesaid, to be assessed upon every town, parish or place within it, in such proportions as the rates under the said several acts of parliament had theretofore been usually assessed, to be collected by the high constable of each hundred from the churchwardens and overseers of the poor of each parish, &c. within his district, and to be paid out of the poor-rates.

And by the same statute, 12 G. 2, c. 29, s. 2, it is enacted, "that in case the churchwardens and overseers of any parish or place shall at any time have reason to believe that the said parish or place is overrated, such churchwardens and overseers may appeal to the respective justices of the peace at their next General or Quarter Sessions, against such part of the rate only as may affect the parishes or places in which they serve such offices; which justices, or the greater part of them, then and there assembled, are hereby authorized and empowered to hear and finally determine the same: provided nevertheless, that, upon such appeal, such rate shall not be quashed or destroyed in regard to any other parishes or places assessed thereby."

As the proportions of the different parishes under the ancient assessments, however, had from several causes become very unequal, it was thought right, in all cases where circumstances should require it, to enable the justices at Sessions, by having returns made to them by the churchwardens and overseers of each parish, &c. of the value of the rateable property within the same, to assess each parish, &c. in the county according to a pound rate of the annual value of the rateable property within it. This was done by stat. 55 G. 3, c. 51. And by the 14th section it is provided, "that if the churchwarden or churchwardens, overseer or overseers of the poor, or other inhabitant or inhabitants of any parish, township or place, whether parochial or otherwise, where there is no churchwarden or overseer or person appointed to act as such, shall at any time have reason to think that such parish, township or place is aggrieved by any rate now existing or hereafter to be made, either in pursuance of this Act or of any Act or Acts now in force, whether it be on account of the proportions assessed upon the respective parishes, townships or places being unequal, or on account of some one or more of them being without sufficient cause omitted altogether from the rate, or on account of such parish, township or place being rated at a higher proportion of the pound sterling, according to the fair annual value of the rateable property therein, than has been fixed and declared by the justices of the peace of the said county in Sessions assembled, as the basis of the rate of the

said county, or on account of any other just cause of complaint whatsoever: it shall be lawful for such churchwarden or churchwardens, overseer or overseers of the poor, or other inhabitant or inhabitants where there is no churchwarden or overseer, or person appointed to act as such, to appeal to the justices of the peace for the county, at any General or Quarter Sessions, against such part of the rate only as may affect the parish or parishes, township or townships, place or places, which are unequally rated, or which shall appear to be overrated or underrated, or omitted altogether from the rate; and the said justices are hereby empowered to hear and finally determine the same, and either to confirm such parts of the rate as shall have been appealed against, or to correct such inequalities, disproportions or omissions as shall be proved to exist therein, in such manner as to them the said justices shall appear fair, just, and equitable; any thing in this Act, or any former Act or Acts, or any law, usage or custom to the contrary thereof notwithstanding: provided nevertheless, that upon such appeal, no such rate shall be quashed or destroyed in regard to any other parish, township or place, unless in cases where the justices of the peace in any county, in General or Quarter Sessions assembled, or the major part of them, shall deem it necessary to proceed to the making of an entire new rate, and shall proceed therein according to the provisions of this Act."

It has been holden that this 14th section, giving the appeal, extends to all county rates, even those made under local acts; and that where such a local act contained an appeal clause, the parties notwithstanding might appeal under this section. *R.* v. *JJ. of Buckinghamshire*, 7 *B.* & *C.* 3. And it extends not only to parishes rated on a pound rate under this statute, but also to parishes rated according to the proportions in the ancient assessments. Where one of the parishes of the city and county of the city of York, appealed against a rate, on the ground of being overrated, and the justices at Sessions refused to entertain the appeal, on the ground that all the parishes had been rated at fixed proportions for a long series of years, and they had no power to vary those proportions: but upon application for a mandamus, the Court of King's Bench held that they had power to do so, and that so far from its being at variance with the object of this Act, they considered it the most convenient construction the Act could receive. *R.* v. *JJ. of York*, 2 *B.* & *C.* 771. But the grievance must be, that the whole parish, &c. is overrated, &c., and not that individuals in it are overrated with respect to other individuals in another parish. Where an appeal was brought by the churchwardens and overseers of the township of S., in the county of W., and by A. B., C. D. and E. F., against the churchwardens and overseers of the parish of B., in the same

county, and against G. H., I. K. and L. M.; and they stated in their notice, as grounds of appeal, that G. H., I. K. and L. M. were underrated, and that A. B., C. D. and E. F. were overrated: but the Court of King's Bench held that they could not appeal upon these grounds; the grievance must be, that the township or parish is overrated. *R.* v. *JJ. of Westmoreland*, 10 *B. & C.* 226.

In boroughs, by stat. 5 & 6 W. 4, c. 76, s. 92, the council of the borough are enabled to order a borough rate to be made within the borough, in the nature of a county rate; and for that purpose they shall have all the powers and authorities that justices of the peace have under the above statute 55 G. 3, c. 51, except that the appeal against such rate shall not be to the council: but "if any person shall think himself aggrieved by any such rate, it shall be lawful for him to appeal to the recorder at the next Quarter Sessions for the borough in which such rate has been made, or in case there shall be no recorder within such borough, to the justices at the next Court of Quarter Sessions for the county, within which such borough is situate, or whereunto it is adjacent; and such recorder or justices respectively shall have power to hear and determine the same, and to award relief in the premises, as in the case of an appeal against any county rate."

To what Sessions.] Against a county rate, the appeal must have been to the next General or Quarter Sessions, by 12 G. 2, c. 29, s. 12; but by stat. 55 G. 3, c. 51, s. 14, no time is limited, but the parish &c. may appeal against the rate at "any General or Quarter Sessions" for the county. In boroughs, however, the appeal against the borough rate must be to the next Sessions. *5 & 6 W. 3, c. 76, s. 92, supra.*

Notice of Appeal.] By stat. 57 G. 3, c. 94, s. 2, it is provided "that fourteen clear days' notice in writing shall be given by the parties intending to appeal against any rate or assessment, to the parties against whose rate the appeal is to be made, the clerk of the peace of the county, and the hundred constable, of the intention to try such appeal at the next General Sessions of the Peace." The words "the parties against whose rate the appeal is to be made," are rather equivocal. In strictness they mean the justices at Sessions, for it is their rate; but it would be absurd to give the Act such a construction. It evidently means the parishes or townships which the appellants say are underrated, or with respect to which their parish or township is overrated; and that notice shall be given to the churchwardens and overseers thereof accordingly, together with the clerk of the peace and constable of the hundred. These are to be the respondents. The appellants must be the churchwardens and overseers of the

parish &c., complaining; or the overseers, if there be no churchwardens; or any inhabitant or inhabitants, if there be no churchwardens or overseers, or persons appointed to act as such. 55 *G.* 3, *c.* 51, *s.* 14, *ante*, *p.* 365. And the appellants must state in their notice of appeal that their parish is aggrieved, or state that from which it follows of necessity that it is so. *R.* v. *Blackawton*, 10 *B.* & *C.* 792.

The Act does not require the grounds of the appeal to be stated in the notice; nor is it necessary to state them. But where the notice stated certain grounds of appeal, and the Sessions dismissed the appeal because the grounds so stated were in law no grounds of appeal whatsoever: upon application for a mandamus, the Court of King's Bench held that the Sessions should not have dismissed the appeal, but should either have tried it, or (if they thought the respondents had been misled by the notice) they should have adjourned it to the next Sessions. *R.* v. *JJ. of Westmoreland*, 10 *B.* & *C.* 226.

Proceedings at the Hearing, &c.] The appellants usually begin, and state and prove the manner in which their parish or township is damnified. The statute (55 *G.* 3, *c.* 51, *s.* 14, *ante*, *p.* 365.) states several causes of appeal, namely: 1st, "the proportions assessed upon their respective parishes, townships or places being unequal; 2dly, "some one or more of them being, without sufficient cause, omitted altogether from the rate;" 3dly, the "parish, township or place being rated at a higher proportion of the pound sterling, according to the fair annual value of the rateable property therein," than has been fixed and declared by the justices at Sessions as the basis of the county rates; 4thly, "some other parish or parishes, township or townships, place or places, being rated at a lower proportion of the pound sterling, according to the fair annual value of the rateable property therein, than has been fixed and declared by the justices of the peace of the said county in Sessions assembled, as the basis of the rate of the said county;" adding generally, "or on account of any other just cause of complaint whatsoever." *See R.* v. *JJ. of Westmoreland*, 10 *B.* & *C.* 226.

The respondents then go into their cases; and if they call witnesses, the appellants are entitled to the general reply.

When the case is closed on both sides, the justices deliver the judgment, either confirming such parts of the rate as have been appealed against, or correcting such inequalities, disproportions, or omissions, as have been proved to exist in it. *See* 55 *G.* 3, *c.* 51, *s.* 14, *ante*, *p.* 366. But they shall not quash or destroy the rate in regard to any other parish &c., unless they deem it necessary to proceed to the making of an entirely new rate. *Id.* Notwithstanding the appeal, the rate shall be paid and may be levied, until the Sessions shall have decided the appeal; and if

upon the hearing of the appeal, the Sessions shall order the rate to be set aside, decreased or lowered, and it appear that any parish &c., have paid any sum in consequence of such rate, which ought not to be paid, the Court shall order so much thereof as was paid after the notice of appeal, to be repaid out of the county rate. 55 *G.* 3, *c.* 51, *s.* 2.

Costs.] The expenses of the appeal shall be borne and paid " by such respective parishes, townships, places and persons, or such of them, and in such proportions, as the said justices in General or Quarter Sessions shall upon any appeal award and order. 57 *G.* 3, *c.* 94, *s.* 4.

SECTION 8.—*Appeal against an Order for stopping up a Highway.*

In what Cases and by whom.] Where the inhabitants in vestry assembled shall deem it expedient that a highway should be " stopped up, diverted or turned, either entirely or reserving a bridleway or footway along the whole or any part or parts thereof," the chairman shall direct the surveyor to apply to two justices to view it; or if any other party shall be desirous of it, he may, by a notice in writing, require the surveyor to give notice to the churchwardens to assemble the vestry and submit it to them, and if the vestry agree to it, then the surveyor shall apply to the justices to view the highway. 5 & 6 *W.* 4, *c.* 50, *s.* 84. And if it appear to the justices on view, that the highway may be diverted or turned so as to make it " nearer or more commodious to the public," and the owner of the land through which the new way is to pass shall consent thereto in writing, or if it appear on view that the highway is unnecessary, then the justices shall direct the surveyor to set up a certain notice at each end of the highway, to advertise the same four times in a newspaper, and to affix a copy of the same on the church for four Sundays; upon proof of which to the satisfaction of the two justices, and a plan of the old and new highway being delivered to them, " the said justices shall proceed to certify under their hands the fact of their having viewed the said highway as aforesaid, and that the proposed new highway is nearer or more commodious to the public; and if nearer, the said certificate shall state the number of yards or feet it is nearer, or if more commodious, the reasons why it is so; and if the highway is proposed to be stopped up as unnecessary, either entirely or subject as aforesaid, then the certificate shall state the reason why it is unnecessary;" this certificate, form, and plan, are to be sent to the clerk of the peace, who, at the Quarter Sessions to be holden " next after the expiration of four weeks from the day of the said certificate of the

said justices having been lodged with the clerk of the peace as aforesaid," shall read the same in open court; and the certificate, proof, and plan, and the written consent of the owner of the land through which the new highway is to pass, shall be enrolled amongst the records of the Quarter Sessions. *Id. s.* 85.

And by sect. 88, it is provided "that when any such certificate shall have been so given as aforesaid, it shall and may be lawful for any person who may think that he would be injured or aggrieved, if any such highway should be ordered to be diverted and turned or stopped up, either entirely or subject as aforesaid, and such new highway set out and appropriated in lieu thereof as aforesaid,—or if any unnecessary highway should be ordered to be stopped up as aforesaid,—to make his complaint thereof by appeal to the justices of the peace at the said Quarter Sessions, upon giving to the surveyor ten days notice in writing of such appeal, together with a statement in writing of the grounds of such appeal, who is hereby required, within forty-eight hours after the receipt of such notice, to deliver a copy of the same to the party by whom he was required to apply to the justices to view the said highway; provided that in all cases where the said surveyor shall have been directed by the inhabitants in vestry assembled to apply to such justices as aforesaid, then the said surveyor shall not be required to deliver a copy of such notice to any party; provided also, that it shall not be lawful for the appellant to be heard in support of such appeal, unless such notice and statement shall have been so given as aforesaid, nor on the hearing of such appeal to go into or give evidence of any other grounds of appeal than those set forth in such statement as aforesaid." By stat. 41 G. 3, c. 109, s. 8, the commissioners under an Inclosure Act, shall not stop up roads passing through inclosures, without the order of two justices, which order shall be subject to appeal to the Quarter Sessions, in like manner, and under the same forms and restrictions, as if the order had been made by the justices originally. *See R. v. Townsend*, 5 *B. & Ald.* 420. *R. v. JJ. of W. R. Yorkshire*, 2 *B. & C.* 228.

To what Sessions.] The appeal must be to the Quarter Sessions which shall be holden next after the expiration of four weeks from the day on which the certificate is lodged with the clerk of the peace. 5 & 6 *W.* 4, *c.* 50, *s.* 88, 85, *supra*. The time at which such certificate shall have been lodged, may be learned at the office of the clerk of the peace, where the certificate and plan may inspected, and copies had, on payment of 6*d.* per folio for the certificate, and a reasonable compensation for the copy of the plan. *Id. s.* 85.

Notice of Appeal.] Notice of appeal in writing must be given to the

surveyor, ten days at least before the Sessions. 5 & 6 *W.* 4, *c.* 50, *s.* 88, *ante*, *p.* 370. These days are reckoned, the one day inclusive, the other exclusive. *R.* v. *JJ. of W. R. Yorkshire*, 4 *B. & Adolph.* 685. As the appeal is given to any person "who may think that he would be injured or aggrieved" if the way should be diverted, &c., the appellant must bring himself within this description by his notice, either expressly, *R.* v. *JJ. of Essex*, 5 *B. & C.* 431. *R.* v. *JJ. of W. R. Yorkshire*, 7 *B. & C.* 678, or by the statement of facts from which it shall be sufficiently apparent. But where it stated that "if the said order should stand and the said road be stopped up, the appellant, and his tenants, occupiers of a farm, lands, &c., near adjoining the said road, and who have heretofore used and have a right to use the same, and also other persons and the public, would be put to great inconvenience:" this was holden to be sufficient. *R.* v. *JJ. of W. R. Yorkshire*, 4 *B. & Adolph.* 685. The notice must also contain a statement of the grounds of the appeal. 5 & 6 *W.* 4, *c.* 50, *s.* 88, *ante*, *p.* 370. And "it shall not be lawful for the appellant to be heard in support of such appeal, unless such notice and statement shall have been so given as aforesaid, nor on the hearing of such appeal to go into or give evidence of any other grounds of appeal than those set forth in such statement as aforesaid." *Id.*

Trial.] The trial in this case is by jury. By stat. 5 & 6 W. 4, c. 50, s. 89, "in case of such appeal, the justices at the said Quarter Sessions shall, for the purpose of determining whether the proposed new highway is nearer or more commodious to the public, or whether the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or whether the said party appealing would be injured or aggrieved, impanel a jury of twelve disinterested men out of the persons returned to serve as jurymen at such Quarter Sessions; and if, after hearing the evidence produced before them, the said jury shall return a verdict that the proposed new highway is nearer or more commodious to the public, or that the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or that the party appealing would not be injured or aggrieved, then the said Court of Quarter Sessions shall dismiss such appeal, and make the order herein mentioned (in sect. 91) for diverting and turning and stopping up such highway, either entirely or subject as aforesaid, or for diverting, turning and stopping up such old highway and purchasing the ground and soil for such new highway, or for stopping up such unnecessary highway either entirely or subject as aforesaid; but if the said jury shall return a verdict that the proposed new highway is not nearer or not more commodious to the public, or that the highway so intended to be stopped up, either entirely or subject as aforesaid, is not unnecessary, or that the party appealing would

be injured or aggrieved, then the said Court of Quarter Sessions shall allow such appeal, and shall not make such order as aforesaid."

The appellant in this case begins. He must prove service of his notice of appeal; and he will be confined in his evidence strictly to the grounds of appeal stated in it. The respondent then opens his case; and if he give evidence, the appellant will be entitled to the general reply.

By the 87th section of the above statute, it is provided that if the order or certificate be for the diverting of more highways than one, "it shall be lawful for the Court to decide upon the propriety of confirming the whole, or any part or parts of such order or certificate, without prejudice to the remaining part or parts thereof."

Costs.] By stat. 5 & 6 W. 4, c. 50, s. 90, "the Court of Quarter Sessions is hereby authorized and required to award to the party giving or receiving notice of appeal, such costs and expenses as shall be incurred in prosecuting or resisting such appeal, whether the same shall be tried or not; and such costs and expenses shall be paid by the surveyor or other party as aforesaid at whose instance the notice for diverting and turning or stopping up the highway, either entirely or subject as aforesaid, shall have been given; and in case the said surveyor or other party shall not appear in support thereof, the said Court of Quarter Sessions shall award the costs of the appellant to be paid by such surveyor or other party as aforesaid, and such costs shall be recoverable in the same manner as any penalties or forfeitures are recoverable under this Act."

Section 9.—*Appeal under Inclosure Acts.*

In what Cases.] There is no appeal clause in the General Inclosure Act, (41 G. 3, c. 109,) except one against the determination of the commissioner as to the boundaries of "parishes, manors, hamlets, or districts," 41 *G.* 3, *c.* 109, *s.* 3. In a subsequent Act to amend it, (1 & 2 G. 4, c. 23,) there is a clause (s. 3) which provides that nothing in that Act shall prevent or take away the right of any person to appeal against the award, order, or direction of such commissioner. And in another Act, amending it, which merely gives a summary mode of proceeding for the recovery of the arrears of rates or assessments made by commissioners, there is a clause giving an appeal to any person thinking himself aggrieved under that Act. 3 & 4 W. 4, c. 35, s. 3. But the local inclosure Acts always contain a clause to the effect of enabling any person who thinks himself aggrieved by the allotments assigned to him, or by any other

determination or act of the commissioner, to appeal to the Quarter Sessions. This clause is variously worded in the different Acts; and of course it depends upon the words of the clause, and the construction to be given to them, whether any particular matter of complaint comes within it or not. *See R. v. JJ. of Cumberland*, 1 *B. & C.* 64. *and see ante, p.* 262, 263.

To what Sessions.] This must entirely depend upon the words of the section giving the appeal. Inclosure Acts usually give the right to appeal within a certain time, or to the next Sessions after the cause of complaint shall have arisen; and generally the only question of any difficulty in ascertaining the time for appealing in these cases is, to fix the time at which the cause of complaint shall be said to have arisen. Where an allotment of 200 acres was made, and staked out on the 10th March, and notice thereof given to the party, who immediately took possession of it, and cropped the land; on the 6th July an exchange was made by the commissioners of a quarter of an acre of it with another person, with the express consent of the party; and at the October Sessions, the party lodged an appeal, on the ground of the insufficiency of the allotment, which appeal was then respited to the next Sessions at the instance of the appellant, on account of the absence of one of his witnesses; but at the next Sessions the justices refused to try the appeal, being of opinion that it was not lodged in time, the statute giving the appeal requiring it to be within four calendar months after the cause of complaint should have arisen: upon an application for a mandamus, the Court held, that as the grievance complained of was the insufficiency of the whole allotment, which took place in March, the appellant should have appealed within four calendar months from that time, and therefore his appeal in October was too late; they accordingly refused the mandamus. *R. v. JJ. of Wiltshire*, 13 *East*, 352. So where the commissioner was authorized to ascertain by his award, or by some previous writing to be annexed thereto, the corn rent which should be paid to the rector in lieu of tithes; on the 3d October 1832, by a writing and a schedule annexed to it, of which the rector had notice, the commissioner fixed the corn rent, and appointed the payments to begin from the 25th December then next, but his award was not made until January 1833; the statute required the appeal to be within four calendar months after the cause of complaint should have arisen; and the rector appealed at the Easter Sessions 1833, on the ground that his equivalent for the tithes was assessed too low: the Court held that the appeal was too late; the cause of complaint arose in October, when the writing fixing the corn-rent was made, that writing being an operative instrument by the terms of the statute. *R. v. Nockolds*, 1 *Ad. &*

E. 245. But where an allotment in lieu of vicarial tithes was set out on a map, and after some alterations made in it, the vicar's agent approved of it on the 18th November 1812; but it was not until November 1813 that the commissioners affixed to the church door the usual notice, that they had ordered all tithes to cease from the 29th September then last, from which day they had made their allotments; the Act gave an appeal within six calendar months after cause of complaint should have arisen, and the vicar appealed at the Easter Sessions 1813: the Court of King's Bench held that the appeal was lodged in sufficient time; there was nothing in the transaction of November 1812, to make the allotment conclusive upon the parties; nor was the vicar aggrieved, until the tithes ceased. *R.* v. *JJ. of Gloucestershire*, 3 *M. & S.* 127. *See also R.* v. *JJ. of Middlesex*, 1 *Chit. R.* 366.

Where an Inclosure Act gave an appeal to the next Sessions within six months after the cause of complaint should arise, at which said Sessions the justices were authorized and required to hear and determine the same: and at the next Sessions the appellant moved to enter and respite his appeal, which the justices refused, on the ground that the next following Sessions would not be within the six months limited by the statute: upon an application for a mandamus, the Court refused it, holding that although the justices were bound to receive the appeal, they could not respite it. *R.* v. *JJ. of Derbyshire*, 4 *T. R.* 488.

See further on this subject, *ante*, *p.* 266.

Notice of Appeal.] The appellant, in giving his notice, must be guided by the words of the Act giving the appeal. See upon this subject, generally, *ante*, *p.* 271—280. *and see R.* v. *JJ. of Lancashire*, 1 *B. & Ald.* 630.

Proceedings at the Hearing, &c.] The appellant always begins, and states and proves his cause of complaint; the respondent then makes out his case; and if he call witnesses, the appellant is entitled to the general reply. In every other respect, the proceedings depend entirely upon the words of the appeal clause in the particular Inclosure Act on which the appeal is founded.

Section 10.—Appeal against a Conviction.

The Conviction.

A conviction is the record of a summary proceeding before a magistrate, drawn up in form. It should perhaps in all cases

be written upon parchment; in practice, however, it is usually written upon paper, unless when returned to a certiorari, in which case it must be upon parchment. It first recites the information; it then states that the defendant, being summoned, appeared and pleaded, or confessed, or failed to appear, as the case may be; it then states the evidence given on both sides; then it states the conviction, and lastly the adjudication. We shall examine these several parts of a conviction a little more particularly.

Information.] The conviction recites the information, but in the past tense, to the words, "contrary to the form of the statute in such case made and provided." In convictions on informations by a common informer, the information must be set out exactly as it is drawn, and ought not to be altered or varied from in the slightest degree, except merely that it must be recited in the past, and not in the present, tense. But in all other cases of convictions, this part of them, usually, in practice, states the offence, not perhaps exactly as it was described in the summons or warrant, but as it was proved by the evidence before the magistrate. And in setting it out, great pains should be taken, that the description of the offence comprises all the facts and circumstances necessary to constitute it, stated with as much certainty precisely as in an indictment, with time and place laid to every material fact; for all objections that can be taken to an information (*see Arch. on Convictions*, p. 94,) and which are not merely for a defect in form, may be taken also to this part of the conviction. On this account, therefore, it may be prudent, if it be at all likely that the defendant will appeal, or sue out a certiorari, to have the conviction settled or redrawn by a barrister, before it is returned to the Sessions.

Summons and Appearance, &c.] The conviction usually states that the defendant was summoned; and it must do so, in cases where the defendant did not actually appear at the hearing, or where it is not shewn on the face of the conviction that he was present at the time of the proceeding before the justice, otherwise the conviction may be quashed. *R.* v. *Allington*, 2 *Str.* 678. *R.* v. *Venables*, 2 *Str.* 630. *and see R.* v. *Stone*, 1 *East*, 649. *R.* v. *Johnson*, 1 *Str.* 261. But this objection cannot be taken upon an appeal.

The conviction also states whether the party accused appeared before the justice or not. If he did not appear, the conviction states the default, then states the evidence against the defendant, and then the conviction and adjudication, in the same manner as if the defendant had appeared and pleaded not guilty. *R.* v. *Simpson*, 1 *Str.* 44. If the defendant appear,

his appearance is stated in the conviction, and it is stated also whether (having heard the charge contained in the information,) he pleaded not guilty, or neglected or refused to make any defence: in either of which cases the conviction states the evidence, and then proceeds to the conviction and adjudication. But if the defendant appear, and confess that he is guilty of the offence imputed to him, the appearance and confession are recorded in the conviction; and then, if it be a confession of the entire offence, instead of stating any evidence, which of course would be unnecessary in such a case, the justice may at once proceed to the conviction and adjudication; but if it be a confession merely of a fact, which forms but a part of the offence charged, the conviction then, after stating the confession in the words of the defendant, proceeds to state the evidence as to the other facts and circumstances constituting the offence charged, and lastly states the conviction and adjudication. *See R. v. Gage*, 1 *Str.* 546. *R. v. Hall*, 1 *T. R.* 320. *R. v. Little*, 1 *Burr.* 613. *R. v. Smith*, 3 *Burr.* 1475.

Evidence.] The conviction must set out the evidence in all cases, except where the defendant confesses that he is guilty of the offence charged against him. This is done, in order that the Court of King's Bench, if the conviction be removed there by certiorari, may see, upon the face of it, whether the evidence be sufficient to warrant it or not. 1 *Burr.* 1163. Therefore, stating merely the result of the evidence, and not the evidence itself, *R. v. Lovett*, 7 *T. R.* 152, as, for instance, stating that the offence was "fully and duly proved," or that the witness swore that the defendant was "guilty of the premises," *R. v. Theed*, 2 *Str.* 919. *R. v. Baker*, 1 *Str.* 316, or the like, would be bad. Care must be taken, also, to set out the evidence correctly. *See R. v. Pearce*, 9 *East*, 358.

If the conviction be removed into the Court of King's Bench, and there appear to have been no evidence to prove a material part of the offence charged, that Court will quash the conviction. *R. v. Smith*, 8 *T. R.* 586. But if, on the other hand, it appear that the justices have acquitted the defendant, upon evidence apparently sufficient to convict him, the Court of King's Bench will not interfere, *R. v. Reason*, 6 *T. R.* 375, for the defendant may possibly have been acquitted, because the witnesses were not credited by the magistrate.

Conviction.] This part of the record is analogous to the verdict of a jury, and merely declares that the party accused is guilty of the offence or offences imputed to him. If the information be for two or more offences, and the justice find him guilty of all, the conviction must state him to be guilty of the

"offences" charged upon him in the information; if, on the other hand, the justice find him guilty of one of the offences only, the conviction should state that offence specially, thus: "*that he the said E. F. is guilty of the offence firstly above charged upon him in the said information, for that he the said E. F., on* ———, *at* ———, *did*," &c. stating the offence as in the information; if the conviction in such a case were to state that the defendant was guilty of the "offence" charged, &c., it would be quashed, because it would be uncertain of which of the offences he was guilty. *R.* v. *Salomons*, 1 *T. R.* 249.

But if the justice should be of opinion that the evidence is not sufficient to convict the defendant, he must acquit him; and in such a case the defendant, in strictness, is entitled to have his acquittal recorded, and transmitted to the Sessions, in order that he may be enabled to give it in evidence as a bar to any other subsequent information for the same offence. The record in that case may be the same as the record of a conviction, to the end of the evidence, and then thus: "*Therefore, it manifestly appearing unto me that he the said E. F. is not guilty of the offence charged upon him in the said information, I do hereby acquit him of the offence aforesaid, and do adjudge that he do go thereof quit without day. Given under my hand and seal this* —— *day of* ———, *in the year of our Lord* ——."

Adjudication, &c.] The adjudication is the judgment passed upon the defendant for his offence: and it must form a part of every conviction, otherwise the conviction may be quashed. *See R.* v. *Hawkes*, 2 *Str.* 858. *R.* v. *Vipont*, 2 *Burr.* 1163. Care must be taken also, that it be such an adjudication as is warranted by the statute creating the offence; otherwise it will be fatal, and the Court, upon application, will quash the conviction. *See R.* v. *Hall*, *Cowp.* 60. *R.* v. *Elwall*, 2 *Ld. Raym.* 1514. As to costs, *see Arch. on Convictions*, *p.* 101. *and stat.* 18 *G.* 3, *c.* 19.

The conviction must be dated. A mistake in the date, however, will not vitiate a conviction, which is otherwise complete. *R.* v. *Picton*, 2 *East*, 196.

Conviction to be returned to the Sessions.] The conviction must in all cases be drawn up in form, and returned to the Sessions, whether appealed against or not. *R.* v. *Eaton*, 2 *T. R.* 285. In cases of convictions under Sir Robert Peel's Acts, for larceny or malicious injuries to property, it is enacted, that every justice of the peace, before whom any person shall be convicted of any offence against these Acts, shall transmit the convictions to the next Court of General or Quarter Sessions, which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among

the records of the Court. 7 & 8 *Geo.* 4, *c.* 29, *s.* 74. 7 & 8 *Geo.* 4, *c.* 30, *s.* 40.

If the defendant demand a copy of the conviction, the justice should give it to him. *R.* v. *Midlam*, 3 *Burr.* 1720. But as the defendant will not be allowed to object that the conviction afterwards returned to the Sessions is in another and more correct form than that of which the copy has been given to him; *R.* v. *Barker*, 1 *East*, 185. *and see R.* v. *Allen*, 15 *East*, 333; it may be imprudent to depend much upon the copy thus obtained, or to appeal against the conviction for any formal defect appearing in such copy, because the same defects may probably not appear in the conviction transmitted to the Sessions.

Form of Conviction.] The form of conviction usually adopted formerly, was not very correct; it frequently led to litigation, and often defeated the ends of justice. To remedy this, in some measure, the legislature, latterly, in statutes creating offences punishable upon summary conviction, have usually given a form of conviction in each particular case. But a general form, sanctioned by statute, for all such offences was still very much wanted; and therefore, by stat. 3 Geo. 4, c. 23, s. 1, (reciting that great inconveniences often arise in summary proceedings before justices of the peace, deputy lieutenants and others, from the want of a general form of conviction,) it is enacted, that in all cases wherein a conviction shall have taken place, and no particular form for the record thereof hath been directed, the justice or justices, deputy lieutenant or deputy lieutenants, or other person or persons duly authorized to proceed summarily therein, and before whom the offender or offenders shall have been convicted, shall and may cause the record of such conviction to be drawn up in the manner and form following, or in any words to the same effect, *mutatis mutandis*, that is to say:

County [*or as the case may be*] of ———. } *Be it remembered, that on the —— day of ——, in the year of our Lord ——, at ———, in the county of ———, A. B. of ———, in the county of ———, labourer,* [or as the case may be,] *personally came before me,* [or, *before us, &c.*] C. D., *one* [or more, as the case may be,] *of his Majesty's justices of the peace for the said ———, and informed me,* [or, *us, &c.*] *that E. F., of ———, in the county of ——, on the —— day of —— at ——, in the said ———, did* [here set forth the fact for which the information is laid]; *contrary to the form of the statute in such case made and provided; whereupon the said E. F., after being duly summoned to answer the said charge, appeared before me,* [or, *us, &c.*] *on the —— day of ——, at ——— in the said ———,*

and having heard the charge contained in the said information, declared he was not guilty of the said offence, [or as the case may happen to be,] *did not appear before me* [or *us, &c.*,] *pursuant to the said summons,* [or, *did neglect and refuse to make any defence against the said charge*]; *whereupon I* [or, *we, &c.* or, *nevertheless I,* or, *we, &c.*] *the said justice* [or *justices*], *did proceed to examine into the truth of the charge contained in the said information, and on the —— day of —— aforesaid, at the parish of ——— aforesaid, one credible witness, to wit, A. W., of ———, in the county of ———, upon his oath deposeth and saith,* [if E. F. be present say, *in the presence of the said E. F.,*] *that within —— months* [or as the case may be,] *next before the said information was made before me* [or, *us, &c.*] *the said justice by the said A. B., to wit, on the —— day of ——, in the year ——, the said E. F. at ———, in the said county of ———,* [here state the evidence, and as nearly as possible in the words used by the witness, and if more than one witness be examined, state the evidence given by each,] [or if the defendant confess, instead of stating the evidence, say, *and the said E. F. acknowledged and voluntarily confessed the same to be true*]; *therefore it manifestly appearing to me* [or, *us, &c.*] *that he the said E. F. is guilty of the offence charged upon him in the said information, I* [or, *we, &c.*] *do hereby convict him of the offence aforesaid, and do declare and adjudge that he the said E. F. hath forfeited the sum of ———, of lawful money of Great Britain, for the offence aforesaid, to be distributed* [or, *paid,* as the case may be,] *according to the form of the statute in that case made and provided. Given under my hand* [or, *our hands, &c.*] *and seal, the —— day of ——, in the year of our Lord ——.*

And by the same statute, sect. 2, where the original complaint or information shall be made to any justice or justices of the peace, deputy lieutenant or deputy lieutenants, or other person or persons different from him or them before whom the same shall be heard and determined, the form of conviction shall be made conformable and according to the fact.

As this precedent is applicable to cases under different circumstances,—to cases where the defendant appears, and where he does not, where he pleads guilty, where he pleads not guilty, and where he refuses to make any defence at all,—and it may therefore perhaps appear a little complicated; and as convictions should be drawn up with great care and attention, and with the greatest possible correctness: it may be useful perhaps to give here the forms of conviction, according to the above precedent, which should be adopted in the following instances:

1. *Where the defendant appears and pleads not guilty, or refuses to make a defence.*

2. *Where the defendant appears and confesses.*
3. *Where the defendant does not appear.*

1. *Conviction, where the Defendant appears and pleads Not Guilty, or refuses to make a Defence.*

County [or as the case may be] *of* ———. { *Be it remembered, that on the* —— *day of* ——, *in the year of our Lord* ——, *at* ———, *in the* [*county*] *of* ———, *A. B. of* ———, *in the county aforesaid, labourer, personally came before me, J. P., one of his Majesty's justices of the peace for the said county, and informed me, that C. D. of* ———, *in the county of* ———, *on the* —— *day of* ——, *in the year aforesaid, at* ———, *in the said* ——, *did*" [here set forth the offence for which the information is laid]; "*contrary to the form of the statute in such case made and provided: Whereupon the said C. D., after being duly summoned to answer the said charge, appeared before me on the* —— *day of* —— *instant, at* ———, *in the said* ——— ; *and having heard the charge contained in the said information,* [*declared he was not guilty of the said offence,*" or, "*did neglect and refuse to make any defence against the said charge*"]: *Whereupon I the said justice did proceed to examine into the truth of the charge contained in the said information; and on the* —— *day of* —— *aforesaid, at* ——— *aforesaid, one credible witness, to wit, E. F. of* ———, *in the county of* ———, *upon his oath deposeth and saith, in the presence of the said C. D., that*" [here state the evidence, and as nearly as possible in the words used by the witness; and if more than one witness be examined, state the evidence given by each, thus:] "*And one other credible witness, to wit, G. H. of* ———, *in the county of* ———, *upon his oath deposeth and saith, in the presence of the said C. D., that*" [&c. stating his evidence]; "*And also a witness, produced and examined on the part of the said C. D., to wit, I. K. of* ———, *in the county of* ———, *upon his oath deposeth and saith, that*" [&c. stating his evidence]: "*Therefore, it manifestly appearing to me that he the said C. D. is guilty of the offence charged upon him in the said information, I do hereby convict him of the offence aforesaid, and do declare and adjudge* that the said C. D. hath forfeited the sum of* ———, *of lawful money of Great Britain, for the offence aforesaid, to be distributed*" [or, "*paid*," as the case may be,] "*according to the form of the statute in that case made and provided*; [*and also that the said C. D. shall forthwith pay unto the said A. B. the further sum of* ———, *for his costs and charges by him the said A. B. about the prosecution in this behalf expended.*" [See Arch. on Convictions, p. 101.] "*Given under my hand and seal, the* —— *day of* —— , *in the year of our Lord* ——.

J. P.

* Or if imprisonment and hard labour be the punishment

assigned by the statute, then the adjudication may be thus. "*do declare and adjudge that the said C. D., for his said offence, be imprisoned in the* ——, [*there to be kept to hard labour*] *for the space of* —— *calendar months. Given under my hand and seal, the* —— *day of* ——, *in the year of our Lord* ——." Care must be taken that this part of the conviction correspond strictly with the statute upon which the conviction is framed.

2. *Conviction, where the Defendant appears and confesses.*

County [or as the case may be] *of* ——. } *Be it remembered, that on the* —— *day of* ——, *in the year of our Lord* ——, *at* ——, *in the county of* ——, *A. B. of* ——, *in the county aforesaid, labourer, personally came before me, J. P., one of his Majesty's justices of the peace for the said county, and informed me that C. D. of* ——, *in the county of* ——, *on the* —— *day of* ——, *in the year aforesaid, at* —— *in the said county, did*" [here set forth the offence for which the information is laid]; "*contrary to the form of the statute in such case made and provided: Whereupon the said C. D., after being duly summoned to answer the said charge, appeared before me on the* —— *day of* —— *instant, at* ——, *in the said county; and having heard the charge contained in the said information, acknowledged and voluntarily confessed the same to be true: Therefore, it manifestly appearing*" [&c. as in the last form, to the end.]

3. *Conviction, where the Defendant does not appear.*

County [or as the case may be] *of* ——. } *Be it remembered, that on the* —— *day of* ——, *in the year of our Lord* ——, *at* ——, *in the county of* ——, *A. B. of* ——, *in the county of* ——, *labourer, personally came before me, J. P., one of his Majesty's justices of the peace for the said county, and informed me that C. D. of* ——, *in the county aforesaid, on the* —— *day of* ——, *in the year aforesaid, at* ——, *in the said county, did*" [here set forth the offence for which the information is laid]; "*contrary to the form of the statute in such case made and provided: Whereupon the said C. D., after being duly summoned to answer the said charge, did not appear before me pursuant to the said summons: Nevertheless I, the said justice, did proceed to examine into the truth of the charge contained in the said information; and on the* —— *day of* —— *aforesaid, at* —— *aforesaid, one credible witness, to wit, E. F. of* ——, *in the county of* ——, *upon his oath deposeth and saith, that*" [here state the evidence, and as nearly as possible in the words used by the witness; and if more than one witness be examined, state the evidence given by each, thus]: "*And one other credible witness, to wit, G. H. of* ——, *in the county of* ——, *upon his oath deposeth and*

objection, was conclusive, and that the party could not appeal a second time. *R.* v. *JJ. of W. R. Yorkshire*, 3 *T. R.* 776.

Notice of Appeal, Recognizance, &c.] Whether a notice of appeal shall be given, or a recognizance entered into, or what notice or recognizance will be sufficient, must depend entirely upon the words of the statute by which the appeal is given or is regulated: in some cases, the statute requires a recognizance only, and in that case a notice of appeal need not be given; *R.* v. *JJ. of Kent*, 6 *M. & S.* 258. *R.* v. *JJ. of Essex*, 4 *B. & Ald.* 276; in some cases a notice of appeal only is required, and in that case of course a recognizance need not be entered into; in some cases both are required, and both must be given. Whatever is required by the statute in this respect, is deemed a condition precedent to the party's appealing; and the Sessions have no jurisdiction whatever with respect to the appeal, they cannot even allow it to be entered, until the directions of the statute in this respect have been complied with. Where a statute gave liberty to persons convicted of offences under it, to appeal to the next Sessions against the conviction, they giving six days' notice of appeal, and entering into a recognizance to prosecute the same with effect; and a party convicted under it entered into the necessary recognizance, but omitted to give the notice; upon the appeal being called on, the respondent made the objection, and the Court entertaining doubts upon the subject, respited the appeal to the next Sessions; before the next Sessions, the appellant gave the respondent notice of trial for the approaching Sessions, but on the appeal being called on, the respondent renewed his objection, and the justices decided in favour of it, and dismissed the appeal: the appellant under these circumstances moved for a mandamus, which was refused; and Lord Ellenborough, C. J. observed, that an appeal is not a matter of common right, but of special provision, and may be granted absolutely or conditionally; here there are two conditions annexed, one of which was not complied with, and of course the appeal was never duly entered; and if not duly entered, the Sessions had no authority to respite it. *R.* v. *JJ. of Oxfordshire*, 1 *M. & S.* 446. *and see* *R.* v. *JJ. of Lincolnshire*, 3 *B. & C.* 548. But where a statute, giving an appeal against a conviction, required the magistrate, at the time of conviction, to inform the party of his right of appeal, and that the party at the same time should give the magistrate a written notice of appeal, and should enter into a recognizance to try it with effect; a party being convicted, the magistrate told him of his right to appeal, and he entered into the necessary recognizance, but the magistrate did not tell him of the necessity of his giving him a written notice of appeal; and at the Sessions, the magistrates, thinking they had no jurisdiction for want of this notice being

given, refused to receive the appeal: the Court of King's Bench, however, upon application, granted a mandamus to the Sessions, commanding them to receive and hear the appeal, Lord Kenyon, C. J. saying, that it was the duty of the magistrate, where he informed the party of his right to appeal, to inform him also of the necessity of his then giving him a written notice; otherwise the party would be deluded by the act of the justice in taking the recognizance. *R. v. JJ. of Leeds*, 4 *T. R.* 583. *See R. v. JJ. of W. R. Yorkshire*, 3 *M. & S.* 493. *Ante*, *p.* 273.

The statute, which requires notice of appeal, usually directs to whom it shall be given: sometimes it directs that it shall be given to the convicting magistrate, as in R. *v.* JJ. of Leeds, just now mentioned; sometimes, as in Peel's Acts (see 7 & 8 G. 4, c. 29, s. 72; c. 30, s. 38,) to the prosecutor or complainant; sometimes to both; and in these cases the directions of the statute must be strictly complied with. Sometimes the statute gives no direction as to whom the notice shall be given; and in that case it may be prudent to give it to the justices and also to the prosecutor. But where the penalty is to be distributed between the informer and the poor of the parish, for instance, it is not necessary in that case that notice should be given to the overseer of the poor of the parish. *Anon.* 2 *Smith*, 248.

As to the length of notice to be given, *see ante*, *p.* 274, 275; the notice may be by parol, unless the statute require it to be in writing. *Ante*, *p.* 276. If the statute require that the grounds of appeal should be stated, this must also be complied with; as to the particularity with which these grounds should be stated, *see ante*, *p.* 277—279; and as to the effect of stating them, *see ante*, *p.* 279.

The following forms of a notice of appeal, and of a recognizance, have been framed on one of Peel's Acts, (7 & 8 G. 4, c. 29, s. 72,) but may readily be altered in particular cases, so as to make them conformable with the statute requiring them.

Notice of Appeal.

Berkshire to wit: To ——, *of* ——, *in the said County.*

This is to give you [and each and every of you] notice, that I C. D. do intend, at the next General Quarter Sessions of the Peace, to be holden in and for the said County of Berks, at —— *in the said County, to appeal against a certain conviction of me the said C. D., by J. P. esquire, one of His Majesty's Justices of the Peace for the said County, for having, as is therein and thereby alleged, [on* ——, *at* ——, *&c.*, stating the offence;] *and that the cause and matter of such appeal are, [that I am not guilty of the said offence; and that*, &c., stating any other

2. *Where the defendant appears and confesses.*
3. *Where the defendant does not appear.*

1. *Conviction, where the Defendant appears and pleads Not Guilty, or refuses to make a Defence.*

County [or as the case may be] *of* ———. { *Be it remembered, that on the* —— *day of* ——, *in the year of our Lord* ——, *at* ———, *in the* [*county*] *of* ———, *A. B. of* ———, *in the county aforesaid, labourer, personally came before me, J. P., one of his Majesty's justices of the peace for the said county, and informed me, that C. D. of* ———, *in the county of* ———, *on the* —— *day of* ——, *in the year aforesaid, at* ———, *in the said* ——, *did*" [here set forth the offence for which the information is laid]; "*contrary to the form of the statute in such case made and provided: Whereupon the said C. D., after being duly summoned to answer the said charge, appeared before me on the* —— *day of* —— *instant, at* ———, *in the said* ——; *and having heard the charge contained in the said information,* [*declared he was not guilty of the said offence,*" or, "*did neglect and refuse to make any defence against the said charge*"]: *Whereupon I the said justice did proceed to examine into the truth of the charge contained in the said information; and on the* —— *day of* —— *aforesaid, at* ——— *aforesaid, one credible witness, to wit, E. F. of* ———, *in the county of* ———, *upon his oath deposeth and saith, in the presence of the said C. D., that*" [here state the evidence, and as nearly as possible in the words used by the witness; and if more than one witness be examined, state the evidence given by each, thus:] "*And one other credible witness, to wit, G. H. of* ———, *in the county of* ———, *upon his oath deposeth and saith, in the presence of the said C. D., that*" [&c. stating his evidence]; "*And also a witness, produced and examined on the part of the said C. D., to wit, I. K. of* ———, *in the county of* ———, *upon his oath deposeth and saith, that*" [&c. stating his evidence]: "*Therefore, it manifestly appearing to me that he the said C. D. is guilty of the offence charged upon him in the said information, I do hereby convict him of the offence aforesaid, and do declare and adjudge* that the said C. D. hath forfeited the sum of* ———, *of lawful money of Great Britain, for the offence aforesaid, to be distributed*" [or, "*paid*," as the case may be,] "*according to the form of the statute in that case made and provided*; [*and also that the said C. D. shall forthwith pay unto the said A. B. the further sum of* ———, *for his costs and charges by him the said A. B. about the prosecution in this behalf expended.*" [See Arch. on Convictions, p. 101.] "*Given under my hand and seal, the* —— *day of* ——, *in the year of our Lord* ——.

J. P.

* Or if imprisonment and hard labour be the punishment

assigned by the statute, then the adjudication may be thus. "*do declare and adjudge that the said C. D., for his said offence, be imprisoned in the ——, [there to be kept to hard labour] for the space of —— calendar months. Given under my hand and seal, the —— day of ——, in the year of our Lord ——.*" Care must be taken that this part of the conviction correspond strictly with the statute upon which the conviction is framed.

2. *Conviction, where the Defendant appears and confesses.*

County [or as the case may be] *of ——.* } *Be it remembered, that on the —— day of ——, in the year of our Lord ——, at ——, in the county of ——, A. B. of ——, in the county aforesaid, labourer, personally came before me, J. P., one of his Majesty's justices of the peace for the said county, and informed me that C. D. of ——, in the county of ——, on the —— day of ——, in the year aforesaid, at —— in the said county, did*" [here set forth the offence for which the information is laid]; "*contrary to the form of the statute in such case made and provided: Whereupon the said C. D., after being duly summoned to answer the said charge, appeared before me on the —— day of —— instant, at ——, in the said county; and having heard the charge contained in the said information, acknowledged and voluntarily confessed the same to be true: Therefore, it manifestly appearing*" [&c. as in the last form, to the end.]

3. *Conviction, where the Defendant does not appear.*

County [or as the case may be] *of ——.* } *Be it remembered, that on the —— day of ——, in the year of our Lord ——, at ——, in the county of ——, A. B. of ——, in the county of ——, labourer, personally came before me, J. P., one of his Majesty's justices of the peace for the said county, and informed me that C. D. of ——, in the county aforesaid, on the —— day of ——, in the year aforesaid, at ——, in the said county, did*" [here set forth the offence for which the information is laid]; "*contrary to the form of the statute in such case made and provided: Whereupon the said C. D., after being duly summoned to answer the said charge, did not appear before me pursuant to the said summons: Nevertheless I, the said justice, did proceed to examine into the truth of the charge contained in the said information; and on the —— day of —— aforesaid, at —— aforesaid, one credible witness, to wit, F. F. of ——, in the county of ——, upon his oath deposeth and saith, that*" [here state the evidence, and as nearly as possible in the words used by the witness; and if more than one witness be examined, state the evidence given by each, thus]: "*And one other credible witness, to wit, G. H. of ——, in the county of ——, upon his oath deposeth and*

award costs against the party appealing or appealed against, a person laid an information under this statute against another, and the party was convicted; the latter (having given notice to the justices as required by the statute) appealed, and the informer not appearing at the Sessions, the conviction was quashed, and the informer ordered to pay the costs: afterwards, in the Court of King's Bench, it was contended that the Sessions had no authority to award costs against the informer, as he was no party to the appeal, the notice of appeal being given to the convicting magistrates and not to him: but the Court held that the informer was the party appealed against, within the meaning of the statute; it was true the statute directed the notice of appeal to be given to the convicting magistrates, and not to the prosecutor, but it would be a great anomaly to cause a Justice, who acts bonâ fide in the discharge of his judicial duty, to pay costs. *R. v. JJ. of Hants*, 1 *B. & Adolph.* 654.

CHAPTER IV.

The Practice of the Court of Quarter Sessions, in other Matters.

Section 1.—*Articles of the Peace.*

The commission of the peace runs thus: Know ye that we have assigned you jointly and severally, and every one of you our justices, to keep our peace in our county of B.; and to keep and cause to be kept all ordinances and statutes for the good of the peace and for preservation of the same &c. "And to cause to come before you or any of you, all those who, to any one or more of our people, concerning their bodies or the firing of their houses, have used threats, to find sufficient security for the peace or their good behaviour, towards us and our people; and if they shall refuse to find such security, then lodge them in our prisons, until they shall find such security, to be safely kept."

On this clause it is, that the practice of finding securities to keep the peace is founded. Although by the terms of this clause, a single justice out of Sessions has as much authority to require sureties for the peace, as the justices at Sessions; and although it has been decided that a justice out of Sessions may require a party to find sureties to keep the peace for two years and longer, and may commit him in default of his doing so; *Willis* v. *Bridger*, 2 *B. & Ald.* 278; yet it is much the safer and better course for a single justice to bind the party over until the next Sessions only, and let the justices at Sessions then, if applied to, bind him over to keep the peace for a specified time.

The practice is thus: If a man, either from having received personal violence from another, or from threats of personal violence, has reasonable ground to fear that further violence will be offered to his person by the same party, he may apply to a justice out of Sessions, to cause the party to be bound over to keep the peace towards him until the next Sessions. This can be done by any person who can make oath or affirmation; even by a wife against her husband, or a husband against his wife. 1 *Hawk. c.* 60, *s.* 2. Against peers or peeresses, however, the proceeding must be either in the Court of King's Bench, or in Chancery. Upon the party making his complaint on oath, the justice issues his warrant to bring the other party before him; the latter accordingly appears, and if he can find sureties, he brings them with him; the complaint is then read over to him, and he and his sureties enter into a recognizance, conditioned for his appearance at the next Sessions, and that he shall keep the peace towards his Majesty and all his liege people, and especially towards the complainant, in the

meantime. But if he cannot find sureties, the justice may then commit him till the next Sessions, unless he find sureties in the meantime.

At the next Sessions, the party is called upon his recognizance, and if he do not answer, his recognizance may be estreated; but if he answer, then the complainant is called, and if he do not answer, the Court will order the recognizance to be discharged. But if both answer when called, then the complainant, having had articles of the peace previously engrossed upon parchment, may exhibit them, and be sworn to the truth of them. This is usually done by counsel, who first moves that the party complained of be called upon his recognizance; and upon his appearing, the counsel then hands the articles to the clerk of the peace, who reads them, and the complainant is then sworn to them; the counsel then moves the Court to declare for what time and in what sum the recognizance shall be taken, which the Court accordingly do. In ordinary cases the Court order him to be bound over until the next Sessions only, or until the next Sessions but one; but in serious cases, or where they think it advisable, from circumstances, that the party should be bound over for a longer time, they may order the recognizances to be taken for one or two years, or longer, if they will. The party complained against is not allowed to make any answer to this, or to controvert the facts stated in the articles. *R.* v. *Doherty*, 13 *East*, 171. *Lord Vane's case*, 2 *Str.* 1202, 13 *East*, 171, n. All he can do is, to enter into the recognizance, with two sureties, whereupon his former recognizance will be discharged; or if he cannot procure sureties, the Court, on the motion of counsel, will order him into custody until he do so.

The following is the form of the Articles of the Peace:

Michaelmas Sessions, 1836.

Middlesex. *Articles of the peace, exhibited by A. B. of ———, cabinet-maker, on behalf of himself and Ann his wife, against C. D. of ———, shoemaker, in order to preserve the lives of himself this exhibitant, and of the said Ann his wife, from bodily harm.*

This exhibitant on his oath saith, that &c. [stating some act of the party complained against, as forming a portion of the matter of complaint.]

And this exhibitant upon his oath further saith, that &c. [stating in each article some distinct portion of the complaint, in such manner as to render the statement intelligible.]

And this exhibitant upon his oath further saith, that [*the said Ann, the wife of this exhibitant, is now so sick and weak, that she cannot be removed from her house, to attend this Honourable Court, to join in the exhibition of this complaint; and that*] *he this exhibitant, by means of the premises aforesaid, conceives himself and his said wife*

to be in great bodily danger; and he further saith, that he doth not make this complaint against the said C. D., through any hatred, malice, or ill will, which he hath or beareth towards the said C. D., but merely for the preservation as well of the life of his said wife, as of his own, and also of their persons from bodily harm. *A. B.*

Sworn at

this —— day of —— 1836.

By the Court.

The following is the Condition of the Recognizance to keep the Peace:

"*The condition of this recognisance is such, that if the above-bounden C. D. shall keep the peace towards his Majesty the King and all his liege people, and especially towards A. B. of ——, in the said county, yeoman, for the term of* [*twelve calendar months*] *now next ensuing, then the said recognizance shall be void, or else shall remain in full force.*"

This recognizance may be forfeited, by actual violence to the person of the complainant, committed either by the party complained of, or others by his procurement; 1 *Hawk. c.* 60, *s.* 20; or by his challenging the complainant to fight, or threatening to beat him in his presence; *Id. s.* 21; but not by mere words of anger, such as calling him a knave, rascal, drunkard, or the like, which though calculated to provoke a choleric man to break the peace, do not directly challenge him to do so. *Id. s.* 22.

SECTION 2.—*As to Friendly Societies.*

By stat. 4 & 5 W. 4, c. 40, s. 4, two transcripts of the rules of such society, signed by three members, and countersigned by the clerk or secretary, shall be transmitted to the barrister appointed to certify the rules of saving banks, who shall certify on each that the same are in conformity to law, and shall return one transcript to the society, and shall transmit the other to the clerk of the peace for the county in which such society shall be formed; and the clerk of the peace shall thereupon lay the same "before the justices for such county, at the General Quarter Sessions, or adjournment thereof, held next after the time when such transcript shall have been so certified and transmitted to him as aforesaid; and the justices then and there present are hereby authorized and required, without motion, to allow and confirm the same; and such transcript shall be filed by such clerk of the peace with the rolls of the sessions of the peace in his custody, without fee or reward; and all rules, alterations and amendments thereof, from the time when the same shall be so certified by the same barrister, shall be binding on the several members and officers of the said society, and all other persons having interest therein."

And the same, as to loan societies, by stat. 5 & 6 W. 4, c. 23, s. 2.

SECTION 3.—*Registering the Chapels of Protestant Dissenters and Catholics.*

By stat. 1 W. & M. c. 18, (the Act of Toleration,) s. 19, no congregation or assembly for religious worship shall be permitted, until the place of meeting be certified to the bishop of the diocese, or to the archdeacon of the archdeaconry, or to the justices of the peace at the General Quarter Sessions of the county, city or place; and the register or clerk of the peace shall register or record the same, and give certificate thereof to any who shall demand the same; for which no greater fee shall be taken than sixpence. *See also stat. 55 G. 3, c. 155, s. 2, to the like effect.*

By stat. 31 G. 3, c. 32, (the Act for the Toleration of Roman Catholics,) s. 5, it is provided, that no place of congregation or assembly for religious worship shall be allowed, until the place of such meeting shall be certified to the Sessions of the county or place where the same shall be held, and be there recorded; and the clerk of the peace shall give a certificate thereof, if demanded, for which he shall have sixpence.

SECTION 4.—*Lunatic Asylums.*

By stat. 2 & 3 W. 4, c. 107, establishing "The Metropolitan Commissioners in Lunacy" for licensing and visiting Lunatic Asylums in the cities of London and Westminster, the county of Middlesex, and the borough of Southwark, and certain parishes in the counties of Surrey, Kent and Essex, it is enacted by sect. 8, that the said commissioners shall meet on the first Wednesday in the months of November, February, May and July in every year, "in order to receive applications from persons requiring houses to be licensed for the reception of two or more insane persons within their jurisdiction, and (if they shall think fit) to licence the same."

By sect. 10, "In all other parts of England, the justices of the peace assembled in General or Quarter Sessions shall have like authority within their respective counties (except within the jurisdiction of the metropolitan commissioners) to license houses (if they shall think fit) for the reception of two or more insane persons, in the same manner as the metropolitan commissioners within their jurisdiction."

By sect. 15, All persons who shall apply, or intend to apply, to have a house licensed for the reception of insane persons, shall give notice to the clerk of the peace, fourteen clear days at the least prior to any General or Quarter Sessions of the Peace for the county where he shall apply for a licence; "which notice shall contain the true christian and surname and place of

abode of the person applying and intending to keep such house, and in case such person so applying does not propose to reside himself in the licensed house, the christian and surname and previous occupation of the superintendant who is to reside therein; and such notice, where given for any house which shall not have been previously licensed, shall be accompanied by a plan of every such house, to be drawn upon a scale of not less than one-eighth of an inch to a foot, with a description of the situation thereof, and the length, breadth and height of, and a reference by a figure or letter to, every room and apartment therein, and a statement of the greatest number of patients proposed to be received into such house;" which notice and plan shall be laid by the clerk of the peace before the justices, at such time as they shall take into their consideration the application for such licence.

The licence shall be made out by the clerk of the peace, according to the form given in a schedule to the Act, for such time, not exceeding thirteen calendar months, as the justices shall think fit; *sect.* 18; and shall be under the hands and seals of three or more of the justices in Quarter Sessions assembled, and stamped with a 10*s.* stamp. *Sect.* 19. For this licence the party shall pay to the clerk of the peace, after the rate of 10*s.* for every insane person not being a parish pauper, and the sum of 2*s.* 6*d.* for every parish pauper proposed to be received into such house, but for no licence to be so granted shall be paid less than 15*l.*, unless granted for a less period than thirteen months, in which case the justices may reduce the sum to not less than 5*l.* *Sect.* 18. The clerk of the peace shall keep an account of the sums so received, and after defraying the expenses to be disbursed in execution of the Act, he shall pay the balance to the treasurer of the county, in aid of the county-rate. *Sect.* 20, 21. If the justices refuse to renew any licence, the lord chancellor, upon the representation of the justices, may, by an instrument under his hand and seal, within one month after each representation, sanction and confirm such refusal; or if the lord chancellor within that time shall not refuse to confirm it, such refusal shall then be deemed effectual. *Sect.* 25, *see also sect.* 26.

By sect. 11, "The justices shall, at the Michaelmas General Quarter Sessions of the Peace in every year, appoint three or more justices of the peace, and also one or more physician, surgeon, or apothecary, to act as visitors of each house licensed for the reception of two or more insane persons within the county; and the said justices, physician, surgeon, or apothecary, so appointed as visitors for each house as aforesaid, shall and are hereby authorized and empowered to visit every such house, in manner directed by this Act; and such visitors shall, at their first meeting, take the oath required by this Act, such oath to be administered by a justice of the peace, being one of

such visitors; and every such visitor, being a physician, surgeon, or apothecary, shall be allowed and paid, for every day he shall be employed in executing the duties imposed upon him by this Act, such sum as the justices in General Quarter Sessions shall be pleased to direct, to be paid him by the clerk of the peace out of the monies to be received by him for licences granted under this Act; and in case of deficiency, then out of the county-rates: provided also, that in case of the death of any justice, physician, surgeon, or apothecary so appointed visitor as aforesaid, or of his refusal or inability by reason of illness or otherwise to act as such, it shall and may be lawful for the said justices, at any general or adjourned Sessions of the peace, to appoint a visitor in the room of such justice, physician, surgeon, or apothecary, who shall die or refuse or become unable to act as aforesaid; and the names of all such visitors, so appointed at the Michaelmas Quarter Sessions or any general or adjourned Sessions of the peace, shall, within seven clear days of such appointment, be published in some newspaper circulated in the county wherein such licensed house shall be situate; and the appointment of such visitors shall, within twenty-one clear days, be communicated by the clerk of the peace to the clerk of the metropolitan commissioners, who shall register the same in a book to be kept for that purpose; and in case of default of such communication, the clerk of the peace shall forfeit and pay a penalty of 5*l.*, to be recovered as is hereinafter directed."

As to county lunatic asylums, and the duties of justices at Sessions with respect to them, *see stat.* 9 *G.* 4, *c.* 40.

Section 5.—*As to Gaols.*

It would be impossible, in a work like this, to set out the statutes which have been enacted, and are now in force, upon this subject, all of which require the attentive perusal of the magistrate. I shall, however, very concisely notice the principal enactments upon the subject, in order to afford the reader some idea of the duties of justices at Sessions, with respect to the gaols and other prisons within the extent of their jurisdiction. The duties of justices out of Sessions, as visitors &c., I do not profess to notice, as not coming within the plan of this little work.

The principal statutes upon the subject are, stat. 4 G. 4, c. 64. and 5 G. 4, c. 85.

If by presentment or otherwise it shall be made to appear to the justices at Sessions, that the gaol or house of correction is insufficient, they shall give notice in the public newspapers

that the subject will be taken into consideration at a subsequent Quarter Sessions; and if at such subsequent Sessions a majority of the justices shall be of opinion that the same should be altered, enlarged, repaired or rebuilt, they may take such measures, by contract or otherwise, as they shall think necessary, to effect it, 4 *G.* 4, *c.* 64, *s.* 45, and may purchase land &c. for the purpose, *Id. s.* 46; and if a new prison is to be built, they may have it built in another part of the county, and may sell the old site. *Id. s.* 50. *and see* 7 *G.* 4, *c.* 18. Also, in order to raise funds for this purpose, the justices at Sessions are empowered to borrow money from the commissioners of public works, 4 *G.* 4, *c.* 63, or they may mortgage the county rates. 4 *G.* 4, *c.* 64, *s.* 54, 55. 5 *G.* 4, *c.* 85, *s.* 20. 6 *G.* 4, *c.* 40.

The justices at Sessions may appoint two or more magistrates to be visitors of the gaol and house of correction within their jurisdiction; 4 *G.* 4, *c.* 64, *s.* 16; they may also appoint a chaplain, *Id. s.* 28, and a surgeon, *Id. s.* 33, to each prison. Also, instead of the gaol fees, which are now abolished, they may order salaries to be paid to the gaolers and their servants, 55 *G.* 3, *c.* 50, *s.* 2. 4 *G.* 4, *c.* 64, *s.* 26, and to the matron, task-master, &c. 4 *G.* 4, *c.* 64, *s.* 26.

In building or enlarging prisons, the justices at Sessions shall adopt such plans as are calculated to afford the best means for the classification of the prisoners. 4 *G.* 4, *c.* 64, *s.* 49. 5 *G.* 4, *c.* 85, *s.* 10—13. And the said justices shall, "by orders to be made for that purpose, ascertain and declare to what class or classes of prisoners every such gaol or house or houses of correction, or any part or parts of any of them respectively, shall be applicable; and every such order shall be signed by the chairman of such Sessions, and shall be notified by the clerks of the peace to the several justices of the peace in every such county" &c., and notice thereof shall be published in the newspapers, and a copy of the order given to the keeper of every such gaol or house of correction; after which, such order shall be observed, and no other classification used. 4 *G.* 4, *c.* 64, *s.* 4. *and see s.* 5, 3.

By 4 G. 4, c. 64, s. 35, reciting that provision had been made by the Act for supplying the prisoners with food and clothing, and bequests had frequently been made and benefactions given for the same purposes, it is enacted "that it shall be lawful for the justices in General or Quarter Sessions assembled, to apply such bequests or benefactions for the benefit of such poor prisoners, either by providing them with the implements of labour, or with the means of returning to their own houses, or in such manner as to the magistrates may appear expedient."

At the Michaelmas Sessions in every year, the clerk of the peace shall lay before the justices a general report, founded on

the reports of the visiting magistrates and of the chaplain; and when approved of by the justices, it shall be signed by the chairman, and transmitted to one of his majesty's principal secretaries of state, and laid before parliament. 6 *G.* 4, *c.* 64, *s.* 24.

It may be necessary to observe, that in counties divided into ridings or divisions, having distinct commissions of the peace, all matters relating to the gaol of such county are, by stat. 5 G. 4, c. 12, placed under the direction of a "Court of Sessions" of such gaol, of which the justices of all the ridings or divisions are members; and such Court are vested with all the powers and authorities with respect to such common gaol, as Courts of Quarter Sessions possess in any other county.

SECTION 6.—*As to the County Rate.*

By stat. 12 G. 2, c. 29, s. 1, reciting that before then distinct rates upon the county were made by virtue of certain Acts of Parliament, for each of the several purposes therein mentioned, which occasioned many difficulties and inconveniences, it was enacted, that thereafter the justices of the peace at their General or Quarter Sessions, or the greater part of them then and there assembled, should have "full power and authority from time to time to make one general rate or assessment" for such sum or sums of money, as they in their discretions should think sufficient to answer all and every the ends and purposes of the before recited Acts, instead and in lieu of the several separate and distinct rates directed thereby to be made, levied and collected; "which rate shall be assessed upon every town, parish, or place within the respective limits of their commissions, in such proportions as any of the rates heretofore made in pursuance of the said several Acts have been usually assessed;" to be collected afterwards by the high constables, in the manner the Act directs, *see s.* 3, who shall pay the same to the county treasurer, *Id. s.* 6, and both the treasurer and high constables shall account for the same before the justices at the General or Quarter Sessions. *Id. s.* 7, 8. *and see s.* 17. *and* 55 *G.* 3, *c.* 51, *s.* 18.

The old proportions, according to which the rate was to be assessed upon the different parishes &c. by the above Act, being found to be very unequal in some instances, it was enacted by 55 G. 3, c. 51, s. 1, that it should be lawful for the justices assembled at their General or Quarter Sessions, or any adjournment thereof, "whenever circumstances shall appear to require it, to order and direct a fair and equal county rate to be made, for all the purposes to which the county stock or

rate is now or shall hereafter be made liable by law, according to the directions hereinafter mentioned; and for that purpose to assess or tax every parish, township, or other place, whether parochial or extra-parochial, within the respective limits of their commissions, rateably and equally according to a certain pound rate (to be from time to time fixed and publicly declared by such justices) of the full and fair annual value of the messuages, lands, tenements, and hereditaments, rateable to the relief of the poor therein." And for the purpose of enabling the justices at Sessions to make such a rate, they may issue precepts, signed by their chairman, or by the clerk of the peace under the authority of the Court, to the high constables, churchwardens and overseers of the poor &c. of all or any of the parishes or places, to make a return in writing, on oath, to the justices at Petty Session, of the annual value of the rateable property of such parish &c. rated to the poor rate; *Id. s. 2*; and such latter justices are to report thereon to the justices at the next or any subsequent Quarter Sessions, as shall be directed, *Id. s. 3*, and certify the value of the rateable property within their respective divisions. *Id. s. 11. see also stat. 56 G. 3, c. 49. 57 G. 3, c. 94. 1 & 2 G. 4, c. 85.*

By stat. 4 & 5 W. 4, c. 48, s. 1, reciting that it had been doubted whether it was requisite that this business of the Court of Quarter Sessions, with respect to county rates, should be transacted publicly in open Court, and that a practice had prevailed in some counties of transacting such business in private: it was enacted, that "all business appertaining to the assessment, application, or management of the county stock or rate, or any fund or funds used or applied in aid thereof or contributory thereto, or to any matter or thing whereby or in respect whereof the said county stock or rate is or may be chargeable by law, which by any statute or statutes now in force the justices of the peace are authorized and directed to do and transact at the General or Quarter Sessions, or at any adjournment thereof, shall be done and transacted publicly and in open Court at such General or Quarter Sessions, or adjournment thereof, and not otherwise; and that no order of such justices relating to the matters aforesaid, shall be binding or effectual, unless the said order shall have been made, and the business relating thereto shall have been done and transacted publicly and in open Court, as aforesaid." But it has been decided, that although the business is to be done thus publicly, no rate-payer or other person, other than a member of the Court, is entitled in any way to interfere with the jurisdiction of the justices, or to take any part in the proceedings. *R. v. Nottingham, T. 1835, 1 Burn, D. & W. 905, n.*

By sect. 2, "Public notice shall be given, in two newspapers generally circulating in the county, of the time of holding the

General Quarter Sessions or any adjournment thereof, at least two weeks before the holding of the same, and also of the day and hour at which the business relating to the assessment, application, or management of the county stock or rate will commence at such Sessions."

SECTION 7.—*As to diverting or stopping up Highways.*

We have already considered this subject, with reference to the appeal against diverting or stopping up a highway; we have here to consider it, with reference to the proceedings and proof necessary, in order to obtain the order of Sessions for diverting or stopping up the way, in the supposition that no appeal has been lodged against it. This is done so plainly and explicitly by the statute, that it is only necessary that I should give here the different clauses upon the subject.

By stat. 5 & 6 W. 4, c. 50, s. 84, "When the inhabitants in vestry] assembled shall deem it expedient that any highway should be stopped up, diverted or turned, either entirely or reserving a bridleway or footway along the whole or any part or parts thereof, the chairman of such meeting shall, by an order in writing, direct the surveyor to apply to two justices to view the same, and shall authorize him to pay all the expenses attending such view, and the stopping up, diverting, or turning such highway, either entirely or subject to such reservation as aforesaid, out of the money received by him for the purposes of this Act: Provided nevertheless, that if any other party shall be desirous of stopping up, diverting, or turning any highway as aforesaid, he shall, by a notice in writing, require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and if such inhabitants shall agree to the proposal, the said surveyor shall apply to the justices as last aforesaid, for the purposes aforesaid; and in such case the expenses aforesaid shall be paid to such surveyor by the said party, or be recoverable in the same manner as any forfeiture is recoverable under this Act; and the said surveyor is hereby required to make such application as aforesaid."

"When it shall appear upon such view of such two justices of the peace, made at the request of the said surveyor as aforesaid, that any public highway may be diverted and turned, either entirely or subject as aforesaid, so as to make the same nearer or more commodious to the public, and the owner of the lands or grounds through which such new highway so proposed to be made, shall consent thereto under his hand; or if it shall appear, upon such view, that any public highway is unneces-

sary: the said justices shall direct the surveyor to affix a notice in the form or to the effect in the schedule to this Act annexed (*vide infra,*) in legible characters, at the place and by the side of each end of the said highway, from whence the same is proposed to be turned, diverted, or stopped up, either entirely or subject as aforesaid; and also to insert the same notice in one newspaper published or generally circulated in the county where the highway, so proposed to be diverted, turned, or stopped up, either entirely or subject as aforesaid (as the case may be) shall lie, for four successive weeks next after the said justices have viewed such public highway; and to affix a like notice on the door of the church of every parish, in which such highway, so proposed to be diverted, turned, or stopped up, either entirely or subject as aforesaid, or any part thereof, shall lie, on four successive Sundays next after the making such view." *Id.* s. 85.

The following is the form of the notice:

"*Notice is hereby given, that on the —— day of —— next, application will be made to his Majesty's justices of the peace, assembled at Quarter Sessions in and for the county of ———, at ———, for an order for,*" [if the order be for turning, diverting and stopping up &c., here state it, and describe the road ordered to be turned, diverted, and stopped up; if the order be for stopping up a useless road, here state it, and describe the road ordered to be stopped up:] "*and that the certificate of two justices having viewed the same &c., with the plan of the old and proposed new highway, will be lodged with the clerk of the peace for the said county, on the —— day of —— next.*

A. B. } *Surveyor or Surveyors of*
C. D. } *the parish of ———.*"

"And the said several notices having been so published, and proof thereof having been given to the satisfaction of the said justices; and a plan having been delivered to them at the same time, particularly describing the old and proposed new highway, by metes, bounds and admeasurement thereof, which plan shall be verified by some competent surveyor: the said justices shall proceed to certify under their hands, the fact of their having viewed the said highway as aforesaid, and that the proposed new highway is nearer or more commodious to the public; and if nearer, the said certificate shall state the number of yards or feet it is nearer, or if more commodious, the reasons why it is so; and if the highway is proposed to be stopped up as unnecessary, either entirely or subject as aforesaid, then the certificate shall state the reason why it is unnecessary." *Id.*

"And the said certificate of the said justices, together with the proof and plan so laid before them as aforesaid, shall, as soon as conveniently may be after the making of the said certificate,

be lodged with the clerk of the peace of the county in which the said highway is situated, and shall, (at the Quarter Sessions which shall be holden for the limit within which the highway so diverted and turned or stopped up, either entirely or subject as aforesaid, shall lie, next after the expiration of four weeks from the day of the said certificate of the said justices having been lodged with the clerk of the peace as aforesaid) be read by the said clerk of the peace in open Court; and the said certificate, together with the proof and plan as aforesaid, as well as the consent in writing of the owner of the land through which the new highway is proposed to be made, shall be enrolled by the clerk of the peace amongst the records of the said Court of Quarter Sessions." *Id.*

By sect. 86, it is provided, that "in any case where it is proposed to stop up or divert more than one highway, which highways shall be deemed to be so connected together as that they cannot be separately stopped or diverted, without interfering one with the other, it shall be lawful to include such different highways in one order or certificate."

By stat. 91, if no appeal be made, or being made shall be dismissed, then "the justices at the said Quarter General Sessions shall make an order to divert and turn and to stop up such highway, either entirely or subject as aforesaid, or to divert, turn, and stop up such old highway, and to purchase the ground and soil for such new highway, or to stop up such unnecessary highway, either entirely or subject as aforesaid, by such ways and means, and subject to such exceptions and conditions in all respects, as in this Act is mentioned in regard to highways to be widened; and the proceedings thereupon shall be binding and conclusive on all persons whomsoever."

Section 8.—*As to Coroners' Fees.*

By stat. 25 G. 2, c. 29 s. 1, the coroner, for every inquisition (not taken upon view of a body dying in gaol) which shall be duly taken in any township or place contributing to the county rate, shall have 20*s.*, and also 9*d.* for every mile he shall be compelled to travel from his usual place of abode to take such inquisition: to be paid by order of the justices in Sessions, out of the county rates; for which order no fee shall be paid. The 9*d.* per mile is to be paid to him for the number of miles he has to travel from his home, but not for the number of miles he travels in returning. *R.* v. *JJ. of Oxfordshire*, 2 *B.* & *Ald.* 203. And if he hold two more inquisitions, on the same day, at the same place, he is only entitled of one sum of 9*d.* per mile from the place of his abode to the place of taking the inquisition. *R.* v. *JJ. of Warwick*, 5 *B.* & *C.* 430. The justices are judges

whether the inquisition was necessary, and duly taken. *R.* v. *JJ. of Kent*, 11 *East*, 229.

And for every inquisition taken on view of a body dying in prison, the coroner shall be paid so much as the justices in Sessions shall allow, not exceeding 20*s.*; to be paid in like manner. 25 G. 2, c. 29, s. 2.

By stat. 5 & 6 W. 4, c. 76, (Municipal Corporation Act,) s. 62, in boroughs in which a separate Court of Quarter Sessions shall be holden, the coroner of such borough, for every inquisition which he shall duly take within such borough, shall be entitled to have the sum of 20*s.*, and also the sum of 9*d.* for every mile exceeding two miles which he shall be compelled to travel from his usual place of abode to take such inquisition, to be paid by the treasurer of the borough out of the borough fund of such borough, by order of the Court of Quarter Sessions of such borough.

SECTION 9.—*As to Vagrants.*

The stat. 5 G. 3, c. 83, defines who shall be deemed an idle and disorderly person, (s. 3,) a rogue and vagabond, (s. 4,) and an incorrigible rogue, (sect 5;) and this last section adds, as to incorrigible rogues, that "it shall be lawful for any justice of the peace to commit such offender, (being thereof convicted before him, by the confession of the offender, or by the evidence on oath of one or more credible witness or witnesses,) to the House of Correction, there to remain until the next General or Quarter Sessions of the Peace; and every such offender, who shall be so committed to the House of Correction, shall be there kept to hard labour during the period of his or her imprisonment."

And by sect. 10, "when any incorrigible rogue shall have been committed to the House of Correction, there to remain until the next General or Quarter Sessions, it shall be lawful for the justices of the peace there assembled, to examine into the circumstances of the case, and to order, if they think fit, that such offender be further imprisoned in the House of Correction, and be there kept to hard labour, for any time not exceeding one year from the time of making such order, and to order further, if they think fit, that such offender (if not a female) be punished by whipping, at such time during his imprisonment, and at such place within their jurisdiction, as according to the nature of the offence they in their discretion shall deem to be expedient."

SECTION 10.—*Applications in Bastardy Cases.*

By stat. 4 & 5 W. 4, c. 76, (the Poor Law Amendment Act,) s. 72, "when any child shall hereafter be born a bastard, and shall, by reason of the inability of the mother of such child to provide for its maintenance, become chargeable to any parish, the overseers or guardians of such parish, or the guardians of any union in which such parish may be situate, may, if they think proper, after diligent inquiry as to the father of such child, apply to the next General Quarter Sessions of the Peace, within the jurisdiction of which such parish or union shall be situate, after such child shall have become chargeable, for an order upon the person whom they shall charge with being the putative father of such child, to reimburse such parish or union for its maintenance and support; and the Court to which such application shall be made, shall proceed to hear evidence thereon; and if it shall be satisfied, after hearing both parties, that the person so charged is really and in truth the father of such child, it shall make such order upon such person in that respect, as to such Court shall appear to be just and reasonable under all the circumstances of the case: provided always, that no such order shall be made, unless the evidence of the mother of such bastard child shall be corroborated in some material particular by other testimony, to the satisfaction of the Court: provided also, that such order shall in no case exceed the actual expense incurred or to be incurred for the maintenance and support of such bastard child while so chargeable, and shall continue in force only until such child shall attain the age of seven years, if he shall so long live; provided also, that no part of the monies paid by such putative father, in pursuance of such order, shall at any time be paid to the mother of such bastard child, nor in any way be applied to the maintenance and support of such mother."

By sect. 73, "no such application shall be heard at such Sessions, unless fourteen days' notice shall have been given, under the hands of such overseers or guardians, to the person intended to be charged with being the father of such child, of such intended application; and in case there shall not, previously to such Sessions, have been sufficient time to give such notice, the hearing of such application shall be deferred to the next ensuing Quarter Sessions: provided always, that whenever such application shall be heard, the costs of the maintenance of such bastard child shall, in case the Court shall think fit to make an order thereon, be calculated from the birth of such bastard child, if such birth shall have taken place within six calendar months previous to such application being heard; but if such birth shall have taken place more than six calendar months pre-

viously to such application being heard, then from the day of the commencement of six calendar months next preceding the hearing of such application: provided also, that if, upon the hearing of such application, the Court shall not think fit to make any order thereon, it shall order and direct that the full costs and charges incurred by the person so intended to be charged, in resisting such application, shall be paid by such overseers or guardians."

And by sect. 74, "if such person, so intended to be charged, shall not appear by himself or his attorney, at the time when such application shall come on to be heard before such Court, according to such notice, such Court shall nevertheless proceed to hear the same, unless such overseers or guardians shall produce an agreement, under the hand of such person, to abide by such order as such Court shall make thereon, without the hearing of evidence by such Court: provided always, that such Court may, notwithstanding such agreement, require that evidence shall be given in support of such application, if it thinks fit, before such order is made."

Where a bastard child, born since the passing of this statute, (14 August, 1834,) becomes chargeable to a parish, the overseers should immediately make inquiry as to the putative father; and if they learn this from the mother, they must then make inquiries, and endeavour to obtain such evidence, confirmatory of the girl's account, as may be sufficient to satisfy the justices at Sessions that the party to be charged is the putative father of the child. If the overseers be then in time to give notice of application for the next Sessions, they must do so. The words "next Sessions," in the 72d section (*supra*) have given rise to much doubt and difficulty. In last Trinity Term, a case was decided by Mr. Justice Coleridge, in the Bail Court of the Court of King's Bench, which appeared at the time to put an end to all doubt or difficulty upon the point. The case was thus: On the 13th June, 1835, a bastard child became chargeable; the Midsummer Sessions commenced on the 28th June, and the Michaelmas Sessions on the 30th October; it was not however until the Epiphany Sessions that the overseers made an application against the putative father under this Act, and the Sessions then refused to receive it, on the ground that it ought to have been made at the next Sessions after the child became chargeable, and was now too late. A rule nisi was then obtained for a mandamus to the justices, to receive and decide upon the application, and after the matter was argued before Coleridge, J., his Lordship, after taking time to consider the point, delivered a written judgment to this effect: He said that to construe the words "next General Quarter Sessions" in the 72d section, as meaning that the application, if made at all, must be made at the next Sessions

after the child becomes chargeable, and that it cannot be made at any subsequent Sessions, would have the effect of rendering that section of the statute nearly nugatory: it might be, that the mother would not disclose the name of the putative father until after the next Sessions were over: or the father might abscond: or the overseers might not be able to obtain the confirmatory evidence required by statute. On the other hand, it might and probably would be productive of great hardship to the person suspected of being the putative father, if the overseers were allowed to delay their application, and make it at any distance of time, just as it might suit their convenience. He thought it best, in analogy to the cases decided on stat. 13 & 14 C. 2, c. 12, s. 2, and 3 W. & M. c. 11, s. 9, relating to appeals against orders of removal, to hold, that the words "next General Quarter Sessions," mean the next practicable Sessions after the overseers, having made diligent inquiry as to the father, shall be in a situation to make the application. This construction would have the effect of still leaving it in the discretion of the justices, to entertain the application at a subsequent Sessions, if they were satisfied that the delay was not voluntary upon the part of the overseers, but was occasioned solely by their not being able sooner to learn who the putative father was, or to obtain the confirmatory evidence required by the statute. He said, that the 73d section did not affect the question; it related only to cases where the application is made in time, and the hearing of it adjourned. *R.* v. *JJ. of Oxfordshire, MS. T.* 1836. But in a still more recent case, before the full Court of King's Bench, the point seems to have been doubted, although the contrary was not actually decided, The case was thus: The child was born on the 16th August, 1834, and became chargeable on the 29th September following; the next Sessions commenced on the 13th October; the notice of application was given to the putative father on the 9th December, and the application was made to the Sessions on the 8th January. It was objected by the putative father, that the application was not made to the "next Sessions" after the child became chargeable, and that there was no proof of the overseers having made diligent inquiry as to the father, nor was any excuse then offered or proved for the application not having been made to the Michaelmas Sessions. The Sessions, however, entertained the application, and made the order, subject to the opinion of the Court of King's Bench upon a case. In the course of the argument on the special case, the above case of *R.* v. *JJ. of Oxfordshire* was cited. But the Court expressed considerable doubt, whether they could give any other construction to the words "next Sessions" "if they think proper," than that the overseers, if they apply at all, must apply to the next actual Sessions; they said, however, that it was not necessary to decide the point in this case, because the Court were

of opinion that, as the overseers had not made the application to the next Sessions, it lay upon them at least to shew why they had not made it: and as they had not done so, the Sessions should not have made the order. *R. v. Charles Heath, MS. T.* 1836. Until there shall be some further decision upon the subject, however, the above case of *R. v.* JJ. of Oxfordshire may be deemed a safe practical guide to justices and parish officers.

The following may be the form of the notice:

Whereas Ann Styles, single woman, was on the —— day of ——— last delivered of a male bastard child, and the said child, on the —— day of ——— last, by reason of its said mother being unable to provide for its maintenance, became chargeable to the parish of ———, in the county of ———, and from thence hitherto has been maintained and supported by the said parish. And whereas we, the undersigned, being the churchwardens and overseers of the poor of the said parish," [or *" the guardians of the poor of the said parish,"* or *" the guardians of the union in which such parish is situate,"*] *have made diligent inquiry as to the father of the said child, and find that you, John Nokes, are the father of the same: Therefore take notice, that at the next General Quarter Sessions of the Peace, to be holden in and for the county of ——— aforesaid, within which such parish is situate, we, as such churchwardens and overseers of the poor of the said parish, intend to make an application to the Court, at the said Sessions, for an order upon you, John Nokes, to reimburse the said parish for the maintenance and support of the said child. Given under our hands, this —— day of ———,* 1836.

To John Nokes, of ——, labourer.

A. B. } *Churchwardens of the*
C. D. } *parish of ——.*
E. F. } *Overseers of the poor*
G. H. } *of the said parish.*

Upon being served with this notice, the putative father may probably sign such a written agreement or consent as is mentioned in the 74th section, *ante*, p. 403. It may be in this form:

I hereby consent to the Court of Quarter Sessions for the county of ——— making an order against me, as the putative father of the bastard child, of which Ann Styles has been delivered; and I hereby agree to abide by such order as such Court shall make hereupon, without the hearing of any evidence by such Court. Given under my hand this —— day of ——, 1836.

John Nokes.

And at the Sessions, the counsel for the parish, having made the application, has merely to prove the party's signature to this consent, and examine the overseer as to the amount already paid

for the maintenance of the child, for a period not exceeding six months. *See sect.* 73, *ante*, *p.* 402, 403.

But if the putative father have not signed the consent, then the parish will have to prove:

1. Service of a copy of the notice, and that the notice is signed by the churchwardens and overseers.

2. By the mother, that she is a single woman, has had a child, and that the party charged is the father of it; the time of the birth; and when the child became chargeable.

3. Evidence confirmatory of what the mother has stated, as to the party charged being the putative father.

4. By the overseer, the amount expended in the maintenance of the child, during a period not exceeding six calendar months. In this the Sessions will not allow any money which has been given to the mother, or the expenses of her lying-in, or the like, to be included; but they confine it strictly to the sum which has been expended in the maintenance of the child.

For forms of the order made upon such an application, *see Arch. P. L. Amend. Act*, *p.* 25—27.

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