

operative part of it, the keeper of the common gaol is commanded to receive the said Ellen Bryant and "there to imprison her and keep her for the space of one month, unless the said several sums and costs, and charges of conveying her to the said common gaol, amounting to the further sum of ——— dollar, shall be sooner paid."

The words, *at hard labor*, found in the recital, are not in the conviction, and it is contended that the magistrate had no right to impose hard labor in this case, and that it is a fatal variance from the conviction.

As to the first point, the offence being one created by Provincial statute, and the statute having no provision imposing hard labor, I think the magistrate could not impose it. But is that a fatal variance, or, as argued on the part of the prosecution, it being only in the recital part, is it a mere defect of form, not materially affecting the validity of the commitment? There is no doubt that a material variance, a variance in the substantial part of the commitment, as when the offence stated is different from that in the conviction, or under a different statute, would be fatal. But when the conviction and the commitment substantially agree, it is sufficient. *Barnes v. White*, 1 C. B. 211. If the defect be only one of form, and the conviction be right, the defect will be cured, provided the commitment shows the like offence as is stated in the conviction. *R. v. Taylor*, 7 D. & R. 623. *Re Allison*, 24 L. J. M. C. 73. In the latter case, Platt, J., said, "No rule is more wholesome as that which prevents technical objection defeating justice."

In the present case, the defect and variance being only in the recital part of the commitment, I consider it a mere defect in form which may be cured by the conviction.

Another objection is taken on the ground that the commitment, in its operative part, commands the gaoler to keep the said defendant in gaol for one month, unless the said sums above mentioned "and charges of conveying her to the common gaol, amounting to the further sum of ——— dollar, shall be sooner paid." It is contended that the magistrate had no right to impose said additional costs of conveying to gaol, and that the said sum payable for costs being left in blank, this renders the commitment substantially defective. The prosecution contends that this is mere surplusage, and the defendant has no sum to pay, as the amount is left in blank.