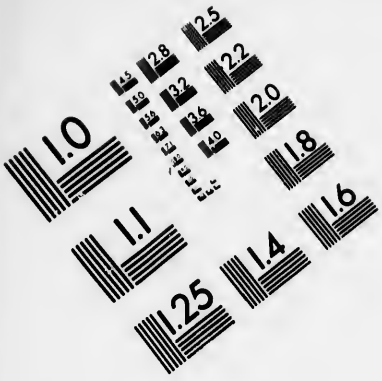

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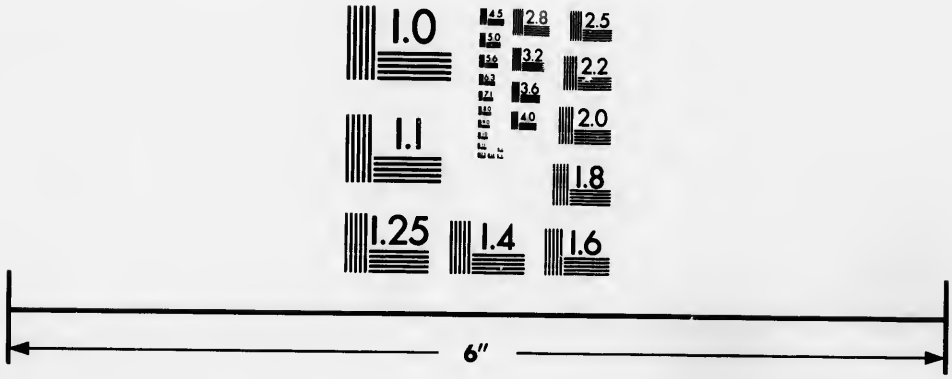

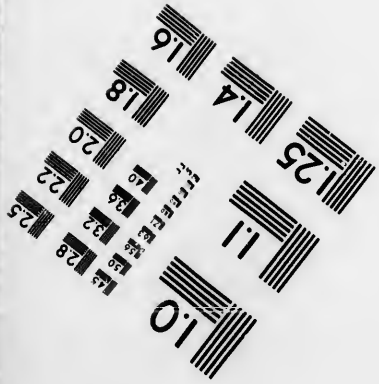

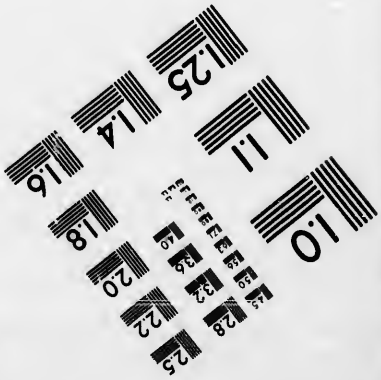

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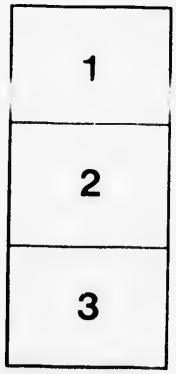

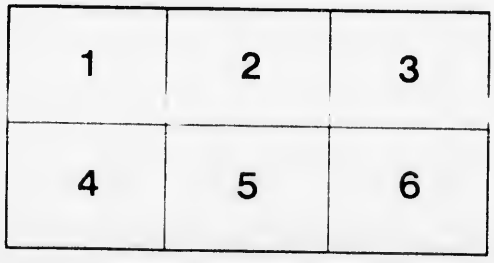

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The Honorable Sir William Young
Chief Justice of Nova Scotia

NO. X

REVIEW

With the Compliments of the author

OF THE

JUDGMENTS

OF THE

SUPREME COURT

IN

THE QUEEN

vs.

JOSEPH CHASSON.

BY DAVID S. KERR, BARRISTER, Q. C.

SAINT JOHN, N. B.:
PRINTED AT THE "DAILY NEWS" STEAM JOB PRINTING ESTABLISHMENT, CANTERBURY ST.
1876.

The Queen vs. Joseph Chasson.

This case was tried at Bathurst, before the Chief Justice, at the adjourned Gloucester Circuit, for 1875, beginning in October and lasting upwards of forty days, upon an indictment against the prisoner Chasson and eight others, as principals in the first degree for the murder of one John Gifford, at Caraquet, on the 27th of January, 1875, the trial being of Chasson alone.

Numerous objections, to the number of 48, were made and reserved at the trial (two others being added at Term) by the prisoner's counsel, the whole of which were decided by the Chief Justice in favor of the Crown. Various of the objections arose on the impanneling of the jury, which occupied nearly seven days, in challenges to the jurors, demurrers to challenges, and to the triers of the examination and cross-examination of jurors, as to opinions which they had formed, etc., a course allowed by His Honor, but strongly objected to, throughout by the Crown counsel, as contrary to the right, the dignity and utility of a juror, and finally adjudged in favor of the jurors right, as maintained by the Crown counsel, in the following judgments of the Supreme Court. Many of the objections, were to the reception and rejection of evidence on the trial, upon several of which the majority of the Court determined for quashing the conviction, Mr. Justice WELDON differing upon additional objections of quashing, all of which, form the subject of this review. A verdict of guilty of murder, was found by the jury, with a recommendation to mercy, and at the termination of the case, it was consented that six of the other prisoners might withdraw their pleas and plead guilty of manslaughter, subject to the above objections, the other two being discharged by an entry of *nolle prosequi*.

A lengthy special case, enumerating all the objections, was submitted by the Chief Justice, to the Supreme Court, the matters were fully argued in Easter Term last and the judgment delivered in Trinity Term last. The case and the objections so far as they are

material for the understanding of the subject sufficiently appear in the respective judgments of Mr. Justice WELDON, and the majority of the Court and by the review which follows, wherein many questions of great interest to the public and to the legal profession are presented:—

Judgment of WELDON, J. This case was tried before the Chief Justice at the adjourned Circuit in Gloucester, at which a new Grand Jury and a Petit Jury had been summoned. At the Circuit in September, a Bill of Indictment had been found against the prisoner and ten other prisoners for murder, and the order to summon one hundred and fifty petit jurors was made in consequence. A *nolle prosequi* was entered on that Bill of Indictment, and another Bill of Indictment was submitted to the Grand Jury. A true bill was found, charging the defendant and eight other persons with the crime of murder. The defendant, Joseph Chasson, one of the parties charged, was placed on trial. The Attorney General, on behalf of the Crown, claimed the right to have the jurors objected to stand aside until the panel was gone through without assigning any cause. By the 32 and 33 Vic., c. 29, sec. 38, it is enacted: "In all criminal trials, whether for treason, felony or misdemeanour, four jurors may be peremptorily challenged on the part of the Crown; but this shall not be construed to affect the right of the Crown to cause any juror to stand aside until the panel has been gone through, or to challenge any number of jurors for cause." There is, by this section, a distinct admission that the right of the Crown is preserved, and the *Queen* v. *Maunsell* (8 E. & B. 52; 3 Jurist N. S. 564), and on appeal (4 Jurist 435), Lord CAMPBELL, in *Gray* v. *The Queen* (11 Cl. & F.; House of Lords Case, 487), shews what the right is, which, practically speaking, "the Crown has an unlimited right of challenge till the panel is exhausted," and this was considered as disposed of at the hearing, it not being an arguable question. Then as to the challenge of jurors, requiring it to be in writing, and to what it shall contain and the extent which a juror may be examined. As to the challenge being put in writing, all the authorities seem to agree that it should be made in such form as to be put on the record. ABBOTT, C. J., in *Rex* v. *Edmonds* (4 B. & Ald. 471), in delivering the judgment of the Court in that case says: "Every challenge, either to the array or to the polls, ought to be propounded in such a way that it may be put at the time upon the *Nisi Prius* record, and so particular were they in early times, when challenges were more in use, that it was made a question (in 27 Hen. 8, 13 B., pl. 38) whether it was not a fatal defect to omit the concluding of it with an '*et hoc paratus est verificare*;' and it was because many precedents were shewn without

such a conclusion, and the justices did not choose to depart from the precedents, that it was held unnecessary. When a challenge is made, the adverse party may either demur (which brings into consideration the legal validity of the matter of challenge) or counterplead (by setting up some new matter consistent with the matter of challenge to vacate and annul it as a ground of challenge), or he may deny what is alleged for matter of challenge, and it is then, and then only, that triers are to be appointed." After quoting various instances in which the objections had been put on the records, his Lordship thus proceeds: "The challenges, therefore, ought to be put upon the record, and the defendants are not in a condition, in strictness, to ask of the Court an opinion upon their sufficiency." This case shews very clearly that the Chief Justice was right in requiring the challenges to be in writing. It may not be necessary in all cases it should be in writing; it is in the discretion of the Judge, when a challenge is made and decided at once, without requiring evidence, to prove the charge of partiality, or that the juror has a bias or prejudice which unfits him for being a juror, and disposed of at once, it is unnecessary to put in writing; but when questions may arise upon the challenge in subsequent proceedings, it is for the benefit and security of the party challenging to have it put in writing, so as to have the benefit of it afterwards as forming part of the record. It is laid down in *Coke Littleton*, 158 *b.*: "If the cause of challenge touch the dishonor or credit of the juror, he shall not be examined upon his oath. But in other cases he shall be examined upon his oath to inform the triers. This is one instance of the examination called a *voir dire*; for a witness is, on a *voir dire* to try an objection to his competency, to give evidence; so a juror may be sworn in like manner to try the cause of challenge to him. It is thought fit to take notice of this, because in some of our books the *voir dire* is described as if confined to the challenge of a witness, and only used to distinguish such a partial swearing of a witness from swearing him in chief." From the mode of examinations on the *voir dire*, which is so limited from an examination of a witness sworn in chief, shows clearly, in my opinion, that a juror summoned to attend the Court, which is not a voluntary attendance, he is supposed to come indifferent between the litigants, and, therefore, it is not allowable that he should be treated as a hostile party upon being challenged for cause; the cause being stated, he is sworn as to his being indifferent; or if he has any prejudice against the party, or hath declared his opinion beforehand, the language of Mr. Sergeant Hawkins upon this subject (Leb. 2, Ch. 43, sec. 28) is, that if a juryman "hath declared his opinion beforehand, that the party is guilty, or will be hanged, or the like, yet if it shall appear that the juror hath made such declaration from his know-

ledge of the cause, and not out of any illw-ill to the party, it is no cause of challenge." This learned writer's opinion is, that if the declaration of a juryman will not be a good cause of challenge unless it be made in terms or under circumstances denoting an ill intention towards the party challenging. This is probably carrying the doctrine of what is necessary to constitute a good challenge too far. If a juror has a strong bias or prejudice against the party on his trial it would be sufficient, or that he has expressed an unfavorable opinion of the prisoner's case, would be good cause; but if a juror has never expressed an opinion—for all have opinions more or less who think or have read anything relating to the question to be tried—it would not, in my opinion, be good ground for challenge. In *Fitz*, Chall. 22, the opinion of BABINGTON is thus given: "If he will pass for one party, whether the matter be true or false, he is favorable; so, if he has said he will pass for one party, if it be for affection that he has to the person and not for the truth of the matter that he has knowledge of it, he is not favorable; wherefore you will inquire of that of what I have said." The charge of BABINGTON to the triers, as given in the *Year Book* (7 Hen. 6, p. 25), is thus addressing himself to the triers, he says: "If, whether the matter be true or false, he will pass for the one or the other, in that case he is favorable; but if a man has said twenty times that he will pass for the one or the other, you will inquire on your oaths whether the cause will be for affection that he has to the party, or for the knowledge he has for the matter in issue; if for affection that he has to the party, then he is favorable, but otherwise not; and if he has more affection to the one than he has to the other, but if he has a full knowledge of the matter in issue, if he be sworn he will speak the truth, notwithstanding the affection he has for the party, then he is not favorable." Again (Bro. pl. 90, by FROWICK, J.: "Not sufficient freehold is good challenge, and upon this the party himself shall be sworn whether he has sufficient or not." The ancient authorities, ANNOTT, C. J., in *The King* v. *Edmonds and others* (4 Barn. & Ald. 492), says: "Shew that expressions used by a juryman are not a cause of challenge unless they are to be referred to something of personal illw-ill towards the party challenging; and also that the juryman himself is not to be sworn when the cause of challenge tends to his dishonor; and to be sure, it is very dishonorable for a man to express illw-ill towards a person accused of crime in regard to the matter of his accusation." The challenges to the jurors were mostly made on the ground of the jurors having entertained opinions, or expressed opinions, or made up their minds unfavorable to the prisoner. The objection to John Chalmers, 1st. That the said John Chalmers had heretofore formed an opinion adversely to the prisoner without reasonable cause, and is now prejudiced against the

prisoner. The juror was sworn and examined. Other jurors in like manner. There was no proof, nor any offer to prove, the jurors challenged had made any expression of their opinions hostile to the prisoner by extrinsic evidence, but the jurors were subjected to a cross-examination by the prisoner's counsel. One of the jurors (Payne) stated he probably had expressed an opinion about the case from what he had read in the newspapers, but did not think he had expressed any opinion of the guilt or innocence of the prisoner. The learned Chief Justice refused to allow the juror to be asked if he had formed an opinion as to the result whether it would be justice or injustice. The learned Chief Justice refused to allow such questions to be put, and I am of the opinion he was right in this refusal. It certainly is not allowable from any decided cases that I can discover, that a juror has to be subjected to a rigorous cross-examination as was attempted by the counsel for the prisoner. Several cases were cited from the American Courts in favor of the course pursued by the counsel for the prisoner, and however highly such authorities are valued, I am of the opinion it would not be desirable to extend the right of examining a juror challenged further than is allowed in the English Courts, and that the mode of examination is that hitherto allowed to a witness on his *voir dire*. If challenges to jurors were so confined, it renders their being in writing unnecessary; but if a number of witnesses were to be examined, and a lengthy examination take place, then the challenge ought to be in writing. This is for the Judge in his discretion to direct it to be in writing, if any question is to arise in regard to it afterwards. Improper reception of evidence and rejection of evidence was given to shew the prisoner had done acts of riot and robbery with others on the 15th January, which led to the issue of a warrant against him that he was liable to be proceeded against, and to shew a motive for fearing the constables and James G. C. Blackhall had been examined by the Crown to shew this. The prisoner's counsel proposed to cross-examine the witness to prove all that had taken place on the 14th January, at a school meeting; that he come there with others; that the proceedings alleged to be acts of riot and robbery arose out of that meeting, and the offence which the prisoner was charged with was not as the witness had described. The objection to this is two-fold. First. Such evidence of the prisoner having committed an offence, for which, upon information or affidavit made, a warrant might issue, was inadmissible on two grounds, 1st. That it was not a similar offence to the one charged, and for which he was on his trial. 2nd. If the alleged offence was one the prisoner had not been convicted upon, he had the right, by cross-examination of the Crown witness Blackhall, then under examination, to shew all the facts out of which what took place on the 15th January arose, to negative

the charge of having been guilty of riot and robbery. I am unable to discover any case where such evidence has been held admissible. The charge here against the prisoner is, that he, acting in concert with others, and to resist the constables, Gifford was by some one shot on the 27th January. The evidence given was to shew that he had, with some others, been guilty of riot on the 15th January, and, therefore, had notice the constables were coming to arrest him. In *The Queen* v. *Oddy* (20 L. J. Rep. N. S., M. C. 198; 15 Jurist 517), on the trial of an indictment for stealing cloth from a certain mill, and for receiving the same, knowing it to have been stolen, evidence was admitted that, previous to the larceny of the cloth mentioned in the indictment, the prisoner had been in possession of other cloth which had been stolen from another mill, the property of different owners. But it was held inadmissible, and the conviction quashed. Lord CAMPBELL, C. J., says: "In the French Courts the case against an accused person is often commenced by evidence that he had previously committed offences of the same sort as that which forms the subject of inquiry. But that is not the practice of our law." In cases of uttering forged notes, knowing them to be forged, and of receiving stolen goods, known to be stolen, it is the constant practice to give evidence of utterings and of other receivings, with a view of shewing a guilty knowledge; and in the case of *Reg.* v. *Voke* (R. & R. C. C. 531), it was held by the twelve Judges, that if, upon an indictment for maliciously shooting, it be questionable whether the shooting was by accident or design, evidence may be given that the prisoner at another time intentionally shot at the same person; and in the case of *Reg.* v. *Clewes* (4 C. & P. 221), referred to by the Attorney General, the prisoner was indicted for the murder of Hemmings, and it was opened that great enmity between Mr. Parker and his parishioners, and the prisoner had used expressions of enmity against Mr. Parker, and had said he would give £50 to have him shot, and that Mr. Parker was shot by Hemmings, and that the persons who had employed Hemmings to shoot Parker, fearing that they should be discovered as having hired him to shoot Parker, murdered Hemmings, and that Hemmings' bones had been found in a barn occupied by the prisoner. Evidence was given of the declaration of the prisoner, shewing that he entertained malice against Parker, and it was proposed to shew that Hemmings was the person by whom Parker had been murdered. It was objected that this evidence as to the murder of Mr. Parker was not receivable; but Mr. Justice LITTLEDALE said: "I think I must receive the evidence on the part of the prosecution. It is put thus: that the prisoner and others employed Hemmings to shoot Mr. Parker, and that he being detected, the prisoner and others then murdered Hemmings to prevent a discovery of their own guilt.

Now, to ascertain whether or not that was so in point of fact, it is necessary I should receive evidence respecting the murder of Mr. Parker," and his Lordship received the evidence. The facts of the case now under consideration is by no means similar. It is evident that what took place on the 15th January had its origin and commenced on the 14th January at a school meeting. The evidence given by the Crown, on the part of the prosecution, that for some act done on the 15th January a warrant might or might not issue, and the prisoner had notice that the deceased, who had only arrived on the morning of the 27th January from Miramichi, was aiding the constable to execute the warrant. The fact of an act being alleged against him (the prisoner), which his counsel assumes he can prove was not a crime, is to be received as evidence against the prisoner of his knowledge that the party coming to Albert's house were constables, and was for the purpose of arresting him, appears to be unsupported by any case The offence is not of the same sort or kind. In *The Queen* v. *Oddy*, before referred to, Lord CAMPBELL says: "The law of England does not allow one crime to be proved in order to raise a probability that another crime has been committed by the perpetrator of the first." In *Rex* v. *Ellis* (6 B. & Cra. 145), BAYLEY, J.: "Generally speaking, it is not competent for a prosecutor to prove a man guilty of one felony, by proving him guilty of another unconvicted felony." In *Rex* v. *Crocker* (2 Leach 987), a charge of forging one promissory note was supported by evidence that another one was found in the prisoner's pocket book that was forged. The evidence was admitted by the Judge at the Assizes. But the prisoner was afterwards released on a case submitted to the twelve Judges, who thought the evidence inadmissible. The evidence does not shew that the prisoner knew that a warrant was out against him for the offence alleged to be committed on the 15th January, and yet this evidence is offered, from which the jury are to infer he had such knowledge and was prepared to resist, and was acting in consort with others to resist. Lord CAMPBELL further says: "The rule which has prevailed in the case of indictments for uttering forged bank notes to different persons has gone to great length, and I should not be willing to see that rule applied generally to the administration of criminal law." The evidence was, in my opinion, wholly inadmissible, and a conviction obtained by such evidence cannot, in my opinion, be sustained. Not allowing the prisoner's counsel to cross-examine the witness, as to what was the origin of the alleged offence, was equally objectionable; he clearly had a right to do that. The calling a witness on behalf of the prosecution to prove one fact, does not, in my opinion, prevent his being fully cross-examined as to everything he may know about the matter that led to the offence of which he alleges the prisoner

was guilty of. If it was objected to also on the ground that evidence of what took place was irrelevant and not applicable, and, therefore, ought not to be allowed on cross-examination. I think the learned Chief Justice right in refusing further evidence on the subject. The Crown having got improper evidence in, does not justify the introduction of illegal evidence by the prisoner. The inconvenience of evidence of other acts of the prisoner to shew he had been guilty of some illegal act prior to that upon which he is being tried, and to shew he is a bad character, is not admissible under English law. First, it would be taking the prisoner by surprise; and secondly, of raising many different issues. See *The Queen* v. *Holmes* (41 L. J. Rep., M. C. 12). Robert Young appears to have been called, on the part of the prosecution, to describe shot marks in the house where Gifford was shot, and the prisoner's counsel claim to cross-examine him upon this and other subjects arising out of the arrest of the prisoner; he having stated in the cross-examination that he was President of the Executive Council, and his cross-examination by prisoner's counsel disallowed on being objected to. Some of the questions were certainly not relevant, but others of them were, in my opinion, admissible as evidence to shew the feeling and prejudices of the witness, what part he had taken; all this went to his credit. What the shot marks were in evidence for does not appear. Because the witness was President of the Executive Council gave him no immunity from being cross-examined in the same manner as any other witness. If he had taken an active part in carrying on this prosecution, and the question is put to him on cross-examination, he must answer the same as any other person who may be on the witness stand. It by no means follows that having been placed in the witness box to prove one thing, he is exempt from answering upon all other subjects in connection with the offence upon which the prisoner is being tried. The answers which the witness might have given to some of the questions would lead to others which might benefit the prisoner. It appeared by the case that one of the constables discharged his rifle through the trap door of the entrance up stairs. There is a conflict of evidence whether there were shots prior to any act being done by the prisoners, and that they had not been ordered to surrender. The question to Sewell on cross-examination, whether he had not boasted "that he had shot Mailloux," the Frenchman killed in the loft. The question, if answered in the affirmative, would not criminate the witness. It appeared, if said, to be only a silly boast, but it would certainly go to his credit. He was called as a witness for the Crown to give an account of what took place; he having given part, must give the whole if interrogated to do so. The examination of Gammon having shewn there was difficulty in making arrests that

morning, when the prisoner's counsel asked the witness what the trouble was. To my mind, this question should have been answered, as the answer might shew there was cause for alarm which induced the people who were at Albert's house to hide themselves, and that they did not go there with an intent to resist, or for any illegal purpose. It was not the people of the County who were called out to aid or assist the Sheriff in the execution of his duty, but a number of strangers armed, from the adjoining County, had arrived in the village; all this might have produced alarm among the people. When Chasson (the prisoner) went to Albert's house, it did not appear, up to that time, there was any common intent shewn, or evidence to shew after all were assembled at Albert's, the prisoners were there with a common object, but an innocent meeting, was all-important; and when they went into the loft, the discharge of a rifle from one of the constables would necessa excite alarm. I am of opinion Fabien Dugas should have been allowed to state what the armed men were going about Caraquet for, and also to state what the people at Albert's said they were there for. It was a part of the whole transaction for which the prisoners were assembled at Albert's house. The prosecution contended it was for an unlawful purpose to resist the constable, and any evidence to negative this, or shew what they were really there for, what they said and did, is to shew the object in being there. It is the only evidence which the nature of the case is capable of being given to enable the jury to find upon. The questions very properly left by the Chief Justice to the jury, viz.: 1. Whether the prisoners knew that the English people, who came to Albert's house, were constables, and the purpose for which they came there? 2. Whether the prisoners were assembled at Albert's house with the common purpose of resisting the Sheriff or constables, etc.? or 3. Whether they went there to hide themselves, and through fear because they saw a body of armed men coming to the house, and without any intention of resisting? These were the issues for the jury to find, and any evidence bearing upon these questions was relevant, and important to enable to arrive at a proper conclusion. It must be borne in mind that the charge is, that the prisoner and nine other persons, who are named in the indictment, but who are not on their trial, were charged with constructive murder, and, therefore, are witnesses as well on behalf of the Crown as the prisoner, and are charged with having conspired together with common intent to resist the constables in executing their warrants, or persons acting in aid of the constables, and one is shot by some one of the prisoners or by Mailloux, who was with them. The evidence of the parties charged with the prisoner in the indictment was tendered to shew the purpose for which they met at Albert's house on the 27th January, and all that they

said or did was to shew there was no common intent; that they did not go into the loft to resist the constables or those acting in their aid. And what was their object in going there? That it was for a lawful purpose, and they were alarmed, and to negative the charge against the prisoner of constructively being guilty of the crime of murder. This evidence was, in my opinion, clearly admissible, and ought to have been received. The case of *Winsor*, plaintiff in error, v. *The Queen*, defendant in error (35 L. J., Q. B. 121 and 161),* as BLACKBURN, J., says: "It would be right to tell the jury to look at her evidence with great caution, and to take in account that she was an accomplice, and I do not doubt that the Judge did carefully direct the jury as to that, and that there was ample confirmatory evidence. It would no doubt be much better that when an accomplice is a witness, the objection to that witness should be as slight as possible, and, therefore, I agree that it would, as a general rule, be judicious, where the accomplice is indicted with the prisoner, to dispose of the indictment by acquitting or convicting the accomplice before she is called as a witness, so that the temptation to strain the truth should be as slight as possible. But that is not an objection to the admissibility of the witness, but it only affects the degree of credit which should be given to her." So in this case it would be for the jury to give such credit to the statements of the other prisoners named in the indictment, and to decide upon the questions submitted to them from the testimony of all the witnesses. As to the prisoners acting with a common intent, ALDERSON, B., in Macklin's case (2 Lewis 225), thus lays down the law: "Again, it is a principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all. The act must be in pursuance of the common intent. Thus, if several were to intend and agree together to frighten a constable, and one were to shoot him through the head, such an act would affect the individual only by whom it was done" (1 Russel in Crimes, 584.) These witnesses should certainly have been allowed to answer the questions which the prisoner's counsel put to them—what they went into the loft for, whether to resist the constables or for fear, or were acting in concert for an unlawful purpose, and with the prisoner, to resist, or did resist, the constables, and to their

* This case Charlotte Winsor and Mary Ann Harris had been indicted for having feloniously, and of their malice aforethought, kill and murder Thomas Edwin Gibson, they were severally arraigned and plead not guilty, and they were tried by a jury in the County of Devon in 1865. The jury being unable to agree, after being kept together thirty-two hours, were discharged. Charlotte Winsor was afterwards tried by another jury, and tried alone on the same indictment, when a verdict of guilty was returned and judgment of death awarded. Mary Ann Harris was admitted as a witness without having been acquitted or convicted upon the indictment. The Court hold she was an admissible witness.

knowledge of these being constables. The witnesses should have been allowed to state their intentions when in the loft. This was evidence to be submitted to the jury; the credit due to their statements was for the jury; and if there was no common intent, and the jury arrived at that conclusion, the shooting of Gifford would only affect the individual who fired the shot which caused his death. There was no evidence to shew the prisoner, on his trial, had a gun or fired one, and it would only be from them (the jury) finding affirmatively the questions of the Chief Justice that the prisoner would be guilty.

As to the 1st—I answer in the affirmative.

2. Challenges must be in writing, if entered on the record, and not disposed of at once.

3. I answer in the affirmative.

4. The questions were rightly disallowed.

5. The questions should have been rejected.

6. The triers had no right to ask questions.

7. The Jury List should have been allowed, if it came from the proper place of deposit as directed by the Act of Assembly, not otherwise.

8. What had the instructions of the Sheriff to the constable to do with the case? If the constables acted according to law, that was what was required of them. Any instructions which the Sheriff gave would not affect them if they acted otherwise.

9. This is answered by the 8th. What had the reason given by the Sheriff to do with the matter? Did the constables improperly use their arms, or properly use them? The reasons given by the Sheriff could not affect their conduct. The constable's acts is the sole criterion for which they are judged.

10. It is quite immaterial.

11 and 12. These questions were not admissible unless the 13th was allowed; the questions—answers to which might give a coloring unfavorable to the prisoner, unless explained by his answer to the 13th.

14. I am of opinion the sketch or plan of the house was not improperly allowed, and the witness might look at it to explain. No question could bear on this.

15. I am of opinion the evidence of Blackhall, of what took place on the 15th January, was not admissible.

16. The evidence was rightly received.

17 and 18. These questions were proper to justify the shooting of Mailloux.

19. Is answered by the 15th.

20. Robert Young should have been cross-examined. Some of the questions were irrelevant, but I am of opinion, that to prevent the cross-

examination of a witness, unless counsel go to unreasonable length, the Court ought not to interfere. It must be left to counsel, who, it is not supposed, will abuse his privilege.

21. The same as the last.

22, 23, 24 and 25. All hearsay are rightly rejected.

26. The Sheriff having given his reason, this question, then, would be proper; but I am of opinion he should not have been allowed to state what instructions he gave to the constable.

27. The question was properly rejected.

28, 29, 30, 31, 32, 33 and 34. I am of the opinion that these parties should have been allowed to answer the questions. The answers might be evidence for the consideration of the jury, as to the degree of credit due to such evidence to negative any combination among the parties at Albert's, for the reasons I have already stated.

As to the 35, 36, 37, 38, 39 were properly disposed of, they were irrelevant to the present inquiry.

As to the 40th question. If the prisoner could shew Mailloux's shots, which killed Gifford, and that it was in self-defence, I think such evidence would go to prove the prisoner on his trial was not guilty of the charge which he was on trial for, and, therefore, was admissible.

41, 42, 43, 44. The evidence was not admissible.

45. Properly rejected.

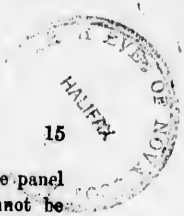
46. Properly received.

47. In Olroyd's case (2 Russell 896; Russell & Ryan, C. C. R. 88), when the counsel for the Crown, by the direction of the Judge, unwillingly called the prisoner's mother (her name being on the back of the indictment as having been before the Grand Jury), and her evidence was in favor of the prisoner, GRAHAM, B., ordered her deposition before the Coroner to be read for the purpose of affecting the credit of her testimony by shewing its variance from the deposition. And the twelve Judges Held, That it was competent for the Judge to do so, and Lord ELLENBOROUGH and Lord MANSFIELD, C. J.'s, thought the prosecutor also had the same right.

48. The direction of the learned Judge was correct. All persons called in aid of the Sheriff or constable are protected.

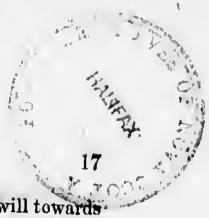
I am, therefore, of opinion no judgment ought to be given on the finding of the jury, and the conviction should be quashed or arrested.

ALLEN, C. J. I think there is nothing in the first objection, that the Crown had no right to direct jurors called to stand aside, without assigning any cause of challenge. The case of *Mansell* v. *Reg.* (8 E. B. 54.) settles this point. It was there held by the Court of Exch. Cham. that the Crown is entitled, as of right, to set aside any juror when called,



and is not bound to challenge the juror for cause until the whole panel is perused, and it is found that without him a complete jury cannot be obtained, see also, *Reg.* v. *Geach*, (9 C. & P. 500.) The Statute of Canada, 32 and 33, Vic. c. 29, sec. 38, 41, expressly recognizes this right on the part of the Crown. Thus, sec. 38 declares that the Crown may challenge four jurors peremptorily in all criminal trials, "but this shall not be construed to affect the right of the Crown to cause any juror to stand aside until the panel has been gone through, or, to challenge any number of jurors for cause," and in sec. 41, which authorises the Court to direct the summoning of such number of jurors as may be deemed necessary in criminal cases, where the panel has been exhausted by challenges, or, from any other cause a complete jury cannot be had for the trial of the case, and directs that the names of the persons so summoned shall be added to the general panel of jurors; it expressly reserves the right of the Crown and of the accused respectively, "as to challenge or direction to stand aside." This enactment seems effectually to dispose of the objection that this right of the Crown can only be exercised where an ordinary panel of twenty-one jurors has been summoned under the Jury Act, 18 Vic. c. 24. On the trial of Frost for treason in 1840, the same objection was taken to the right of challenge by the Crown as was taken by the prisoner's counsel in this case; but the objection was overruled. In that case, there were 240 names on the panel. See *Gurney's* report, pages 33 and 52. And in Watson's case (32 State Trials 2) 300 jurors were summoned. The next general objection was, that the prisoner should not have been required to put his challenges in writing. In 1 Chit. Crim. L. 546, it is said that a challenge to the array must be in writing; but where it is only to a single individual, the words "I challenge him," are sufficient on the part of the defendant. This evidently refers to a peremptory challenge, as appears by what is stated in the next page. "When the challenge is peremptory, the above words will suffice, but when it is necessary for a prisoner to assign a ground for this challenge, the prisoner must immediately shew the cause upon which his objection is founded, which he does verbally, and the matter is immediately argued and determined." In Joy on Challenges 186, it is said "a challenge to the array must be in writing, but a challenge to the polls is merely a verbal intimation of objection." For which the author cites *Trials per Pais*, 172; but I find no such rule stated there, nor can I see any reason for the distinction, if he is speaking of challenges for cause. *Rex* v. *Edmonds*, (4 B. & Al. 474.) ABBOTT, C. J., says "every challenge either to the array or to the polls ought to be propounded in such a way, that it may be put at the time upon the *Nisi Prius* record, and so particular were they in early times

when challenges were more in use, that it was made a question in 27 H. 8. 13 B., pl. 38, whether it was not a fatal defect to omit the concluding of it, with an '*Et hoc paratus est verificare*,' and it was, because many precedents were shewn without such a conclusion, and the Justices did not choose to depart from the precedents, that it was held unnecessary." This practice was referred to and recognised in the *Mayor of Carmarthen* v. *Evens*, (10 M. & W. 274.) In Arch. Cr. Ev. 144, it is said that challenges to the polls are generally made by parole, although in strictness if any question is raised upon the validity of such a challenge, it must be entered in due form on the record. I think it must be a matter in the discretion of the presiding Judge, whether the challenge shall be in writing; and I can see no reason for requiring a challenge to the array to be in writing, which will not apply with equal force to challenges to the polls. It is as necessary that the objection should be stated specifically and with certainty in the one case as in the other, in order that the adverse party may determine whether he will traverse, counterplead, or demur to the challenge. No inconvenience can result from requiring the challenges to be put in writing, but very great inconvenience, delay and difficulty and constant disputes would inevitably have resulted from the opposite course in the present case, where nearly every juror called was challenged for cause. Surely, it is not the duty of the Judge, or the Clerk of the Court to act as the amanuensis of the prisoner; and write down from his dictation, the words of his challenges. Then, if it is necessary for the attainment of certainity, that the grounds of challenge should be in writing, whose duty is it so to state them, but that of the prisoner or his attorney? No doubt there might be cases where the prisoner was undefended, and was unable to write, if such a case should arise, it would be quite in the discretion of the Judge to receive a verbal challenge, and have the grounds of it put in writing by the officer of the Court, if necessary, but no such contingency arose in the case. My Brother WELDON has gone so fully into the several points arising on the various challenges to the jurors, that I shall not deem it necessary to consider these questions at any great length. Not much authority is to be found as to the extent to which jurors can be interrogated on challenges for unindifferency; but so far as the authorities go, they are generally opposed to the contention of the prisoner's counsel in this case. The leading case is *Reg.* v. *Edmonds*, (4 B. & A. 471,) where ABBOTT, C. J., after referring to the ancient authorities, says, "these ancient authorities show that expressions used by a juryman are not a cause of challenge unless they are to be referred to something of personal illwill towards the party challenging; and also that the juryman himself is not to be sworn when the cause of challenge tends to his dishonor; and to



be sure, it is a very dishonorable thing for a man to express illwill towards a person accused of a crime in regard to the matter of his accusation. And, accordingly we find it established in later times, namely, at the trial of Peter Cook, in the 8th of King William the third, that such questions are not to be put to the juror himself." The only other case which I have been able to find relating to this point is, *Reg.* v. *Stewart*, (1 Cox 174) where on an indictment for larceny the prisoner's counsel asked the juror whether he was a member of a certain association for the prosecution of parties committing frauds on tradesmen; and ALDERSON, B., said, "It is quite a new course to catechise a jury in this way, I cannot allow you to cross-examine the jury." In Arch. Crim. Evid. 145, it is said that the juror objected to may be examined on the *voir dire* as to his qualification, on the learning of his affection; but he cannot be interrogated as to matters which tend to his own discredit, as, whether he has been convicted of felony, etc., nor, as it seems, whether he has expressed a hostile opinion as to the guilt of the defendant. The most difficult questions in this case seem to me to be those which relate to the admission and rejection of evidence. I shall only refer to a few of them, not considering it necessary to express any opinion upon the others, the whole of which have been fully considered by my brother WELDON. I do not wish however to be considered as assenting to his opinions on all the points. With some of them I agree, with others I do not. I think the question put to Sewell, whether he had not boasted that he had shot Mailloux, was improperly rejected. The prisoner's counsel had a right to ask the question, though the witness had the right to decline answering it if he pleased. I also think that some of the questions put to Mr. Young, on the cross-examination were improperly rejected. I refer particularly to the seventh, eighth, tenth, eleventh, twelfth, thirteenth and fourteenth questions stated in the case. Questions relating to collateral facts may be put to a witness for the purpose of discrediting his testimony, and showing his interest, motives and prejudices. 1 Stark. Ev. 201., Taylor on Evid. sec. 1066. In the case of the *Attorney General* v. *Hitchcock* (1 Exch. 91.) POLLOCK, C. B., says, "It is certainly allowable to ask a witness in what manner he stands affected towards the opposite party to the cause, and whether he does not stand in such a relation to that person as is likely to affect him, and prevent him from having an unprejudiced state of mind, and whether he has not used expressions importing that he would be revenged on some one, or, that he would give such evidence as would dispose of the cause in one way or the other," and ALDERSON, B., said "a witness may be asked as to his state of equal mind, or impartiality between the two contending parties, questions which would have a tendency to shew that

the whole of his statement is to be taken with a qualification, and that such a statement ought really to be laid out of the case for want of impartiality. In the case of *Ex parte Twyn*, it was held to be competent for the prisoner to shew that the witness had a spite against him. It was material to shew that the mind of the witness was not in a fit state of impartiality or equality towards the prisoner. * * * So, in the case before my Brother COLERIDGE, in which the woman who was called as a witness for the plaintiff, was asked whether she was not living with him as his mistress. The tendency of the question was to shew that she stood in that peculiar relation to the plaintiff, which the jury ought to know, in order that they might judge to what extent they could rely on the general character of her testimony as an impartial witness, between the plaintiff and defendant. The question had a bearing on the general status of the witness." Several of the questions put to Mr. Young, would, if answered in the affirmative, have tended to shew that he was influenced by some motives or prejudices which was calculated to affect the impartiality of his testimony; or at least might do so. For instance, whether he had not declared that no Roman Catholic should sit on the jury; and whether he had not been constantly advising with the Attorney General as to which of the jurors should be ordered to stand aside; and whether it was not his desire as a member of the Government to procure a conviction. As to the declarations of the prisoners of the purpose for which they met at Albert's house, *and all that they said on that occasion*. I do not think the evidence was admissible in the shape in which it was offered. It was not merely a declaration accompanying, and explanatory of an act of the prisoners and thereby becoming a part of the *res gestæ*, but went beyond that. To admit such evidence, would be to allow them to make evidence for themselves by their own declarations. But I think the prisoners who were not on their trial and were called as witnesses should have been allowed to state the purpose for which they went to the house in order to disprove the inference that they were there for an unlawful purpose. Such evidence rests on a different principle from the admission of declarations. I am also inclined to think that I should have allowed the question put to Prudent Albert. "After you got up stairs, what did your people say among you?" The question, what the prisoners said when they rushed up stairs, was allowed, and, I think, properly, as explanatory of their act of going to the loft and as being a part of the *res gestæ*, and it is difficult to say that if one statement would be admissible, the other would not be so, as the whole transaction from the time of their going to the loft, till the constables got up and the firing began, only occupied a few minutes. It is difficult to draw a line, and to hold that what the prisoners said while in the act of rushing to the

loft, would be evidence to explain and throw light upon their conduct, as being a part of the transaction, and to exclude what they said, immediately after they got there. Had any considerable time elapsed after their getting to the loft and before making the statements, I am not prepared to say that there declarations in that case would be admissible; but, under the circumstances, I think it was one continuous transaction. I have not particularly considered the question as to the admissibility of the act of riot by the prisoners on the 15th January, which were offered for the purpose of shewing the knowledge that they were liable to be arrested, and therefore had a motive to resist the officers. Evidence of one crime may be given to shew a motive for committing another, as in the case of *Rex* v. *Clewes*, (4 C. & P. 221) and whose several felonies are all parts of the same transaction, evidence of all is admissible upon the trial of an indictment for any of them. But the question here is whether there is such a connection between the riotous acts of the prisoners and others on the 15th January, and their conduct afterwards, when the constables went to make the arrests, as to make their conduct on the former day evidence in this case? I incline to think there was no such connection and that the evidence should not have been received, but I do not wish to express any decided opinion upon this point as it is unnecessary for the decision of this case. I think the evidence given by Mr. Blackhall, of the statements made by Andrew Albert and Joseph Dugas, on the inquest held before Blackhall, was properly received. It is immaterial whether the inquest was illegally taken or not. The only purpose for which the evidence was offered was to discredit Albert and Dugas, by shewing that they had made statements in giving evidence before Blackhall on the inquest, at variance with their evidence on the present trial. The fact that the inquest, as such, was an illegal proceeding, cannot affect the admissibility of the evidence. The only point is, did Albert and Dugas, on some previous occasion, give a different account of the transaction from that which they gave on this trial? It matters not that the oath which was administered to them by Blackhall on that occasion was unauthorised, and that his proceedings were *coram non judice*. The cases cited by Mr. Thomson on this point, *Reg.* v. *Garbet*, (1 Deu, C. C. 236; 2 C. & K. 474.) The *People* v. *Gibbons*, (1 Green's C. C. 592) and the *Territory of Montana* v. *McClin*, (Ibid. 705) do not apply. The questions in those cases, were whether admissions made by a party, under compulsion, could be used against him on his trial on a criminal charge; not whether they could be used to contradict him as a witness, as in this case. The only other points which I shall think it necessary to refer to, is the direction to the jury, that the persons who came from the county of Northumberland and as [illegible] the Sheriff in the

execution of the warrants, were entitled to the same protection as the constables of this county. I have heard nothing to raise any doubts in my mind that the direction on this point was right. This is also the judgment of Mr. Justice DUFF. Mr. Justice WETMORE has some doubts on one or two points, which he will state.

WETMORE, J. stated that he had some doubts on two points stated in the above judgment, 1st as to the declarations of the prisoners after they got into the loft, he was inclined to think this evidence was properly excluded. 2nd as to the admission of the evidence of the acts of riot on the 15th January, he thought that evidence was properly admitted. With these exceptions he entirely agreed with the judgment of the Chief Justice.

REVIEW OF THE JUDGMENTS.

"*Salus populi suprema lex*, Bac Maxims R. 12. The *Public welfare*—"*the highest law*, and "It is true that the life of a man is much favoured "in law but the life of the law itself (which protects all in peace and safety) "ought to be more favoured, and the execution of the process of the "law and the offices of conservators of the peace, is the soul and "and life of the law and the means by which justice is [illegible]inistered and "the peace of the realm kept: 2nd Rich. 3, 21 *b*., MacKa..eys case 9 Coke "68 *b*. The maxim and sentiment above quoted, have been ever a part of our public system of justice, especially applying to J. Chasson, and every person charged with crime,—resisting and killing peace officers, etc., as to their arrest,—trial and punishment. The public weal imperatively demands, on, the one hand, that every individual charged with a crime should receive an impartial trial, on the other, that public justice,—*the highest right*; should stand prefered and sure (if by law it may,) *not defeated* by illusive, shifts,—mistake, want of care, or lack of learning by those who administer it.

In the *Queen* v. *Chasson*, I deferentially think that His Honor Mr. Justice WELDON, is in law wrong, and that His Honor the Chief Justice in relinquishing his opinions at the trial, concerning the evidence, and their Honors composing the majority of the Court in the opinions they have expressed have most unfortunately erred, and their decision most sadly harmed this Province, by freeing Chasson and others named, from the punishment which the law awarded to them. This then should be the subject of my review

In the course of that forty day conflict vast numbers of challenges, demurers and objections occasioned by the prisoner's counsel were fully argued

and determined in the Crown's favor, but in no instance did the Crown Counsel press any evidence against His Honor's view, though moved by the overthrow of the jury-right to do so, but all this by the unanimous opinion of the Supreme Court, and by the best exertions of the Crown Counsel is now pronounced wholly against law. Out of fifty objections made by the prisoner's counsel, and all ruled against him, all have been sustained by a majority of the Supreme Court, so far as can be discovered, with the few exceptions which I am about to review, and numerous questions of immense importance to the public, relating to the rights of jurors where life and property are at stake, and for the first time determined favouribly to public rights, are of incalculable value to the law abiding people of this Country.

The questions ruled at the trial and guiding the Crown Counsel in their course, but by the same judge reserved, relate entirely to the subjects, 1st. of improper rejection of evidence in certain particulars which I shall maintain to have been a lawful rejection of evidence. 2nd. Improper reception of evidence in certain particulars, which I shall submit, was in every way right.

In view of the above axiom of public rights, and to make intelligible the bearing of my remarks, I submit the following principles with illustrations concerning evidence:

It will not be disputed, as clear law, by any lawyer of standing, that wherever the reply to any question put is privileged from answer or if answered, would be entirely irrelevant to the issue on trial, upon objection to such a question, the Judge in his discretion may reject it, see *Spencely* v. *Willott*, (7 East 108.) *Tennant* v. *Hamilton*, (7 Cl. & F. 122.) *Attorney General* v. *Bryant*, (15 M. & W. 169) and cases there cited.

The only issue to be tried here, being, did Joseph Chasson feloniously, wilfully and of his malace aforethought, kill and murder John Gifford?

It is a well established law, that the evidence given on a trial must be material and confined to the issue to be tried. It is equally clear law, that the substance of the issue must be proved. How proved? By evidence, not only ample in *quantity* but sufficient in *quality*; for instance, a witness might swear that he actually saw Joseph Chasson kill and murder John Gifford—ample in *quantity*; but on his cross-examination, or by other evidence, it might appear that the witness was so worthless as not to be believed upon his oath—his evidence, then, would be worthless in *quality*. Again, it might appear, upon cross-examination or otherwise, that though the witness was not generally worthless, he gave his evidence under the influence of some improper feeling or bias or corrupt motive *in the particular case*, which might lead

a jury to suspect his evidence or wholy disbelieve him, as in *Thomas v. Davis*, (7 C. & P. 350,) where, in an action upon a promissory note, the defence forgery, a woman servant was called for the plaintiff, as the subscribing and principal witness to the note, who amply swore to the making of it, but being asked upon cross-examination if she did not sleep every night with her master the plaintiff, she denied it, the learned Judge allowed it to be proved that she did so sleep with her master, obviously to shew, that as the woman had yielded herself to her masters corrupt influences, or acted as his wife, she might likewise have been improperly influenced by him to be a party to the alleged forgery; so in Yewing's case 2 Camp. 638 *n.*, where the principle witness for the plaintiff had said he would be revenged upon the defendant, and fix him in Manmouth Jail; so with the bribing and corrupt witness in Lord Stafford's case (How. State. Trials, 1400.) In all the foregoing instances the evidence would be material as to the *quality* of the evidence, likewise if a witness on his cross-examination could swear to something which if answered in a particular way, would either go to contridict or *qualify* some part of his previous testimony, or might prove some relevant fact which could be given in evidence as part of the prisoners defence, all such evidence would be material to the issue, and any questions asked upon them, should be answered, but unless the questions put could accomplish some or one of the foregoing ends, they would be wholly *collateral*, *irrelevant* and *immaterial* to the issue, and should not be answered, as in a case of the highest authority, *Attorney General* v. *Hitchcock*, (1 Exch. 90,) quoted for the prisoner and cited in the judgment of the Supreme Court, as where Spooner, the principal witness for the prosecution, upon cross-examination, swore that he had not said that the Crown officers had offered him a bribe. Evidence was not allowed to contradict him, it being wholly collateral—irrevlant and immaterial to the issue. The Court, in reviewing all the previous authorities, lay down specified rules in regard to such evidence. There POLLOCK, C. B., p. 100, in which the other judges agreed with him, after dissenting from "the vague and loose doctrine," as his Lordship calls it, laid down by Mr. Starkie, "as to any facts immediately connected with "the subject of inquiry," says, "it must be connected with the issue, as a "matter capable of being distinctly given in evidence, or it must be so far "connected with it as to be matter, which, if answered in a praticular "way, would contradict a part of the witnesses testimony, and if it is, "neither the one nor the other, it is collateral to, though in some sense it "may be considered as connected with the subject of inquiry. Again p. "101, "There is no instance shown that you may contradict the witness on any matter that is not directly in issue before the Court." By the

foregoing principles and authorities, I will now proceed to review the judgments of the Court in quashing the conviction. And first in order the judgment of Mr. Justice WELDON. I may justly say it amazes me there are some general features of it which I will remark upon in the outset.

Of the rather lengthy arguments of the Crown Counsel, and their answers to the several objections, as well as the many authorities cited by them, His Honor, with one single exception, appears to have taken no more notice than if no counsel for the public had ever been there, in fact, the judgment itself, would better suit a production composed before the cause was heard. Another striking feature of the judgment, namely, a running in opposition to almost everything which His Honor, the Chief Justice, in his discretionary and higher capacity, decided at the trial, running as it were, the Chief Magistrate of our Criminal Law off the track, and allowing to His Honor's judgment on the trial, no judicial discretion whatever. Now from the settled state of our ancient Criminal Law system, as I have long observed it, and from the admitted attainments of the Chief Justice of the country, before whom every point was solemnly debated prior to judgment, it must seem unreasonable to everybody that his Honor could be so far astray in nearly all his judgments as Judge WELDON—(not at the trial) has adjudged. On the contrary, from a rather lengthy experience in the law, my opinion (except about juries and challenges, from a loose practice, lately crept in from the United States, which misled his Honor) decidedly is in favor of the law as laid down at the trial, and after the best investigation and thought which I can bestow, I discover no reason to doubt the correctness of the Chief Justice's decisions as opposite to Judge WELDON, except as before mentioned. And it seems truly unfortunate, for public safety, that such contradictions of decisions, and floods of uncertainty should be introduced by the Bench or by any member of it. There is yet another, and to my mind a *most remarkable* feature, which I observe in His Honor's judgment and I have looked at it with all the care and diligence which I can bestow, and with a deference properly due to a Judge of the Supreme Court—that feature, in my opinion, is that the judgment of His Honor upon the subject of improper admission and rejection of evidence, is erroneous in fact and in law, from beginning to end. I wish it to be understood, that I do not venture to ascribe this to any lack of integrity in the Judge, but I do ascribe it to something else, viz., to a want of proper accuracy, in the statement of the facts which the learned Judge had before him and to the want of an accurate knowledge of the law,—the subject which a Judge of the Supreme Court, as a public servant should possess, before he acts, and thereby avoid the injury of over-

throwing public justice and of seriously harming the highest right.

One of the great evils of the judgment, is its inaccuracy in stating facts. Beginning about the improper admission of testimony, as to riot and robbery, it quotes for evidence and treats for facts as if others besides Chasson had been charged on this trial, or it assumes it, and thereby materially alters the legal effect of the testimony throughout, in favour of the conclusion which the learned Judge seems to aim at, whereas the law clearly being that a single trial, of one jointly indicted with others, produces as separate a charge and issue against him as if no other person were named, and though a Jury cannot try the same case twice, they are competent to be sworn to try the prisoners severally as independent cases. See Kel Rep. 9, *Bac Ab.* v. *Juries F.*, Trials in Pais 204, Hawk *b.* 2 c. 43, sec. 29, and gives to the prisoner the full right of singleness in trial, and to call the others for his witnesses, but takes from him advantages which jointness of trial might sometime afford, by others being tried with him, and Chasson's case was viewed and conducted accordingly.

His Honor in putting our purpose for giving evidence as he says, "was "to *show a motive for fearing the constables etc.*" *Not at all so*, but to show J. Chasson's *guilty motive* for *resisting* the *arrest*, as by the Chief Justice's printed report—so put by His Honor, *fearing the constables* makes no offence at all—put by us, as *resisting the arrest*, is a high misdemeanor, His Honor treats the evidence thus, "'The evidence given by "the Crown,' that for *some act done* on the 15th January a warrant *might* "*or might not issue*" without noticing the felony, and His Honor also puts forth James Blackhall's name as if he were the only witness adduced, whereas the Robbery charged in the warrant on Chasson, and being the only cause which we opened and confined the evidence to such robbery at Young's was proved by Coleson Hubbard, not cross-examined to nor attempted to be controverted, his robbery at Robins' explicitly proved by Walter Hammond and not attempted to be controverted, but the robberies being so mixed up by an agreement between the prisoners, and others in the riot movement to get rum from Robins and money from Young's, it was impossible to fully prove the one without Blackhall's giving evidence about the other. His Honor again says, "the prisoner's counsel proposed to "cross-examine Blackhall to show" the proceedings of the school meeting on the 14th, and "that the offence which the prisoner was charged with "was not as the witness described." If this had been so, no doubt, the evidence would have been improperly rejected, but such statement by the learned Judge, is entirely wrong—not so at all—look at the Chief Justice's printed report, for the contrary—the offered cross-examination of Blackhall did not propose to deny anything Blackhall had said, as

occuring on the 15th, but rather to confess and avoid it, by showing that the robberies, etc. of the 15th arose out of proceedings of the school meeting on the 14th, a thing wholly opposite, in fact and in law effect, to what the Judge has it, and entirely immaterial as evidence. How in the face of such inaccuracies could the learned Judge have given other than an erroneous judgment? His Honor enters upon the subject with the foregoing errors, by consequence his lengthy citation of cases, as unconnected as a dream, are wholly inapplicable, and the two grounds of His Honor's objections based upon such a mistake of facts are necessarily erroneous.

As His Honor has adjudged that we should not have given evidence of the felony, and to submit to the profession and to the public, the Crown counsels view of this matter as all the Judges but Judge WETMORE (and for no reason that I can discern) seemed to take the opposite view. I offer the following:—"The notion, says Mr. Roscoe, that it is in itself "an objection to the admission of evidence that it discovers other "offences, especially where they are the subject of Indictment is now "exploded." Roscoe's Crim. Ev. p. 90, (7th Amer. from the 8th London Edition,) citing numerous late cases for the position there referred to. "If the evidence is admissible on general grounds it cannot be resisted "on this ground." Ros. ib. and "of course, all evidence directly bearing 'on any offence which can be and is under the Indictment, before the "Jury made the subject of enquiry is admissible." Ros. Crim. Ev. ib. "Evidence" says Mr. Roscoe "is allowed to be given of the prisoner's "conduct on other occasions where it has no other connexion with the "charge under enquiry than it tends to throw light on what were his "motives and intention in doing the act complained of." Ros. Crm. Ev. 92, the same in a full note 1 by the Amer. Editon. He says, "Where "it is shown that a crime has been committed, and the circumstances "point to the accused as the perpetrator, facts tending to show a motive, "although remote, are admissible as evidence." Now as the killing by Chasson is charged, which was through resistence of the officers, would not his consciousness of a felony lately committed by him, which he knew he was liable to be arrested for, show a motive for his resistance as distinguished from one entirely innocent, and would not such felony tend to throw light on his motives for resistance? So in the same note, "In "cases where the *scienter* or the *quo animo* constitutes a necessary part of "the crime charged, as in murder and the like, testimony of such acts or "declarations of the prisoner as tend to prove such knowledge, is "admissible, notwithstanding they may constitute, in law a distinct "crime," citing several American cases of high authority. "And wher-"ever the *intentor guilty knowledge* of a party is material to the issue, *of*

"*the case*, collateral facts tending to establish such intent or knowledge "are proper evidence." Bottomly vs. United States, 1 Story, 135. Was not the intent and guilty knowledge of Chasson, material here to the issue; and did not the knowledge of Chasson within himself that he had committed a felony tend to establish such necessary intent and knowledge? Again "on the trial of a criminal prosecution, where the facts "and circumstances offered in evidence amount to proof fo a crime, other "than that charged, and there is gound to believe that the crime charged "grew out of it or was caused by it. Such facts and circumstances may "be admitted to show the *quo animo* of the accused;" "whatever shows motive is admissible"—for which the Editor cites seven or eight cases of the highest authority, and the same general doctrine is laid down in Archbold, Russell, Taylor and many other books. Is this good law? Nobody can doubt it. Then does our case come within it? The felony committed was not indeed the crime charged, but did not the crime charged grow out of it? Did not the complaint—the warrant—the constables—their resistance and the death, grow out of this felony committed? Was not the crime charged caused by the felony committed? Did it cause the complaint, the warrant, the constables, their resistance and the death? The fact was undeniable, and it being contended by the prisoner's counsel (as may be seen in the printed case) that the killing of Gifford was justifiable, because the constables had not made known the purpose for which they came to Albert's house, and the prisoners in resisting, only acted in self defence, and the learned Chief Justice put it to the jury whether Chasson knew the purpose for which the constables came, we showed in pursuance of the foregoing authorities that the complaint and warrant put in evidence charged Joseph Chasson with a felony committed by him at Young's on the 15th January, 1875. And it was proved by Friggo that Tels. Bredo personally informed Chasson that the constables were coming to arrest him, and it was likewise proved that Blackhall the constable, when he went with the other constables to Albert's house, asked for J. Chasson, and told Albert in the hearing of Chasson, as it afterwards appeared, that they had papers and came to arrest J. Chasson—as argued, however, in Mackally's case that the person should have knowledge or notice in some way, if he required it, of the cause of arresting, (for the complaint and warrant proved nothing) it was consequently proved that Chasson had actually committed the felony at Young's on the 15th, as charged in the complaint and warrant, and for which he knew by law he was liable to be arrested, and thereby had the guilty knowledge or notice, by his own felonious act, of the cause of the arrest and the guilty motive, within *himself*, for resisting it, or the jury from the evidence might so infer it; and therefore the resistance and

killing of Gifford were wilful and malicious. Can any lawyer of standing in face of the defence urged, contend that such evidence was not properly admissible? It was not as His Honor Judge WELDON assumes to give evidence of the riot and robbery in order to make out that the prisoner had committed murder, as in *Reg. v. Addy*, which has no resemblance to this case, but the robbery shown to make out thereby, a necessary link of title in the case on trial by evidence which the prisoner had within himself—to get before the jury a *specific* kind of *knowledge* and *motive* which J. Chasson had, and which nothing but showing the felony could enable us to give. Why did not the learned Judge refer to *Reg. v. Francis Law Rep.* (2 Crown cases Revised 128) again upon the argument by the strongest of authorities from Lord HALE and other books, 1 *Hale* 485, 489, 587, 593; 2 *Hale* 72. 74, 76, 77; *Foster* 309, 321, that the prisoner's counsel having urged that the constables, especially from the County of Northumberland, had no authority and no protection. (See the Chief Justices report.) We contended that upon a *felony* proved as here, every private man, no matter from what County, has a good warrant *in law* to arrest the felon, and which warrant the arrester might plead to an action for false imprisonment without the Sheriff's authority or the written warrant, and, whether bidden or not, he might volunteer to aid the officers in arresting, and if any one kill him in the course of the duty it would be murder, and therefore we had a right to show the felony committed in order to corroborate the authority of Gifford and the other officers. All the foregoing were presented to Judge WELDON on the argument, but His Honor adjudged against the public without taking the slightest notice in his judgment of them, and, as I think, not only has overruled the sober decisions of the Chief Justice on the trial, but also virtually overruled all the before mentioned English and American authorities, including the great authority of Lord HALE, and the rules of evidence bearing upon the subject. His Honor says he can find no case like this bearing upon this subject. I think it a pity His Honor does not look more to principles and less to cases which have no just application. I conceive that His Honor got too far from the true course to find any cases or authorities properly applicable to the subject. We cited to him numerous American cases of high authority, above referred to, like the one in question, but His Honor appeared to have never noticed them. I may reply as Lord COKE says, there is no one case like another in all particulars, and as said by ASHHURST, J. in *Pasley* v. *Freeman*, (3 Term. Rep. 62,) a case may be new in its instance, but old in its principle which is the real thing for a correct understanding of the law. The numerous English and American cases above referred to by writers of great authority fully containing the principles of law on this subject, are all that we need,

whereas losing sight of principles, the many cases cited by His Honor on the improper admission and rejection of evidence, are wholly inapplicable. Can His Honor refer us to any case where a felony or robbery of *one man's money or goods*, can be justified, by a school house quarrel, between *third parties* the *day* before?

The objections to the rejection of the questions put to Robt. Young and Richard Sewell, respectively, are fully reviewed by me in considering the judgments of the Chief Justice and the majority of the Court, and there is nothing in those objections. Does His Honor Judge WELDON mean to state it for law, that the question put to Richard Sewell, if answered in the affirmative would not be one of the channels of evidence to criminate him? This, as every lawyer knows, is violently contrary to law. Where is the learned Judge's authority, that upon the issue with Jos. Chasson, the cross-examination of Gammon and other witness should have been received as to what had happened at a different time and at a different place from the scene of the murder, and which the learned Chief Justice in his discretion rejected? How answer the issue with Chasson? It would damage him,—if received it would in effect go to prove that Jos. Chasson, hearing that the constables had acted badly in another place, with his friends determined to have revenge for the insult, and to deliberately kill and murder the constables when they came to Albert's for him, thus showing express malice. The same remark applies to the cross-examination of Fabn. Dougas. "They might have been frightened, etc.," says His Honor Judge WELDON. In answer to inquirie if Chasson was frightened or had any doubt of the cause, when he heard the constables at Albert's asking for him. Why did he not as held Mackally's case, come forth, as was his duty, enquire of them what they wanted of him, instead of denying, through old Albert an accessory, that he was there—flying from justice—resisting the arrest—murdering the officers before they could approach him? Who was in the wrong? Did Chasson owe no duty to the public peace, *the highest right*? (See *Reg.* v. *Tyler*, 8 C. & P. 816.) Is he allowed by Judge WELDON to take advantage of his own wrong?—Keep himself in wilful ignorance of the constables business, that he might commit murder—as a pretext for flying from—resisting and shooting "the conservators of the peace"—"the soul and life of the law?—the highest right"? Has the learned Judge wholly ignored the *sulus populi*? See Mackally's case to the contrary. As to His Honor over-turning the ruling of the Chief Justice at the trial and adjudging that Fab. Dougas should have been allowed to state "what those people at Albert's house said they were there for." Let me examine it:

1st. In the immediately previous part of his judgment His Honor says that which is entirely accurate: that the Crown gave no evidence

that the people there assembled at Albert's house, before the constables came, had any common intent to do wrong, or were acting unlawfully, but, oppositely so, were lawfully there and consequently no inference to the contrary could arise till the acting together by Chasson and others in the loft—flying from and resisting the constables. If then, prior to such resisting, and while F. Dougas was there, they were assembled in the house, lawfully, how can the learned Judge, reversing the decision of the Chief Justice, hold that it was material to show by F. Dugas what the people said they were there for, it being on all hands admitted that, at that time, they were there lawfully? No law or authority for this can be found.

2nd. Suppose that Joseph Chasson could have been actually made a party, speaker to the conversation, how could the gossip of Joseph Chasson, in his own favor, not in the hearing of the constables, be made evidence for himself against the public right? Lord *Geo. Gordon*, case 21 How. State Trials, 535, and many others are against a man's making evidence in such a way, as told by Fab. Dougas, this also is opposed to all rules of law and evidence as found in our book. 3rd. Also the *res inter alios acta* applies, that what is said or done by strangers to the suit—shall not, in law, affect the suitors themselves, why should the gossip of the people—strangers to this suit and who might have come, as Fab. Dougas would say, to play cards—either benefit or injure Joseph Chasson or the public between whom alone the issue was joined? The people who had committed *no* crime, might have been innocently enough there, with no object to resist, and taken their determination on sight of the constables to aid and abet Chasson in his resistance, but Joseph Chasson who had committed a felony, and heard he was to be arrested for it, might have been there for an opposite purpose. The third party, case and Joseph Chasson—not alike—but quite opposite. Where, then any case or authority to support the learned Judge in this view? His Honor has cited none and I never heard of any. Here again His Honor mixes up the other persons indicted with Chasson, as if all were on trial—quite a sufficient error in fact—to produce his erroneous judgment in law, but the difference of a single party on a single charge as opposed to all—is undoubted law as before cited, and leading to a reverse conclusion. The assembling at Albert's house and acting together with a common purpose, as put by the Chief Justice to the Jury, clearly refers in the next question to their assembling in the loft. There was no evidence by the Crown to fix them in a common purpose till found in the loft acting together and resisting the constables. It is quite consistent with the previously lawful purpose of many of them that they should have changed their minds and committed murder, this is perpetually occurring. It is laid

down in Roe, Ev. 720 note (2). "Homocide with intent to kill is "murder, though the intent be formed but an instant, before striking "the blow," citing nine or ten American cases of undoubted authority. In Chasson's case, a loaded gun was deliberately fired into the face and side of Gifford, by which he instantly dropped dead.

"What they said," says His Honor Judge WELDON, was the only evidence the nature of the case was capable of. So in the very act of shooting Gifford if the shooter had said, "I don't intend to hurt you my dear fellow," that would be the only evidence the case was capable of, and so must be given. The answer is, that in law, it is not evidence at all. See *Rex.* v. *Sheppard R. & R.* Crown cases, 169 to the contrary of His Honor's view. In fact His Honor, in his adjudications on the improper reception and rejection of evidence, appears to me to have entirely lost sight of the well established rules of evidence which have governed the Court for 800 years, and more than that, ignored the *salus populi*, the public welfare which by His Honor's oath of office he is bound to look to is a higher right than that of any private man. Again, says His Honor, it must "be borne in mind that the charge is that the prisoner and nine "other persons having conspired together with common intent to resist "the constables," etc.

No such charge, and this is another great inaccuracy of which I complain throughout, as it entirely alters the effect of the pleading and evidence in favor of Judge WELDON's view which losing sight of the means by which public justice is administered and the public peace kept—overthrows this important prosecution—the Indictment not as the Judge states it, is against all, in the common form as principals in the *first* degree as before stated, but the *single* trial presents in law, the *single* charge against Joseph Chasson and a single issue with him alone. It was so presented and evidenced by the Crown at the trial, as also by Joseph Chasson calling the other prisoners as his witnesses, and who were in every way treated as strangers to this suit. How then should the declarations and intents of strangers to this suit, and never notified to the officers or constables of the peace, be allowed to defeat the public in its issue with Joseph Chasson if the rule of *res inter alios acta*, as a rule of law, is to be upheld? Why should public justice be broken down —the ancient rules for the regularity and safety of public trials be trampled upon—or set aside and the public rights overthrown, by a judgment, as I view it, in opposition to the well established rights of the public in the criminal law of this country? The case of *Windsor in error* v. *The Queen*, cited by His Honor has no manner of application, in the way in which His Honor would apply it—that was where Mary Ann Harris an accomplice indicted and tried with Charlotte Windsor for

murder, but the Jury not agreeing and discharged, Harris turned Queen's evidence against Windsor, who was tried again and convicted upon the evidence of Harris, and the great question there was whether Harris who had never been convicted or acquitted on the Indictment could be a witness at all for the Crown, this is like all the learned Judge's citations, nothing to do with this question. We produced no such evidence nor attempted to prove any thing by Joseph Chasson or his witnesses. The foregoing remarks and for the reasons there stated apply with equal effect and more to the intents of Prudent Albert, and as to why Joseph Dougas and others went into the loft, and what they said when they got there, the question embracing all they had said from the time they went into the loft till the surrender after the murder—being objectional as embracing too much and by persons not on trial—strangers to the suit, and as an attempt to manufacture evidence for Joseph Chasson which Chasson himself could not deliver on oath nor be cross-examined to and in every way inadmissible by law and having no other support than the views of Judge WELDON. For instance Joseph Chasson who is *alone* charged on the trial, having committed felony—and informed, that the constables were coming to arrest him, flies from them into Albert's loft—an offence of itself at common law, punishable by indictment, and forfeiture of his goods and chattels, then in the direct performance of an unlawful act, and others which followed per WELDON, J., "create evidence for yourself, "I'll support you." Anything which third parties, strangers, etc., said, flying to the loft or murdering after they got there is utterly inadmissible for Joseph Chasson's case, especially where such declarations and intents were never notified, but wholly unknown to the constables and all those hearsays, and manufacture of the like sort, were purely bad and properly rejectable by the Chief Justice in the long established and well settled powers of his Court, of jail delivery—the opinions of Weldon, J., and the absence of all law and precedent to the contrary notwithstanding.

The other points proposed to be decided but not argued by His Honor and which I have attentively considered, are equally unreliable, groundless and against law and the correct rulings of the presiding Judge at the trial. The only other remark that I shall make here is, to respectfully call His Honor Mr. Justice WELDON's attention to the authorities of jurisdiction in my review, hereafter, cited by me in regard to this and the authority of the Supreme Court to entertain the questions adjudged by him at all—"some case upon the subject," and whether all that he has adjudged be not wholly *coram non judice* and the quashing of the conviction wholly unauthorized and against law?

With reference to the judgment of His Honor the Chief Justice, con-

curred in by WETMORE and DUFF, J. J.; WETMORE, J., differing in two particulars. I will point out some remarkable things in the outset.

It is much to be regretted, in a case of such moment, to "the life of "the law itself, which protects all in peace and safety," that His Honor the Chief Justice, after full hearing by counsel and his deliberate judgments at Bathurst, should feel himself constrained to be of an opposite opinion, and quash the convictions,—yet say of the objections, "I shall "only refer to a few of them, not considering it necessary to express any "opinion upon the others;" this seems strange! in a case of such magnitude and bearing upon the future practice of the Court, to reverse his adjudications, without *pointing out all the objectionable parts* which changed his mind, nor "considering it necessary to express any opinion "upon them." How is any one to find out? "The whole of which," says His Honor, "have been fully considered by my brother WELDON. I do "not wish, however, to be considered as assenting to his opinion in all "the points. With some of them I agree, with others I do not," more strange! for it would seem that Mr. Justice WELDON became chief in making up the judgment whereas I believe him incompetent for the purpose, and that the Chief Justice himself, with his notes and intimate knowledge of the facts, was the only judge who could do justice to the many subjects, and, if any of them imperfectly stated, to have had the case amended according to the Act. He was the *man* at the *head of the* law—*supreme* in his great Court—to have vindicated the rightful exercise of his ancient and powerful tribunal. *Boni judicis est ampliare jurisdictionem*—to have magnified his justice and made it honorable by maintaining his decisions (if rightful) for the public good, and which should have received his *ample* care, diligence and attention, to the exclusion of all private suits. But the contrary is manifest. His Honor could not have examined that part of His Honor's, Mr. Justice WELDON's judgment, which relates to the admission and rejection of evidence with care, or he would have seen the many inaccuracies in the statement of facts which I have referred to in my review of that judgment, and which necessarily led to erroneous conclusions in law, and most strange does it seem! that the judgment of the Chief Justice, as above expressed, embraces the opinions of WETMORE and DUFF, J. J., WETMORE, J. differing in two particulars. What can be more fearful to the future practice of this great Court, of which His Honor is the supreme head, than those divided opinions, so expressed by the Judges leaving it impossible, in most important questions, to distinguish the differences of the majority from the minority, or to know which to follow?

Again, more astounding still! at the trial, whether the Crown for the the public was entitled to give evidence of the felony as presented in my

review of Mr. Justice WELDON's decision, was a question by the approval of both sides, very fully discussed before His Honor at Bathurst. The argument began in the afternoon, affording His Honor a night to consider, and ended in the former part of the following day, at the close of which argument His Honor gave a decided judgment for the admission of such evidence, with reasons at some length, and stating he had no doubt on the subject. The evidence by the Crown counsel was accordingly given. At the Court at Fredericton, however, in opposition to that decided judgment and against the considered judgment of WETMORE, J., His Honor reversed his judgment so given at the trial and decided for overturning the convictions; yet, he there says, "I have not particularly considered the "question, etc," and in another part he observes, "I do not wish to ex- "press any decided opinion upon the point."

This is simply dreadful, and upon looking further I think the judgment itself presents exceeding cause of sorrow—for, with the utmost respect for the Chief Justice, I have attentively examined that judgment, and discover no part of it which appears to have been "particularly "considered" nor any reason for reversing His Honor's solemn judgment at the trial, and overturning the conviction. Yea more, with considerable experience in reading judgments on important subjects, and with eight or nine years observation as reporter of the Court, during the times of CHIPMAN, Chief Justice of this Court, and the other eminent men with him, who have passed away—accustomed to observe the great research, care and ability displayed in their judgments, I most respectfully say, that I am utterly unable to discover any such elements in the judgment of the Chief Justice in this case. On the contrary, as one of the public, I deeply feel that His Honor has not bestowed that attention upon the case which its great importance to the public peace demanded, and which I think has been the cause of its miscarriage. Nor can I find any legal reason, whatever, for the majority of the Court reversing the solemn judgment delivered at the trial, nor do I discern that their Honors have at all given any effect to the well established laws of discretionary power in the Judge on a trial and the practice of the Court, which so pre-eminently belong to the Court, in which this case was tried. One more subject before reviewing the judgment, in particular, (the most serious one of all, as I view it), it being the duty of a Judge to amplify his jurisdiction, I am fully of the belief, that their Honors, by their decision, have virtually overthrown the jurisdiction of the Court of Assizes, Oyer and Terminer, and general jail delivery, and have assumed a jurisdiction in the Supreme Court which by law it does not possess.

Now, in particular review of the judgment of the majority of the

Court, if it means only to assent to those objections there pointed out, I will address myself to them.

The Judges report says, "The counsel also proposed to ask him (Richard Sewell) whether he had not boasted that he had shot Mailloux"—(the Frenchman killed in the loft.) "I rejected it," His Honor says in the judgment, "I think the question was improperly re- "jected, the prisoner's counsel had a right to ask the queston though the "witness had a right to decline answering it, if he pleased." I respectfully say, there is nothing in this objection for several reasons:—1st. Bearing in mind the only issue—"Did Joseph Chasson feloniously, etc. kill and murder John Gifford?—remembering too, by the evidence of both sides, that Gifford was killed by a shot from the prisoners in the loft, a minute or more before Mailloux was shot, and while Sewell was up there, as sheriff's officer, his life being in great danger—endeavoring, as his duty obliged him, to capture Chasson, but no charge or issue being before the Court as regards Sewell nor any reason given for putting the question, what had such a question or any answer that could be given to it, to do with the issue between the Queen and Joseph Chasson? Supposing Sewell had denied the fact—he could not have been contradicted—supposing he had admitted it, it would be no evidence for Chasson, nor would the affirmative have contradicted any part of Sewell's previous testimony—so according to the *Attorney General* v. *Hitchcock*, the answer in any shape would have been entirely collateral and irrelevant, to the issue—then it might be said this answer, if in the affirmative might tend to show some bad feeling, as in Ewin's case before cited, but while nothing was so offered—bad feeling towards whom? *Res inter alias acta, alteri nocere non debet*, which means that an improper feeling, by a Crown witness towards a third party, is not to hurt the Crown witness or public in its issue with Joseph Chasson. There was not a semblance of proof that Sewell had any unkindly feeling towards Chasson nor the slightest that he had any against the man shot; if he was the officer, that shot Mailloux and closed the war, in as hazardous a moment as ever was known, and duty imperatively requiring him to save his own life and capture Chasson,—in the absence of any charge against him of wrong, but with the presumption in his favor that he did only his duty why should his saying that he shot a stranger and after the murder of Gifford had been committed, have any bearing upon Joseph Chasson's case? 2nd. I most respectfully deny, as a matter of law, His Honor's proposition that the counsel had a right to put the question under the circumstances in this case. Had the prisoner's counsel any right? If so the public had a counter-right far out-weighing it. "The execution of the "process of the law and the office of the conservators of the peace, the

"soul and life of the law," were more favored than Joseph Chasson and required to be protected. The books are full of law and statutes for the protection of officers in the execution of their duty, the policy of the law is so, and the Judge, as the mouthpiece of the law, when he sees need, from the circumstances presented before him may and ought to interpose as he did to protect an officer in his privilege against exposure of persecution, especially, when His Honor saw the evident drift of the question. In view of the circumstances attending the arrest the Judge had ample authority and precedent to reject the question. See *R.* v. *Lewis*, 4 *Esp.* 225; *McBride* v. *McBride*, 4 *Esp.* 242; *Cundal* v. *Pratt*, (1 M. & M. 108); *Mackally's Case*, (9 Cl. 68 *b*; *Tennant & Hamilton*, (7 Cl. & F. 122); *Attorney General & Bryant*, (15 M. & M. 159, which are opposed to His Honor's proposition above stated. 3rd. The only reason ever given in the books for the right of asking questions subject to privilege is, that upon such question being put the witness may waive his privilege and give a party the benefit of his exposure if he pleases, and I presume from the Chief Justices language that he so means, but that reason wholly failed in this case, for on the cross-examination of Sewell, the learned Chief Justice interposed, as it was his right to do, (see *Roscoe's Cr. Ev.* 153,) and explained to the witness what his privilege was and informed him that, on such a subject, he was not bound to answer unless he pleased; therefore, to one or more questions put by the prisoner's counsel, touching Sewell's shooting Mailloux, the witness claimed the privilege and distinctly refused to answer any questions on that subject, and the Chief Justice supported him in it. Then the counsel for the prisoner put his question in the words now stated, but leading to the same end as the previous questions wherein he had claimed his privilege, and thereupon the learned Chief Justice rejected the question. It may be said that all this does not appear by His Honor's report, but whose fault is that? If His Honor had made up the judgment, upon the facts himself, he would have seen by his notes or remembered, and he had power by the act to correct the case accordingly. So this ground for the majority of the Court overturning the conviction, especially, when we see the nature of the objection and His Honor's discretionary power respecting it, is wholly worthless in every shape, and no ground for His Honor's changing his opinion after leading the Crown counsel to act upon it.

As to the questions proposed, on the cross-examination of the Hon. R. Young, rejected by the Chief Justice, but afterwards *reversing* his opinion whereby defeat of the cases follow, it may be borne in mind that the learned Chief Justice saw and heard every thing passing in Court, enabling him to exercise a sound discretion superior to any other.

Judge not in Court, that he was conscious of his own sight, from day to day that Young was not before the Court until eight or nine days after the trial was called on, and that a variety of the surmises in the questions proposed had no foundation whatever. (Young had no more to do with selecting and empanneling the jury than the Chief Justice on the Bench had.) His Honor knew or must have concluded that the questions put were only intended for political effect and effect before the jury, (no reflection intended upon the counsel for putting them), and upon objection made to the questions being put, His Honor rejected them which I maintain he was right in doing when many questions of interest to the public and to the legal profession are presented; but says His Honor's judgment on reversal, "I think some of the questions put to Mr. Young on his cross-examination were improperly rejected, viz.: 7th. Have you sat in Court suggesting questions to the Attorney General, etc.? 8th. Have you advised with the Attorney General since he came to Bathurst almost continually about the prosecution? 10th. Have you not very frequently since the trial commenced been in consultation with the Attorney General or Mr. Kerr, etc.? 11th. Is it not your desire as a member of the Government, to procure a conviction, etc.? 12th. Did you not, since the adjourned Circuit, go through the petit jury list with the Attorney General or Mr. Kerr, etc.? 13th. Did you not state that no Roman Catholic should be upon the jury, etc.? 14th. Were you not here during the empanneling of the jury suggesting who to stand aside, etc.? In answer, I meet His Honor's last judgment, with a respectful but explict denial of its soundness in law, and I court correction by all lawyers of standing if I am wrong. Bearing in mind that the evidence of Mr. Young on direct examination was quite immaterial and given rather in pursuance of His Honor's previous ruling than otherwise, and that on cross-examination no objection was made to Mr. Young being asked as to his state of mind between the parties, and of answering that he was President of the Executive Council, thereby developing as judicially such the connection in which he stood to the Government and to Joseph Chasson, that as President of the Local Government and by the constitution of the country in charge of all criminal prosecutions, and bound by his oath to attend to them as much as the Chief Justice by his oath was bound to administer the law, he was therefore an actor, in a judiciary capacity carrying on the suit. And this went to the *quality* of his evidence, showing that under these circumstances the jury might receive his testimony with what grains of allowance they pleased and in every way fulfilling the purpose required in *Thomas* v. *David*. Take then the above questions which His Honor by his last judgment considered. He was wrong in rejecting and measuring

by the rules in *Attorney General* v. *Hitchcock*. Would the above questions or any of them if answered in the affirmative, have either contradicted or qualified anything that Mr. Young had said in his previous examination? It is clear, they would not. Again if the above questions or any of them had been answered in the affirmative, could Joseph Chasson upon the issue joined between the Crown and him have given the answers in evidence as part of his defence or as negativing the the issue so joined? It is most obvious he could not. Then having already had Mr. Young's evidence qualified or reduced by his office, would the questions, if answered, reduce it any more or alter the character of it? No such thing was ever known in the law of evidence nor heard of in the books. Again what were the particular acts suggested by the questions, which if answered in the affirmative would be inconsistent with his duty? Keeping in view that the law considers every officer acting lawfully in his duty until the contrary be shown, and that it was not needful for Mr. Young to have explained why he did a lawful act, observe the answers he might have truthfully given after the abortive trials and failure of Justice then lately occurring through Juries before the Chief Justice in that county. Might not Mr. Young in his judiciary capacity very properly have suggested to the Attorney General—a stranger—any matters concerning Juries, and not suffer all the criminal business of the country to be overthrown? Should it not be the desire of Mr. Young in his governmental capacity to have Chasson convicted, if by the evidence he were guilty? And seeing that it was extensively published, and not denied, that the Roman Catholics had all been called upon in their respective Churches to subscribe for paying the prisoners counsel, might not Mr. Young in his Governmental capacity, very properly think that a Roman Catholic who had subscribed to pay for the defence was not an impartial juror?

Then, was it attempted to be shown by any of the questions that Mr. Young was actuated towards Joseph Chasson by any improper feeling, spite, revenge or any corrupt motive as put in *Attorney General* v. *Hitchcock*? None of the questions indicate such a thing; but the majority of the Court by the Chief Justice cite, as if against us, the *Attorney General* v. *Hitchcock*, the very case which we rely on, and quote from the respective judgments of POLLOCK, C. B. and ALDERSON, B., which are wholly misapplied or by the Court misunderstood. These great Judges in those respective passages, specifically confine the questions to showing the *relation* of the witness to one side or the other, as in *Thomas* v. *David*, (7 C. & P.), the woman servant with her master—any witness actuated towards the defendant by wrongful or spiteful motive as in *Ewin's* case, 2 Camp. 638, where the witness said he would be revenged

of the prisoner and fix him in Monmouth jail—or to a corrupt motive—where a witness had corruptly bribed another witness to give evidence against Lord STAFFORD, 7 How. S. Trials, 1400. But while all this is most clear law, and by which each learned Baron limits his meaning, what has all this to do with Mr. Young or the questions put, which indicate no such matter? Will it be held by any Court, that a witness, after his proper relation is shown, and merely because engaged in the duties of the local government of the country, is actuated by spite or an improper motive for doing acts which were properly his duties? Or will it ever be held for law, that I, acting under oath for a client, and there being a necessary occasion to call me as a witness for him, it must be inferred that, in properly discharging my duty, I am acting with spite, malice, revenge or corrupt motive, toward the opposite side?

I utterly protest against such a monstrous doctrine. I deny it to be law and as having no foundation in principle, authority, justice or common sense. The Chief Justice has cited Starkie and Taylor on Evidence in support of his position, but there is nothing in the generality and vagueness of these text writers unless supported by authority, especially when Mr. Starkie's positions on the subject are condemned by Ch. B. Pollock for vagueness and as not to be depended upon, and Taylor gives no other authority than the *Attorney General* v. *Hitchcock*, the case which has guided us, but in no way sustaining the judgment of the Court. Then what does the Court say in their judgment to the privilege of the Crown, by the Attorney General, in not allowing Mr. Young, as an officer of the Government, and acting in the suit with the Crown counsel, to divulge anything which passed between him and the counsel as to the conduct of this suit? If there be any point known to the law better settled than almost any other it is for the sake of public policy and justice that such matters as were put to Mr. Young were privileged from answer. The books are full of this doctrine, applying it to all cases of professional confidence, especially Crown prosecutions. It would be a waste of time to cite the numerous authorities; I will name only two, the *Attorney General* v. *Bryant*, 15 M. & W. 169 and *Lawton* v. *Chance*, 4 Allen R. 411, where the late Chief Justice Ritchie held the doctrine to the broadest extent. Yet the Court in this case as on every other proposition with authorities put by the Crown counsel (except one case) does not favor them or their authoities with even a passing glance. This privilege, however, is undoubted, and the questions clearly recitable. *Therefore the questions proposed* to Mr. Young whose office was proved—if answered affirmatively—contradicting no part of his previous examination, nor affording any evidence to answer the issue, nor indicating in Mr. Young any improper feeling, spite or corrupt motive against

Chasson, whereby the questions were wholly collateral and irrelevant to the issue and Mr. Young as an officer of the Government acting with the Crown counsel, privileged from answering such questions. The judgment at the trial rejecting such questions was accordingly right and the judgment of reversal is wrong.

Passing over several grounds which I reviewed in His Honor Judge WELDON's judgment, and finding that the majority of the Court support me against His Honor as to the rejection of divers declarations of certain persons at Albert's house, etc., I come to the next objection made in this judgment. "I think (says His Honor the Chief Justice) the prisoners "who were not on their trial and were called as witnesses, should have "been allowed to state the purposes for which they went to Albert's "house, (why?) in order to disprove the inference that they were "there for an unlawful purpose." I most explicitly deny that any inference of that kind did or could arise against them at that time. They were at Albert's house, some his own family, others his relations—all by his licence and consent, doing no unlawful act, as rightly there as I in my house, as truly remarked by Mr. Justice WELDON. The Crown gave no evidence that these persons, at that time, were unlawfully there, afterward their hiding and resisting in the loft was a misdemeanor and raised such an inference; but before that, being there lawfully, what inference was there to disprove? None, even if this matter had been admissable. His Honor says, "the prisoners." Numerous were the times that the Crown counsel called His Honor's attention to the single issue of Chasson standing alone, and their objections were all made as well in reference to the maxim, *Res inter alios acta, alteri nocere non debet*, as that Chasson could not thus create evidence for himself. Why should strangers purposes affect this suit? They, as I have before stated, charged with no crime, expecting no arrest, may have come to Albert's house for a very innocent purpose; on the contrary, Chasson, charged with felony and informed that the constables were coming to arrest him may have been there for the very opposite purpose. Why should the one affect the other? The Chief Justice at the trial having ruled this question out. *in law* was right; the new judgment overturning it, *in law* is wrong. "I am inclined to think," (says His Honor) that I should have allowed the question put to Prudent Albert, viz.: "After you got up stairs "what did you people say among you." In answer, I respectfully but sorrowfully feel (if His Honor think so,) that the long established rules of evidence are becoming fearfully discarded, and that a different book in the profession upon evidence will be needed, as adapted to the overthrown jurisdiction of the Court of Assizes, the best manner of producing long and ruinous trials, the most approved modes of quashing verdict

and of defeating public justice by an appeal to the Supreme Court. Or if it really be that I am so grossly ignorant, will any kind brother of the law, mercifully set me right by some English case, authority or principle as contrary to the numerous and long established authorities collected on the subject in that excellent book 1 *Chitty's Criminal Law*, 568, and in every other work of authority which have guided me; corroborated also by that clear headed Judge, WETMORE, J. How could the matter as put by His Honor, "what strangers said, purely hearsay, be legally received for evidence against the Crown?" for I verily believe that the non observance of the rules of law and evidence, and of the facts proved have been the sole cause of overturning these convictions. What people *said* among themselves in their own favor, not in hearing of the constables, and while in the immediate performance of an unlawful act, as cutting off a man's head, cutting his throat, shooting him, or with loaded guns and ammunition ready to shoot him, surely cannot be evidence; their declarations as strangers to this suit, accompanying their illegal acts, surely could not be received for evidence on the issue joined between the Crown and Joseph Chasson. Surely the shape in which the question was put, covering the whole period from the time they went into the loft until after the surrender, and covering not only what was said at the time of the killing as explanatory of it, but every thing that might have been said by way of narration, was imperative for its rejection, and His Honor's discretionay rejection of it at the trial was right, but his judgment overturning it wrong. Such declarations, even if given by the Crown, would have been immaterial, as the immediate effect of their acts was resistance and murder. See *R. v. Sheppard*, R. & R. C. 170. The learned Judge appears to have changed his mind upon the ground that a nearly similar question objected to and ruled out by him was afterward, *ex gratia*, admitted by the Attorney General; but surely if by consent, an improper question is allowed to be answered when a similar kind of question put is objected to and ruled out, the consented answer of the one cannot overrule the judgment of the Court in the other, nor be any authority in law for the admission? Another observation upon the Judge's discretion, as to the character of the evidence offered, and the manner in which Chasson's co-prisoners gave their testimony in Court. If all the questions put had been answered by them, could any man who heard them believe it would have made the slightest odds with the Jury in their verdict? Was the character of this evidence not a matter to move His Honor's discretion?

The only other objection in this judgment is the receiving evidence of the felony which I have considered in the review of Mr. Justice WELDON's judgment, and I shall not repeat the same matter again.

WETMORE, J. agrees with His Honor's judgment on the trial for receiving the evidence but disagrees with his reviewing judgment at Fredericton which His Honor gave "without particularly considering the question, "and did not wish to express any decided opinion upon the point." As one of the public however, in deferential opposition to His Honor the Chief Justice, I have fully considered the question as before referred to and for the reasons there offered have not the remotest doubt that the judgment delivered by His Honor at Bathurst was according to law and that His Honor's reversing judgment is against law. The evidence given of Chasson being party to a robbery committed at Young's and Robins' with others whose names were not given on the trial, the evidence being as separately directed upon Chasson only as if all the others were utterly unknown, (see His Honor's notes) it is truly astonishing that the Chief Justice should treat the matter, in his judgment, as if *acts of riot* only had been the purpose of the evidence, not including robbery, and *as riot by the prisoners* where no prisoner was named but Joseph Chasson alone, and this mistake is carried out with effect against the reception of such evidence by confounding Chasson who *did* with others who *did not* committ robbery, and confusing the matter in such a way that His Honor could not indeed see the connexion; but if the subject had been looked at according to the proof actually given, the connexion is as palpable as the link in a chain. Does His Honor consider that there is any connexion between cause and effect? between the discharge of a loaded gun and the carriage of that charge? If so there is equal connexion between the robbery *actually committed*, the complaint of it, the warrant for apprehension, a delivery thereof to the sheriff whose officers in going to execute it, are resisted and killed by the robbers; they are all connected and parts of the same transaction, and it matters not whether the parts be contemporaneously, successively or retrospectively connected, the principle and effect are the same. Not seeing this connexion, which His Honor says he does not, may be accounted for in His Honor's "not particularly considering the case" or "wishing to "express any decided opinion upon the point." For the better understanding of the matter, however, it may be observed that the many cases in the books are presented in three classes; 1st. Where a crime not charged in the indictment is the cause of the one charged in the indictment—the proof of the first tending to show guilty knowledge and motive in the second as in the many cases before referred to in the note to *Roscoe's Criminal Evidence*, p. 92, and as in this case. 2nd. Where a crime not charged in the indictment is a contemporaneous part and as if one transaction with the crime charged in the indictment, and tending to show guilty knowledge and motive in it as in *Rex.* v. *Ellis*, 6 B. &

C. 145 and other cases. 3rd. Where a crime not charged in the indictment is not the cause or part of and has no connexion whatever with the crime charged in the indictment, except as showing by the first a practice of the wrongdoer in committing such crimes as charged in the second, and thereby to raise a presumption of guilty knowledge or motive in it, as in cases of forgery, and uttering base coin, other forgeries and other utterings, no way connected with the crime charged, may be shown as proving a course of dealing or practice in the accused of committing such crimes, and thereby raising a presumption of his guilty knowledge or purpose in the crime charged, as also in the late case of *Reg.* v. *Francis*, (Law Rep. 2 Crown cases reserved, 128), where a prisoner was charged in two counts of the indictment with attempts to obtain money upon false pretences, from one Walters and one Dyer, pawnbrokers, respectively, by offering a ring which he represented to be a diamond ring, whereas the stones were only crystals. The prisoner's defence was that he did not know the ring was false, having been employed by one Roberts to pawn the ring for him upon his representation that it was a diamond ring and prisoner believing the assertion to be true. After proving the respective charges in the indictment, in order to shew guilty knowledge in the prisoner, evidence was proposed that the prisoner two days before had offered other false articles to *other* pawnbrokers: namely, to one Lazenby, a chain representing it to be gold while it was not, and to one Stowe, and to one Taylor, respectively, a watch and a cluster ring which was not a cluster ring. The evidence was received, the point reserved, the prisoner convicted and after argument upon appeal Lord Chief Justice COLERIDGE in delivering the judgment of the Court and approving such evidence said: "It seems clear upon principle "that when the fact of the prisoner having done the thing charged is "*proved*, and the only remaining question is whether at the time he did it "he had guilty knowledge of the quality of his act or acted under a "mistake, evidence of the class received must be admissible. It tends "to shew that he was pursuing a course of similar acts, and thereby "raises a presumption that he was not acting under a mistake." This case fully affirms the Crown counsel's views, the judgment at the trial, and Judge WETMORE's opinion in the judgment of the Supreme Court, but overthrows the reversing judgment of the Chief Justice, especially, as intimating that the felonies shown must be all parts of the same transaction. See also the case before HOLROYD, J., confirmed by all the Judges, *Rex.* v. *Egerton*, 6 B. & C. 148. Therefore, by the strictest rules of law and evidence there is nothing in the foregoing objections to warrant the reversing of the judgment given at the trial, nor to quash the convictions.

Then as to discretion and the meaning and effect of a Judge's discretion. A Judge on a trial or in Court, sees and hears all that is passing around him, embracing many things which a functionary out of Court cannot know and cannot judge of, and his discretionary powers *ex necessatite rei* are as much warranted by the law of the land and the practice of procedure as any part of the law governing his Court, and the exercise of his discretionary powers are as fully embraced in his oath of office as any other duties he undertakes to perform. This discretion is not like that founded upon specific facts, ministerially exercised, and which may in some cases be appealed from, but depending upon necessities as they occur in judicial course, upon circumstances which arise before him and which none but the Judges at the trial can properly know. It was said by the late Lord Chief Justice TENTERDEN, a most excellent Judge, that there was no duty more painful, oft times for a Judge, than to decide discretionary matters. Still it must be done and what necessity obliges, it maintains, and a matter so adjudged, especially by a Court of Supreme and exclusive jurisdiction, becomes *rem judicatam*, and no other Court can interfere with it; as in fining or committing for contempt, ordering challenges to be in writing, discharging a jury after disagreement, admission and rejection of evidence, controlling a witness under examination, and a variety of other matters. Mr. Starkie speaking of cross-examination, 1 vol. 188, says, "the mode of examination is in truth rejected by *the discretion "of the Court*, according to the disposition and temper of the witness." And in Chitty's Criminal Law 622, speaking of the latitude allowed a cross-examination, this great author says, "It is perhaps *better* left, "to the *discretion of the Courts*, in each particular case to prevent "the counsel from too great a digression from the matters in issue." This power is as old as the tribunal itself, and has been perpetually exercised in the Court of Assizes, Over and Terminer and jail delivery as a part of the ordinary law and practice of the Court, concerning evidence, and the latitude allowed on cross-examination is limited and controlled by the very authority by which it is exercised, namely, by the discretion of the Court. Now, according to the foregoing; which one of the forty-eight questions adjudged by the Chief Justice at the late trial was *not* a question within the judicial discretion and practice of the trial Court to decide? I have very attentively gone over the questions, and can find *nine*, the only question about which there seemed any doubt, was the admission (if it were improper) of the evidence of the felony, but that appears fully answered by the cases, because, granting for argument that such evidence was improper, no objection as to the sufficiency of the other evidence which was ample without it to sustain

the verdict, as in *Rex.* v. *Ball*, R. & R, Crown cases, 132, where it was held that although it appears upon a case reserved that evidence was admitted at the trial which ought not to have been received. Yet if the Judges are of opinion that, after rejecting the improper evidence, there was ample to support the conviction, they will not set it aside. Here no special report was made by the Chief Justice as to the effect of objected evidence, and the other evidence being ample without it, and no objection taken to the verdict according to the law and practice of this Court, it was no ground for disturbing the conviction. Then, as to discretion, in *Rex.* v. *Ellis*, 6 B. & C. 147, Bayley says, "I think that it "was *in the discretion of the Judge* to confine the prosecutor to the "proof of one felony or to allow him to give evidence of other acts "which were all parts of one transaction." So it was contended by the Crown counsel that the felony committed here was a part of the transaction of resistance and murder, however in *Reg.* v. *Francis*, before cited, 1874, where the offences were no way connected, and attempts of uttering false coin had gone so far, BLACKBURN, J., reserved the point on that account and reported to the Court that he had no doubt that the evidence of the other pretences had much weight with the jury. It being manifest by the defence that the other evidence for the prosecution would have been entirely insufficient for conviction, but it was there held that other offences no way connected could be received against the prisoner, and, therefore, it became the established practice of the Court to admit such evidence generally. So that in every view the Chief Justice was right in his discretion for receiving the evidence at the trial. Then some questions for the public to think of. Was not the Judge's decision final and unappealable? Has not the public a right to claim it so? The other four questions (WETMORE, J. 3) upon which the majority of the Court quashed the conviction. Looking at the law from Starkie and Chitty above cited, and many other books, can it be doubted that it came within the Chief Justice's discretionary power to reject the questions put to Sewell, to Young and the rejections as to the purposes of the prisoners going to Albert's house, and as to what the people said in the loft? Can it be doubted that all these questions came properly within the Judge's discretionary power? Have not the public as much right and interest in the *rem judicatam* or thing adjudicated by the Judge's discretionary adjudications as to his administration of any part of the law? Can the trial Judge, months after the circumstances of the decision have gone from his memory, sitting in another Court with other Judges never present, go back upon his discretionary adjudications and reverse them, exercising a discretion upon a discretion by each Judge according to his own fancy, wholly defeating seven convictions for

felony, and bringing the long established and uniform rights of the public into contradiction, confusion and contempt? No such adjudication upon matters of discretion and practice is to be found in the English books, and I think, I may safely say was never before heard of in any country. As to assuming jurisdiction by the Supreme Court, which it does not possess, I will be somewhat particular in explaining this proposition, as it is of great importance to the public—the *salus populi*. It is not generally known that the Court in which His Honor the Chief Justice presided in Bathurst (excepting Parliament) is the highest Court of Criminal Jurisdiction ever known to the British Crown. The Chief Justice by right of office being the Supreme Justiciary of criminal law for public rights throughout the land. The Court itself is nothing less in criminal jurisdiction than the *aula regis*, the great Court of the King, ever since the Norman conquest, of more than eight hundred years standing. It existed in full power long before the division of the four Courts at Westminister, and one hundred and fifty years prior to the great Charter. It has taken the place and power of the Justices in eyre, as a Court of Assizes, (nisi prius), Oyer and Terminer and jail delivery, (see *Reeve's His.* of Eng. law) and the matter fully discussed as to the original jurisdiction and powers of this Court. *In re Fernandes*, 6 H. & N. 717 10 Com. B. N. S. 25, particularly on its power to commit, for contempt, which no other Court can interfere with, by EARL, C. J. and WILLIS, J., and by our Act of Assembly, 17 Vic. ch. 19, all those powers are combined in a single Judge with no more right to appeal from his judgment, to the Court at Fredericton than from the Court at Fredericton to the Court at Bathurst, and the judgments of the Chief Justice in his Court of Assizes and jail delivery at Bathurst have the same unappealable force and absolute finality as if pronounced by the Chief Justice and the full Bench on a trial at Bar at Fredericton. There never was, nor is there now any appeal as *of right*, from one Court to the other. No new trial nor venire de novo can be granted in felony. No writ of error can be granted to a higher Court except by permission of the Attorney General. Nor will any bill of exceptions lie, and the Court, as of right, is absolute, exclusive and final in its jurisdiction and power, and no other Court can interfere with it. For centuries, however, until a late period it was the usual course in England where an objection was taken on the part of the prisoner which the Judge in the trial considered well founded in law, to defer giving judgment until the next Assizes, and in the meantime take the advice of the Judges upon the question, but the Act of Parliament 11 & 12, Vic. ch. 78, passed in 1848, enacted that when any person was or is convicted of any felony, etc., before any Court, etc., the Judge before whom

the cause is tried *may, in his discretion*, reserve any *question of law* which may have arisen on the trial for the consideration of either Bench, etc. Our Act of Assembly, 12 Vic. ch. 3, passed in 1849, by sec. 67, enacted the above provision verbatim, and applied it to the Supreme Court in Term, and this law was codified by the Rev. Statutes of 1854, and is now the only authority by which the questions in this case were reserved or could be dealt with. Here the question is, what does "*any question of law*" in the act mean? Does it mean *any* and every question which the counsel choose to raise in respect to the mere discretion in the Judge, based upon innumerable facts, circumstances and appearances in the eyes of the Judge trying, which no absent Judge had seen or could see, as also all matters of law involving the mere practice of the Court in regard to evidence, or does it mean a pure and unmixed question of law, as upon a writ of error in law? I think the late authorities clearly determine the act to be confined to the latter. In *Sandon* v. *Proctor*, 7 B. & C. 800, it was held by HOLROYD, J., that a writ of error would not lie upon mere matters of practice. In *Reg.* v *Newton* 13, Q. B. 724, I observe it stated in argument by the Attorney General, a most eminent counsel of the time, in reference to a Judge discharging a jury at the Assizes, and not questioned by the other side as follows:—"At common law there was no point of right, no way of "reviewing a Judge's discretion in a criminal case on law or on exception "of evidence, and it may well be, that there is not, as matter of right, "any way of reviewing his decision on this question, yet the power of "discharge must be exercised." In *Reg.* v. *Charlesworth*, 1 B. & S. 460, 479, as to whether a Judge had discretionary power to discharge a jury by most eminent counsel, (Sir W. Atherton, Overend, Cleasby and Welsby,) it is stated as follows:—"The Judge had power to discharge the jury "and if he had that power it must be exercised in his discretion, and his "discretion is not subject to be reversed any more than the ruling of a "Judge in criminal cases as to the admissability of evidence or his mode "of leaving the case to the jury." The same doctrine is substantially held by the Court in *Mansell in error* v. *The Queen*, 8 E. & B. 54, as to the matters of practice. So in *Gray* v. *The Queen*, 11 C. & F. 42, and in *Windsor in error* v. *The Queen*, 6 B. & S. 143, upon the exercise of the Judge's discretion, as being matters in which there is no appeal, from his decision and in *Regina* v. *Boyes*, 1 B. & S. 319, as to the finality of the Judge's discretionary rulings both in matters of discretion and practice. On examining the authorities that have occurred, under the Act of Parliament, of which ours is substantially a copy, from 1848 to 1875 the cases appear to be very few, none like any of the forty-eight objections upon discretion and practice as in this case, the law reports

for the last ten years comprising only five or six hundred pages. The Judges themselves properly take exception wherever a case does not come within the jurisdiction of the act, and will not hear the questions, but questions of *law* occurring in any trial and conviction. See *Reg.* v. *Clark*, L. Rep. 1 (Cn. cases reserved) 54 *Reg.* v. *Will*, ib. 378, *Reg.* v. *Jenkins*, ib. 186, but in *Reg.* v. *Stubbs*, (Cn. cases reserved, 1 Jurist, N. S. 1115, it was there distinctly held that under the Act of Parliament, the Court cannot entertain questions of mere practice as to whether a case was properly left to the jury upon the unconfirmed testimony of an accomplice, though PARKER, B., WILLIS, J., and other Judges were against the sufficiency of the evidence which produced the conviction, and did not approve of the way the case was put to the jury; yet not being strictly a question of law they would not interfere. See also, as to jurisdiction, *Reg.* v. *Mellor*, 4 Jurist, N. S. 214. According to those authorities all the objections taken in this case were in the mere discretion of the Judge, and governed by the practice of the Court concerning evidence, and did not come within the act at all, but the judgment of the Supreme Court in effect deprives the Judge of Assizes and jail delivery of all discretionary power, and of finally deciding questions of practice concerning evidence, and otherwise, and virtually overthrows the jurisdiction of that Court altogether. Now, the appeal allowed by the discretion of the trial Judge under our Rev. Stat. virtually copied from the English Act, is not like an application to the discretion of the Court above for a new trial, but upon *some specific question of law*, unmixed with discretion or practice; otherwise the appellate Court by law has no jurisdiction and no consent can give it, nor has a Judge on trial any right to reserve questions which the appellate Court has no jurisdiction to entertain. I should like to be informed which one of the objections, taken by the prisoner's counsel, came within the jurisdiction of the Supreme Court according to the power referred to. The objections were all of matters either immaterial, discretionary or pertaining to the mere practice of the Court in which they arose, and from the earliest of time to the present we have no train of such questions ever having been entertained in the Criminal Courts of appeal in England; for instance, compare the numerous objections which, it appears by His Honor Judge WELDON'S judgment, he undertook to decide. Where is anything like it to be found in the English authorities that govern us? There is none to be found! Where is anything to be found like the five objections upon which the majority of the Court quashed the conviction? None; but the cases of *Reg.* v. *Stubbs*, 4 Jurist, N. S. 1115, and the other late cases above cited, fully establish the contrary, and maintain the Court of Assizes, Oyer and Terminer and jail delivery, undisturbed in its ancient

strength, discretion and practice; wherefore, I think the Supreme Court had no jurisdiction to deal with the objections submitted, and that their adjudications for quashing the convictions, are *coram non judice* and void. However, for the various reasons set forth in this pamphlet, *especially*, there being no legal authority, precedent nor reason to support the judgment of His Honor Judge WELDON for overturning the judgment of the Chief Justice in the Court of Assizes, Oyer and Terminer and jail delivery; nor any legal authority, precedent nor reason in the judgment of the Chief Justice and the majority of the Supreme Court to warrant the reversal of the judgment in the Court of Assizes, etc., and jail delivery; nor any legal authority, precedent nor reason to interfere with the Court of Assizes, Oyer and Terminer and jail delivery, as to its judgment on questions of mere discretion and practice; nor any jurisdiction in the Supreme Court to entertain the objections upon which they quashed the convictions in this case, I, therefore, think that the convictions were improperly quashed. The foregoing has really occupied more of my time than I could conveniently spare, but less than its public importance deserves. I view it as involving subjects of the highest importance to the public justice of this country, and as deserving the consideration of every body. No one, I think, felt more kindly towards the prisoners than I, considering them innocent dupes of others, and having suffered very much from a long imprisonment, and otherwise. The question, however, is not one of Governmental clemency, for which I should go very great lengths, but of judicial justice for the safety of the public here. A trial of forty days length upon a charge of the highest crime that can be committed against the public peace, ends with a verdict of guilty of murder found upon the most ample evidence, and by one of the best Juries I ever saw on a trial; six other prisoners confessing themselves guilty of manslaughter, subject to the objections taken on this trial. The objections are argued before four of the Supreme Court Judges who determine to quash all the convictions. All the prisoners are set free, public justice defeated, and the laws of peace and safety brought into public ridicule and contempt. The enquiry which the public makes is, whose fault is all this? "A mistake of the Crown Counsel," says the *Union Advocate*, "the fault of the Crown Counsel," says the *Farmer*. *Not at all so*, Mr. *Union Advocate*. *By no means so*, Mr. *Farmer*. I can speak for myself. No man could have used more care and diligence in duty than I. I could do mine, and I may truly say as much for the Hon. Attorney General, who to my mind displayed remarkable ability and prudence in the course of this trial. We carefully considered the evidence before submitting it, and were entirely guided by the judgments of the Court, which, to our minds, were according to law and the usual

discretion and practice of the Court. It was no fault of ours, if the same Judge afterward reversed the very judgments which led us, especially when, for the reasons now set forth, there appears no law for his doing so, nor for the majority of the Court, including the Chief Justice, quashing the convictions, thereby producing so injurious a defeat. The several matters are, therefore, presented in the only way in which I could bring them before the public, including the editors of the *Union Advocate*, *Farmer*, and any other public journalists who may have expressed or formed opinions on the subject, to consider whether the Crown counsel could have done more in the way of their duty, and whether they were to blame for so serious an injury to public justice, or whether the fault does not lie with the Court itself. The public have a right to look that way in order to observe how the public servants, in the administration of justice, perform their duties in the Supreme Court. The foregoing are matters of common sense, upon which, in my opinion, properly explained, all intelligent persons (nearly as well as lawyers) may form a reasonably accurate opinion, namely, upon such questions offered above for my conclusions, after reading the respective judgments, and my review of them: and whether the public have not the same vested right and interest in questions pronounced according to the discretionary power and long established practice of the Court of Assizes and Jail Delivery as any other judgment of the law, and whether the Chief Justice, or the majority of the Supreme Court, can go back upon those judgments after they have been acted upon and reverse them, and thus defeat public justice; looking, too, at the respective judgments, and the manner in which *they show* they have been prepared, whether they appear to have received that careful attention from the Chief Justice and the majority of the Court which the great importance of the subjects to public justice demanded, and whether a better attention to the facts and to the law concerning the respective objections would not have necessarily led the Court to conclusions for sustaining the convictions; whether, in all their experience, they ever saw or heard of such a case before, and whether this is a sample of the modes in which judgments are considered and justice non-administered in the Supreme Court; and as to what will be the effect of the foregoing judgments on the future practice of the Court if they be followed as precedents; and if so, whether public justice can be hereafter attempted without the sure prospect of defeat; and whether, in order to prevent such judgments from being followed as to admissions and rejections of evidence, it may not be necessary for the Government and the Legislature to interpose, with an Act repealing any future applications to the Supreme Court or declaring that the respective judgments as to the admissions and rejections of evidence in

this suit shall not be followed as a precedent for future procedure either in the Court of Assizes, Oyer and Terminer and general jail delivery or for the Supreme Court. These and other questions may be proper for the public to consider in connexion with the maxim *salus populi suprema lex*, and the laws of peace and safety, and the offices of conservators of the peace,—the soul and life of the law which I think have been lost sight of in the final disposition of this case.

ERRATA.—Twelfth line of Statement of Case, "for to the triers" *read* "by triers."

ERRATA.

12th line of Statement of Case, for "to triers" read *by triers.*
36th line of 20th page, for "should" read *shall.*
14th line of 22nd page, for "How" read 7 *How.*
25th line of 28th page, for "to enquire" read *I enquire.*
17th line of 30th page, for "is a" read *as a.*
32nd line of 36th page, for "judicially such" read *judicially seen.*
37th line of 36th page, for "judiciary" read *fiduciary.*
20th line of 37th page, for "judiciary" read *fiduciary.*
38th line of 38th page, for "recitable" read *[illegible]ble.*
22nd line of 41st page, for "link" read *links.*
23rd line of 43rd page, for "rejected" read *regulated.*
25th line of 43rd page, for "allowed a" read *on.*
38th line of 43rd page, for "nine" read *none.*
10th line of 47th page, for "Parker" read *Parke.*
33rd line of 47th page, for "train" read *trace.*
38th line of 48th page, for "do mine" read *do no more.*
34th line of 49th page, for "non-administered" read *administered.*