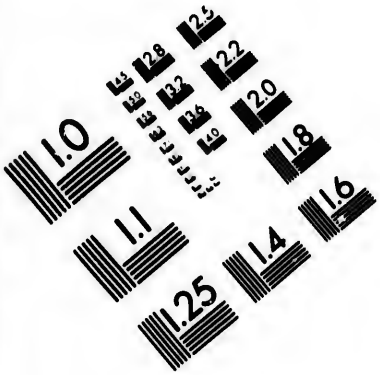

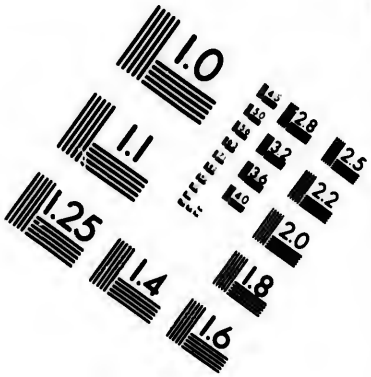

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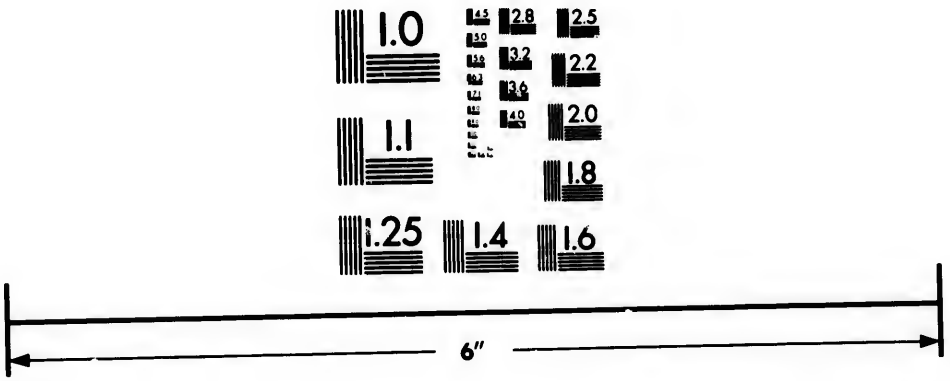

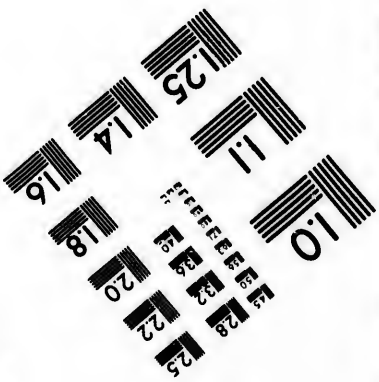

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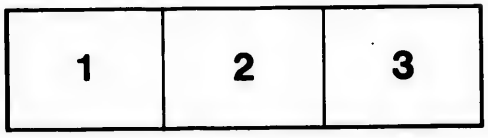

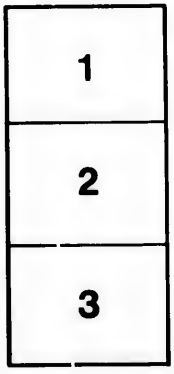

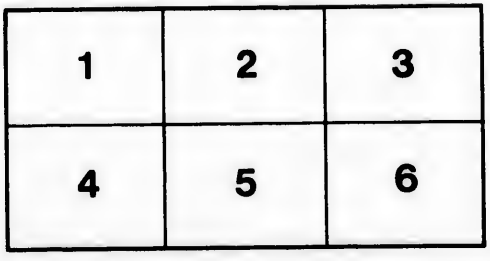

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SOME

LOOSE SUGGESTIONS

FOR THE

Improvement of the Criminal Law,

IN ITS

PRESENT STATE OF TRANSITION.

By JOHN HENRY WILLAN,

BARRISTER AT LAW.

Published by request.

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PREFACE.

The following few loose suggestions have been submitted by me to the public in accordance with the kind recommendations of a few friends in the Law. Not originally intended for publication, their manner contains many defects which I beg to submit to the indulgence of the critical.

JOHN HENRY WILLAN.

OFFENCES AGAINST THE STATE, AGAINST PERSON AND PROPERTY, AND OTHER OFFENCES.

Chapter I.

1st.—That death in all capital cases should be inflicted as in Felony. Reason for suggestion.—That the sentence in Treason is that the prisoner be tortured to death and mangled, in a manner revolting to modern ideas. It might be skilfully used for defence before a Jury, and, at all events, can be always used as a reproach to existing law.

2nd.—That Treason, Murder, and crimes made capital by Provincial Statutes, be the only offences punished by death.

3rd.—That Coining cease to be regarded as an offence against the State, and treated as it really is—that is, as a crime of the class known as the *crimen falsi*.*

4th.—That all non-capital cases be reduced to misdemeanors.

5th.—That those which are now Felony and all which deserve the Penitentiary should create infamy; but no infamy, save conviction for Perjury, should render a witness *incompetent*, but go only to his credit.†

6th.—That misdemeanors carrying "infamy" shall be distinguished by a prefix.‡ Say "HEINOUS."§ Because it is so near to the word felonious, and can be conveniently inserted, as thus, "unlawfully and heinously did," instead of the other; and because the word "infamy," of old associated with the pillory, is now associated with conflicting and vague ideas in the minds of the generality of people, and is, therefore, perhaps better not too constantly repeated in necessary public documents.

7th.—That all crimes now punishable by Penitentiary (which I will in future call by the name of "Heinous") shall be punished by Penitentiary alone. Reason—To separate prisoners guilty of crimes involving infamy from those not, and make the punishment more certain in its

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* This is an old suggestion, which I have several times met with, and it seems to me a good one.

† This only extends the principle of the 4th and 5th Vic., chap. 24, sec. 21, and 4th and 5th Vic., chap. 24, sec. 22.

‡ For a ready example of this common word, see Stat. 22 H. 8, c. 10, against the persons called Egyptians.

§ I further propose the following new nomenclature: That "heinous offences" against person and property be divided into the following groups, families, or classes, numbered according to prominence in evil—1st. The destructive; 2nd. The libidinous; 3rd. The predatory.

Murder, arson, houghing cattle, &c., are in the first list. All the deeds of hate, revenge, and the angry passions belong to it; and destruction being the effect of these passions and intent of their indulgence, I have preferred it, as it is definite, and "malicious" is not always so. There being a vast difference between the "malice" or "froward mind." (*i.e.*, a propensity to evil) of antiquity and the "malice" of modern conversation; and the malice referred to in law, owing to the changes in the language, is sometimes wide as the one and sometimes narrowed down like the other.

The second word speaks plainly enough for itself.

Of the third, all manner of thieving and cheating and unlawfully by any means, getting hold of what lawfully belongs to others, may well be grouped under it.

nature, which, with other provisions hereafter to be disclosed, will prevent the above suggestion acting harshly.

8th.—That, therefore, detention in the Penitentiary be for a term not "less than" a year and a day, in lieu of two years.

9th.—That, to carry out more clearly the principle that the Law, (as Blackstone says in his fourth volume,) shall determine the "nature," and the Judge the amount of punishment, and yet to limit this principle, so as to harmonize with a graduated scale of offences: the Legislature shall fix a *maximum* and *minimum* of detention in all Penitentiary Cases, leaving the judge free to apportion either or anything between them.

10th.—That, therefore, a scale of crimes and punishments be adopted, and all heinous offences brought within it.

That certain words shall bear meanings suited to this scale. "Life," for instance, to involve the alternative of detention for not more than twenty-one years nor less than a year and a day; the *maximum* being according to their precedence in the scale of guilt, making the periods of punishment tolerably numerous; the *minimum* in all cases the same. A "term" without further description, to mean not more than three years, and to be the punishment for heinous crimes where none other is indicated. By this course all inconsistencies may be got over.

11th.—I think the following would be a good scale, but the grouping of offences would require *much care*, and without *great care* I think it would be *too minute*; at all events, it shews what I mean completely. Highest offences (non-capital) life, as above, and the rest fourteen, ten, seven, three and two years respectively. The last for all attempts (short of assaults) to commit heinous crime, unsuccessful conspiracy to commit, and attempts to suborn or procure the commission of, heinous crimes.

12th.—It may be asked, whether it might not be advisable to continue the Infamy of conviction after discharge from detention, and in consideration thereof, in *most* cases to reduce the term of detention,—the infamy, though (except in perjury) not rendering the witness incompetent to testify, nevertheless carrying SOME CIVIL DISABILITIES, such as may hereafter be determined. In order to compromise between the ancient severity of perpetual

infamy and the modern lenity of making the completion of imprisonment purge the offender as a pardon would, and also as complying with reformatory ideas, I would suggest the offender should, at a term of years from the completion of his detention, be enabled to recover his rights by a legal process—say a petition to a civil Court, shewing that his life, since he recovered his liberty, had been lawful and good, legally and morally, inviting proof to the contrary, and that his means of subsistence are ostensible and proper in all respects. I think it would be well he should be obliged to advertise his petition, which ought to be supported by affidavits; and if, on proclamation, to be made by order of the Court, in a convenient manner, no one opposed it, on making out his case he should have his judgment restoring his right; and if answered by any one, let issue be joined on his allegations, and judgment given on it according to the facts.

13th.—As the next proposal will give rise to some questions, I have resolved to answer them in advance, or rather to remove the ground for putting them, by a brief historical review of the branch of jurisprudence to which they refer.

In the remote origin of the Common Law, fine or imprisonment, or both, were, as they have continued to be, the punishment of misdemeanors; but to these, in cases of nefarious or of scandalous turpitude, were added infamy (indicated usually by the pillory, if not always), and corporal pain. But in the corruption of ages, judges holding office at the pleasure of the Crown applied these punishments to offences of a totally different and often of a political character, and applied to them punishments meant for such crimes as by the "meanness of spirit" (Blackstone's word) they exhibited, or by some very low, vile kind of depravity, were a stain on manhood. This was the original cause of their infliction. They were thought unworthy a man, putting aside every idea of duty as a citizen. The greater refinement of modern ages, shocked at the *manner* of these punishments and long confounded by servile decisions as to their *principle*, sought their abolition, and adopted "hard labor" as their substitute; and thus the incertitude of the old punishment

descended on the new; and it is now, by the Consolidated Statutes,* in the power of a judge in Canada to use a boundless discretion as to "hard labor," or no. Thus the judicial error, the "Bill of Rights," directed a clause against referring to "unusual punishments," has been perpetuated in England as well as here, and in Canada a Statute has confirmed it. In the substitution of "*hard labor*" for "*corporal pain*," &c., many offences were improperly and through inadvertence (arising from the desire to get rid of sights grown odious, rather than to legislate on principle) omitted. They should be returned to their legitimate place. I would, therefore, with submission, put them rather amongst the smaller punishments, though meriting the greater, than give them their deserts, for fear of too great and sudden a change in justice. But "hard labor" was not the only great change of punishment in the English system. Transportation was substituted for death.

These great changes mark corresponding changes in society. Of old, the dread of slavery would have made them impossible; but the long abolition of feudalism in all its sterner features had removed this danger to liberty. It was no longer feared that men would be unjustly condemned that they might be sold as slaves, without sentence, or slain out of the realm contrary to law; neither was "hard labor" the object of abhorrence it was in old times, when a Statute of that sort had to be repealed in two years,—a fact worthy of note in the event of argument on that just system so peculiarly proper for Canada, the *utilization of convict labor*.

14th.—The category of misdemeanors (not to be prefixed by the word "heinous") being thus reduced, the punishment of misdemeanors should be in all cases FINE, except where the judge, &c., presiding, should certify that, from "the circumstances of aggravation accompanying the case," he was of opinion that a fine would not be a sufficient punishment, in which case FINE AND IMPRISONMENT, or rather the reverse, "the defendant to be imprisoned and fined" should be the sentence, without prejudice in any

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* Page 133, 4 and 5 Vic., chap. 24, sec. 28; 4 and 5 Vic., chap. 25, sec. 4; 4 and 5 Vic., chap. 26, sec. 27; 4 and 5 Vic., chap. 27, sec. 36; 10 and 11 Vic., chap. 4, sec. 11,

case (where it has been heretofore usual) to the exacting of sureties to the future conduct of the parties. The imprisonment in all such cases (WITH AN EXCEPTION, to be hereafter mentioned) to be simple imprisonment, not in the Penitentiary or at "hard labor."

15th.—That the utmost extent of such Imprisonment as aforesaid, shall be ONE YEAR.

16th.—That in all cases where Fines are inflicted, if the amount has not been fixed by Statute, the fine shall be PROPORTIONED TO THE DEFENDANT'S MEANS.

This requires a short historical review. In the remote antiquity of the law, FINES were to be inflicted "with safety to the countenance" of the party. This Selden explains by saying "a gobbet" should "be taken" from defendant, but his estate should not be diminished, nor he impoverished so as to lower him from his condition in life. Coke says that "the countenance" of a gentleman is his estate; of a scholar, his books; of a soldier, his armor; of a villein or husbandman, his wainage, *i.e.*, his wagon or cart, and horses or oxen of draught; and all these are to be saved, and so the sentence usually ended, and "*let him be in mercy*" (so translated in Court at Quebec, when a public officer was *fined*, from the old *sit in misericordia.*) And in order to ascertain the "countenance," the jury, after they had found *Guilty*, were bidden "to enquire" of the countenance, so that the fine could be proportioned thereto. Why should not this excellent system be restored? I will now inquire how it came to be lost. It would seem that the commencement of the loss of this good custom must be sought in the use of "*ransoms*," said to be *great fines*, not less than three times as much as a common fine. This *ransom* would appear to be a purchase of liberty by the subject from the king, just as, at a still more ancient period, the murderer, or rather homicide,† not justified, *ransomed* his life by a payment called *weregild.*

† Coke says homicide (not justifiable, *i.e.*, done by lawful order) was in all cases, anciently, death, or a *weregild*. Hawkins questions this; but I think Coke right, because I find in books of travel that the law, as stated by Coke, is that of a certain state of society almost everywhere; and the Chinese, I have read, though civilized, still retain it. By Franchere's narrative it seems to be Indian law on the Pacific coast; and the *social state* of the fathers of the Common Law was what is now deemed barbarous, good as their principles of freedom and justice were.

Fines and forfeitures being a large part of the king's revenue, and the judges holding "at his pleasure," the people once grown accustomed to seeing men impoverished by "*mulcts*," (Coke's favorite and comprehensive term for all manner of *fining*), it was not difficult to gradually dispense with the old inquiry by jury as to the "countenance." In the latter days of the Tudors and the reigns of the Stuarts, complaints of "*excessive fines*" and departures from the old principle and procedure already described were grievous, and after the Revolution "excessive fines" were forbidden in general terms. It is worthy of notice that in this and the matter of "corporal pain," treated of above, *general maxims* were announced, but no adequate and exact provisions made for their enforcement. Complaint, it is to be assumed, was thus to be satisfied by the shadow of reform, while the State preserved the *substance* of oppression. It might be well, however, to adopt a rule as to fines. Therefore, I propose—

17th.—That the fine shall not exceed one year of the defendant's income, when not of an amount fixed by Statute.

18th.—That no distress shall issue against anyone who is poor and needy, or a non-resident; and that, if either has been proved to the satisfaction of the Court, instead of distress the Court shall award imprisonment, not to exceed one year, if no other time has been stated in a Statute.

19th.—That no "distress" shall issue till defendant has been called on to "shew cause" why "distress" should not issue. And if, in answer, he shews that distress would ruin him, or otherwise amount to an excessive punishment, then he shall be "put to his election" to pay or be imprisoned for not more than one year, unless in cases in which a Statute has provided a different period.

20th.—That all imprisonments for unsatisfied judgments awarding FINES, shall *proportion the duration of the imprisonment to the amount of the judgment*, as thus—one dollar or three days, ten dollars or thirty days, and so forth; but not in any case to exceed one year.

21st.—That all judgments awarding FINES not exceeding ONE HUNDRED AND TWENTY DOLLARS shall be collected by IMPRISONMENT ONLY.

22nd.—That no man without property, either fixed or moveable, independent income, or means of subsistence

other than daily manual labor, or other constant lawful employment merely sufficient to his bare subsistence, shall be *fined* more than 120 (one hundred and twenty) dollars.

23rd.—That in all and every case of FINE in which *distress* has issued, if there "be not distress enough," defendant shall be "put to his election," to pay or be imprisoned for one year.

24th.—That where the defendant has been condemned to be imprisoned and FINED, then and then only shall the judgment of imprisonment be "till payment." As thus—"that A. B. shall be imprisoned for and then to pay , and to be further imprisoned till the same be paid."

25th.—That anyone sentenced to be imprisoned and fined, *may, at the end of his imprisonment* (meaning that imprisonment which has no option), make proof of poverty to the satisfaction of a judge of the Queen's Bench or Superior Court, with such advertisement of his petition as may enable any who will to oppose his pretensions; and if his pretensions be not refuted, and *he has distinctly* proved that he has not MADE AWAY *with his means to escape his sentence*, he shall on such proof be discharged from custody.

REASONS FOR PROPOSITIONS FROM 19 TO 25.—That by ANCIENT COMMON LAW THE ONLY MODE OF COLLECTING A FINE IS BY DISTRESS. From which, and the fact that the word "chattel" is derived from "cattle," and many circumstances such as my Lord Coke's authority above as to *wainage*, and from all the historical reading I have had, I believe that in the infancy of the Common Law the whole of the people possessed cattle, or some share of rude wealth, like the Kaffirs and other cotemporaneous nations in a primitive state of agricultural existence, beyond, indeed, the mere hunting state of savage life, but still further from *our* modern life; and wherever that life exists, the usual punishment for almost everything seems to be a fine, when it does not amount to a *forfeiture*. The progress of civilization, however, would alter this, and make some other mode of collecting fines necessary. The abuse of this last mode, as already referred to, made fines odious; the loss of the custom of learning the "countenance" or *means* of the defendant, and fining by the "countenance" has ren-

dered the punishment unequal and led to a preference of other methods. The old error of the Stuart reigns, for instance, was fining men as if they were richer than they were, or, as Selden says, "ten times as much as they were worth." The *modern error* has been to fine as if *all were poor*, and hence other punishments have been preferred to this, the most ancient, the most lenient and the most unexceptionable of all, and a source of revenue (than which none could be more proper) was first brought into odium, and now into disuse. The reasons of my provisions are that the system of punishment by fines seems to have been abused for want of precise provisions to protect and guard the general principle of the law. I have endeavored to supply these, so as to secure *efficiency* without *harshness*. The idea of not distraining where it would be ruinous, but imprisoning, I borrowed from an Imperial Statute, applying, however, to cases never arising in Canada. The rate of "a dollar or three days," &c., I borrow from the ordinary run of fines on summary convictions, because experience shews that that proportion is well adapted to its object, and the people have grown used to it, which is always an advantage, as people do not think that hard which they are accustomed to. The idea of one year's income being the *maximum* of a *rich* man's fine (for that is what my proposal amounts to) is to keep up the idea of *proportion* between the *maximum* FINE and the *maximum* of IMPRISONMENT. The rule *nisi* (or order in its nature) before a distress and the mode of relief from unlimited imprisonment, are checks against severity (the last being in idea borrowed from English reforms, &c, as to *insolvent debtors*), and the whole forming, I hope, a system which cannot be readily abused to any oppressive purpose, but may be justly claimed as much more merciful than the present, despite its amendment of that feature in it which prevents a fine being ever a mere dead letter, as in some cases, I believe, (owing to the Common Law principle I have referred to) it might be found.

26th.—That in some cases the principle of punishing all "heinous" crimes by Penitentiary might operate harshly, to obviate which objection it is PROPOSED—

That in any case of MANSLAUGHTER, if the jury find the offence *to have been mitigated* by the circumstances under

which it was committed, it shall be reduced from "heinous" misdemeanor and lose that prefix, and involve no infamy. Manslaughter stands alone, and requires to be treated accordingly. This proposition would be most pernicious if applied to any other offence.

27th.—That in all other OFFENCES AGAINST THE PERSON, if the Court be of opinion that detention in the Penitentiary would be too severe a punishment, a verdict of "ASSAULT" only shall be taken *instead* of for the higher offence, and punishable as above. This is not to affect the assaults now findable by jury in felonies. These would be "heinous crimes" under it, and the limit of detention on conviction for them would be three years as now. The word "only" makes all the verbal difference needed. For its great force in a verdict see Woodfall's case.

28th.—That on any trial for an offence against the administration of justice, except in perjury or subornation thereof, if the Court think that the offence ought to be more leniently dealt with than a conviction for "heinous" misdemeanor (or crime) would allow of, the verdict should be taken for "contempt" only.* And in order to meet all cases (a far more numerous class) of offences against property, and attempts against *the purse*, as well as to cover a vast number of transactions which the law, as existing, has not properly provided for, it is PROPOSED that a NEW CLASS of offences, only *quasi-criminal*, be inaugurated, to be in legal guilt *penal acts* (that is, adopting the nomenclature of the late Mr. D. Ross, such acts as incur a penalty but do not amount to a misdemeanor, and are not subject to an indictment), and that these offences should be known as penal trespasses. Because the last word would be used in civil suits for many of these if so followed, and because the old trespass (from the *trespass* of the Norman lawyers) included small transgressions of all kinds.† THE PUNISHMENT PROPOSED FOR SUCH is a penalty not exceeding $20 (twenty dollars) and costs, and *restitution* if requisite; or, in default of restitution, compensation for

* There are contempts, it is said, triable by jury. Thus the finding would not be far from precedented.

For this word in this connection see "Traverse" in Burns's Justice, page 324, vol. 4, edition 15.

† See Burns's Justice, page 224, vol. 4, edition 15 (word traverse). It also contains the word "contempt."

injury or loss, *if the party aggrieved were not a witness*, and FORFEITURE to the Crown to the amount if he was. The remedy to be summary, as in "dog stealing," "damaging property," &c., &c.,—the alternative for non-payment to be proportionate imprisonment, not exceeding 6 (six) months. That no person should be convicted for a heinous crime against property, which might be adequately treated as penal trespass. Attempts to commit, or suborn to commit, or unsuccessful conspiracy to commit acts punishable as penal trespass, should themselves be penal trespass. If any person were plainly shewn to have committed a "heinous misdemeanor" against property who had been, previously, three different times convicted for three several penal trespasses, or who had been lawfully detained at any time in the Penitentiary, or if the UNRECOVERED UNACCOUNTED FOR PRODUCT OF THE CRIME should amount to *forty dollars*,* such person should be dealt with as though "penal trespasses" did not exist. If the judge at any trial were of opinion that the magistrate had improperly treated the case as "heinous misdemeanor," he should *discharge* the jury and *direct the magistrate* to do his duty as it ought to have been done in the first instance. (This would prevent the cases being shirked.) But if the judge thought the case one properly sent before him, yet that, from circumstances (*and provided the accused had never been a convict in the Penitentiary*), a conviction for "heinous" crime would entail too great a punishment, then the *verdict* should be taken for penal trespass. It would be well, perhaps, to give power to enter up such a verdict, even if a jury should wish to convict of a greater matter; and so wherever I have put the word "taken" as to a verdict. So, in cases involving "destructive" rather than predatory offences against property, if the Court be of opinion that, from the circumstances, *and provided the accused never was in the Penitentiary*, the verdict should be taken for "damaging property," or for "cruelty to animals" if the offence was against "live stock," and the judgment be with all costs. And otherwise as if by a ma-

* This sum imprisons for debt, therefore I have selected it as supported by a kind of precedent. Moreover, it would confine the summary cases within the range of "proportion," elsewhere laid down, a very few just a little exceeding it.

gistrate in the first instance, except that imprisonment proportioned to the amount of the judgment, instead of other limit, should not exceed ONE YEAR of twelve calendar months. The reason for the proviso as to Penitentiary men is, to keep them as much as possible apart from the other prisoners. Penal trespass would not necessarily include a criminal offence. Depriving another of things not in law property, but which he innocently enjoyed, depriving a person of an article for "fun" as it is called, all these sort of acts would be penal trespasses, so that *no stain would follow* the conviction, and the party be *truly free to amend.* In this way the contempt of the people for theft would not be destroyed, yet the severity of the law, so different from that of the Athenians and of the Hebrews, and others, would be greatly diminished.

I have used the word "detention" in reference to the Penitentiary, for if the "utilization of convict labor" be fully recognized, it might be advisable to employ the convicts in rivers, quarries, or other works far enough from a regular prison; and I think I have shewn the objections to such treatment of them to belong rather to antiquity than to modern times. It is to be observed that burglary would require this definition, "entering with intent to commit a felony" or "heinous" misdemeanor. The first word ought not to be omitted, as it would exclude an intent to murder—a great mistake; and to avoid the error of the Americans for compounding felony, I would substitute compounding "a heinous misdemeanor in the nature of a predatory crime," as the "compounding felony seems always to refer to a crime of that character. And all compromises in criminal prosecutions without the knowledge and, when needed, the leave of the Courts, should be contempt. Because the American system of allowing these things has worked badly.

29th.—That where any person has been condemned in a Court of criminal jurisdiction to a fine or penalty and been imprisoned for non-payment and then discharged without payment, he shall be put on a list to be called "the list of destitute penal debtors," to which the public shall not be allowed access, lest the debtors be kept out of work by it.

The object of the next proposal is to meet the case of persons constantly getting imprisoned for small fines. Of

these, those able to work ought to be employed in gangs at some remunerative work, away from jail, and as much as possible "out of sight" of the public—"convict labor" being a demoralizing sight to the people, and the prisoner being best at work away from "human haunts," when practicable.

30th.—That any person on the said list again incurring a fine shall be put to his election to pay or be deemed guilty of "vagrancy."*

31st.—That any person deemed guilty of Vagrancy, if born or resident in the Province and having therein for any long time (to be fixed by Statute) carried on any useful industry, shall be deemed a "vagrant," and all others in the like case to be be deemed "vagabonds."

32nd.—That if, on examination, he be found able to work, he be condemned as a "sturdy vagrant" (or "vagabond"), and if not, then an "infirm" vagrant or vagabond

33rd.—That the "sturdy vagrant" be condemned to six months detention at hard labor (not in the Penitentiary)—the infirm to six months simple imprisonment for punishment of vagrancy.†

34th.—That the sentence on vagabonds be the same, with this addition, and "to leave the country in ninety days at farthest, or thirty at shortest, according to circumstances, and never to return to it on pain of a further such imprisonment (or detention) of twelve months, and then to leave at the end of thirty days, and so, from time to time, till they depart for ever. N.B.—See 37.

35th.—That on a SECOND CONVICTION OF VAGRANCY, the word incorrigible‡ be prefixed to the offence, and that the punishment on the second conviction shall extend to twelve months, being the same otherwise as before.

36th.—That any one a THIRD TIME CONVICTED as a "vagrant" shall have added to the last-named sentence an order to find "good and sufficient sureties for his good behavior within ninety days from his release from detention, on pain of fresh conviction, and so from time to time, till he find them.

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* See Burns' Justice, 15th edition, vol. 4, page 333.
† See Burns' Juitice, page 347, vol. 4, 15th edition.
‡ Burns' Justice, 15th edition, vol. 4, page 343 (to shew the word has been used in law.)

37th.—That under peculiar circumstances, the Court shall have the power to permit a "vagabond" under clause thirty-four to remain, the cause being fully set forth on the face of the conviction, instead of the order stated in thirty-four, and in a paper of "protection" during "good behavior," to be provided by the Court, permitting his residence, and on his next conviction the order be *without discretion and peremptory* as in proposal thirty-four.

"Sturdy" is the word long used in England for *able-bodied* "tramps," &c. In England "vagrancy" is connected with the poor laws, and all English ideas on the subject are drawn from the feudal tenure and the times that agricultural labor was performed by men who were in fact and law "*adscripti glebæ.*" I do not wish these ideas restored, but have retained the nomenclature when describing a class for whom mere imprisonment has no terror, and who persevere in petty law-breaking. Of such I say, accustom them to work by compulsion for their living and you give them a chance of reform they do not get now. I have inserted imprisonment, &c., for the "vagabond" previous to ordering him off without it, because in the United States some regulations allowing the latter came under my notice, and I have observed lawless persons visited places they would have kept away from if they had been sure of being *punished before* being *expelled.* The word "incorrigible" is an old word in common use, and in reports, &c., should be retained, to shew the reason of the year's imprisonment or detention, which would otherwise sound harsh. Six months was an old Common Law imprisonment for vagrants, and is sufficient to have a reformatory effect on many or most men. Ninety days I have fixed on as sufficient to allow any one to arrange affairs if he has any, and to exhaust all chance of getting work or bail, &c.

38th.—That the principle of INCREASE OF FORMER CONVICTIONS AND PUNISHING accordingly be extended from its present limits to all non-capital cases in all courts of criminal punishment without exception.

39th.—That offenders constantly incurring pecuniary penalties and paying them, shall be known by some name such as "habitual law-breakers," and be guilty of a misdemeanor known as such.

40th.—All BONDS to PEACE and BEHAVIOR, or either, &c.,† should be collectable against the PRINCIPALS in the same manner as a fine, else the more aggravated case (that involving breach of *specific engagement* as well as law) will be often the *least severely punished*.

For the reason of proposition thirty-nine, it is to establish absolute equality before the law as nearly as possible, and obviate the objection that the poor man's punishment is aggravated when he cannot or will not pay, and not the rich. It is true the provision is little more than theoretical, as wealthy law-breakers (such as the Marquis of ———, and others of past days) to meet whose cases provisions were (without avowal of motive) inserted in some English Statutes, are not common in Canada; but it is well that the law should be consistent in its provisions, that we should be able to say—"Our laws are equal; they enquire for former convictions in *all* non-capital cases,‡ and lay hold of the OFFENDER, whether rich or poor. If a man is so destitute that fines can only be collected by his imprisonment, and so shameless that this suffices not, then we collect by labor; and if rich and 'saucy,' we increase the amount of fine till he feels it in his pockets."

CHAPTER II.

By the Common Law of England, coeval with the monarchy, "informations" were allowed to have the effect of "indictments" in cases of misdemeanor. Thus, anciently, mutilation and perpetual imprisonment, with other pains and penalties, might be inflicted without the intervention of a grand jury; and even in life and death the defendant might be put on trial without previous finding at the "appeal," *i.e.*, mere accusation (a process only lately *abolished*) of the private party chiefly aggrieved; § and by Common Law there were several sorts of trial of which we have retained a memorial in the formal words, "How will you be tried?"—noting the former option of the prisoner.

† &c. here means bonds in *their nature*, and NOT other bonds than those to abstain from ill-doing, as I am not now treating of other bonds.

‡ The reason for not enquiring, &c., in capital cases is obvious. See Thornton's Case.

Now, the whole basis of our criminal jurisprudence is historical, and in its history alone can its "reason" be found; and where the ancient *principle* was good and its expression alone was barbarous, why not preserve or restore the first, while avoiding the last? Consequently I do not think there is any gross departure from principle in the following suggestions: 1st.—That the preliminary examination now taken in non-capital felonies be converted in "heinous crimes" into a *trial*, subject to the following conditions.* The complaint and incidents, including tariff of costs, in all respects to follow "the summary" trial of the 4th and 5th Vic.† as had at Quebec, except that, on *conviction*, the Court shall inquire of defendant, "What have you to say why the sentence of the law should not be passed upon you?" If no sufficient legal answer were offered, the Court should sentence the prisoner. If, however, the prisoner chose, he should answer, "I traverse." The rejoinder should be, "Traverser, how will you be tried?" To which the response should be either by "the "quorum of the justices of this county," or "by my country." If the latter, then the question should be, "Who are your country?" and on the enquiry thus opened all facts relevant to the query should be *ascertained* or *confirmed;* and, immediately after the manner of trial has been determined, the question should be put, "Traverser, when will you be ready for your trial?" In answer, cause of delay (if any) is to be shewn, and the time of trial is then to be peremptorily fixed. If the traverser elect the "*quorum*" for his tribunal, the three justices thereof whose then term of duty it shall be, shall assemble at the earliest moment, and determine the case by vote of majority; if not, then, if he be a foreigner, the Sheriff shall be ordered to summon for the earliest moment a jury *de medietate linguæ*. If the traverser be a non-resident subject, or any non-resident is the party immediately aggrieved by the offence, or is an indispensable witness in the case, or an indispensable witness proves grievous wrong will accrue to him by prolonged detention, the Court shall assemble a jury as the Coroner now does, at the earliest possible day—that, if possible, of the trial just had; and another magistrate presiding, the traverse will be then determined. Whether the jury shall be of English and French tongue, or wholly of one

* Excluding misprision of Treason.

† but see page 27.

tongue, or taken without reference to language at traverser's option, shall be resolved on the question, "Who are your country?" If none of the circumstances just stated appear, the case shall be sent for trial (delay not being ordered for "cause" shewn) to the next General Sessions of the Peace.* At a convenient stated time before the Sessions of the Peace, the quorum shall meet and enquire of the business to be done, and if no grand jury have met for a year, or if there seems to be any bill or other matter for them to take action on, then they shall make order for a grand jury to be summoned, but no petty jury if no case be then pending. If a grand jury meet without petty jury and after they are risen indictment remain to which "not guilty" has been answered, and the prisoner (shewing no cause when asked to the contrary, and the composition of the jury being decided on) is ready for trial, the petty jurors necessary shall be summoned for the earliest possible day. If there be neither of the foregoing causes for calling together the grand jury, then the necessary petty jurors shall be called for the General Sessions to dispose of any pending case, and the *tales de circumstantibus*—that necessary adjunct of jury trials and coeval therewith, and the loss of which has delayed and confounded justice in this district—should be restored to that body of jurisprudence of which it is an essential member. Law provides most amply against magisterial delays, and prerogative writs as old as the monarchy itself protects the subject against this mode of denying justice.

So soon as the trial of a traverser has been fixed, the Court (that is, a justice of the peace, or officer acting as such) should bind the party either with or without sureties, according to circumstances, to appear on his traverse, and failing bail, send him to prison. Previously, all the witnesses on both sides should be bound, without fee, to appear at the traverse, and the bond should be their only notice. The traverse should be called without fee, and if traverser fail to appear either personally or by his attorney, and no cause for his default, despite of proclamation cried in and about the Court, his recognizances shall be escheated and process ordered. The conviction should then be confirmed and sent back to the Court which rendered it. On a traverse being so returned, a warrant should issue to bring the

* If none be sitting.

traverser to shew cause why judgment should not be given against him; and if he fled for it, on proof of the return, proclamation should be made and notice given and duly advertised for him to surrender by a given day, failing which sentence should be passed, and take effect whenever he should be arrested. If the traverser appeared before the Court, he should be asked "what he had to say why the sentence of the law should not be pronounced against him?" and his answer should be be taken in writing, and he should be free to prove if he could that it was not possible for him to have appeared, or get another to have appeared for him on his traverse, and the evidence on the trial of that issue must be taken *in extenso*, so that it may be "returned" if sought, and if he made good his case he should be allowed a special trial, to be had as speedily as in the case of a non-resident, but otherwise in the way he originally chose, unless he waives a jury he had first desired. At the trial of traverses, calling the witnesses should in all cases be the next step after calling the traverse, and default, should escheat recognizance and process issue forthwith. Where the traverse goes to the "quorum" and not to a jury, the evidence before the quorum should be taken *in extenso*, so as to be part of a return, if sought. Acquittal by the quorum should be final, save as subject, like any other decision given by it, to *certiorari*.

4th.—Of mere Misdemeanors.—I propose that, with the following exceptions, these should be subjected to an extension of the principle of summary trials. I would except all seditions and offences committed by publishing, endeavoring or conspiring to publish in registered prints or publications, or conspiracy to defame by public discourses at lawfully convened or lawfully assembled public meetings, or to defame any person on account of his public conduct or office or dignity, or any matter relating thereto; likewise all misprisions of office by sheriffs, deputy sheriffs, coroners, justices of the peace, or any higher public officers; or offences against justice by advocates or suitors in the course of litigation, save contempt of Court. All these should be left to the old method. Thus the liberty of speech, the liberty of the press, the liberty of association, the liberty of the advocate, the liberty of the suitor before the law, the right of

accusation, and the control of the country over its public officers are all retained intact and as they now are. All other misdemeanors to be subject to summary trial, without prejudice to existing remedies, should they be preferred. The jurisdiction in such trials to be a fine not exceeding fifty dollars and costs, or, for non-payment, proportionate imprisonment, at the rate of three days to one dollar, &c.—the whole not to exceed six months, unless special circumstances of aggravation, proved at the trial, be set forth with the sentence and entered on the face of the conviction, and any commitment arising therefrom. On such conviction the sentence shall be either a fine exceeding fifty and not exceeding one hundred dollars with costs, or, in lieu of payment, imprisonment for more than six and not more than twelve months,—following within those limits the proportionate principle of fine and its alternative, as already stated, or imprisonment for not more than six months, besides fine not over $50 and costs.

5th.—Of Surety.—Future summary sentences not to affect existing law as to binding to the peace; but any person three times convicted—the second and third offence being committed after the expiration of a preceding sentence—(of misdemeanors directly and not merely constructively against the peace, or tending in the same immediate way to the breach thereof,) to be called on to shew cause why he should not be bound to the peace for life and failing it so bound.

6th.—Of Threats.—Threats should be tried like assaults, and the binding over should be the punishment following conviction with costs as in assault cases, and in the same way the third conviction should entail binding over for life. If in answer to the charge the defendant shewed strong provocation in the common sense of the words, he should be exonerated from being bound over as proposed; if he failed to do so he should find sureties for life on pain of imprisonment. See Chapter I., from 29 to 38.

7th.—Of Codification in Certain Cases.—The existing summary jurisdiction acts should be codified, with the exception of those referring to the army and navy, and the offences they contain classified in two divisions, to form permanently the two general definitions of public offences beneath vagrancy. These two should be misdemeanors and penal

acts. The first should mean an indictable offence: the latter an offence only carrying a pecuniary penalty (to which the word fine should not apply). Such offences are of three kinds.—those which, from their inherent malice, are indictable at Common Law; those declared indictable by Statute, or by Statute specially named as misdemeanors; and those criminal violations of a Statute, not carrying with it a specific penalty, as are held by a general maxim of law to be indictable. Where these ingredients are wanting, the violation of law should be classed as a penal act only, and where a specific amount has thus been fixed, the penalty to be not over fifty dollars and costs, and the procedure (when not otherwise directed by Statute) to be summary, and the judgment enforced as in misdemeanor—the discretion of the Court to be the same as in mi-demeanor, saving, however, the right of an informer or other individual sharing in the penalty. Where the same thing is both a misdemeanor and a penal act,* and process be had in two Courts, the same check (subject to an informer or other individual's rights) which exists on indictment, and suit, when brought for the same trespass, shall extend to the double remedy just referred to. When the jurisdiction over both is vested in the same Court, it shall suffer but one at a time. After punishment being undergone for misdemeanor, no information for a penalty shall by it be allowed for it; and if on information a misdemeanor be disclosed, the Court may certify (if circumstances warrant it) that defendant has been sufficiently punished, which (if not set aside by higher authority; for instance, on an appeal), shall be conclusive as an estoppel.

Of Infamous Persons.—All persons rightly attainted or sentenced (lawfully) to death, or who have been sent to the Penitentiary in consequence of an undisturbed capital conviction, or have been rightly sentenced to the Penitentiary on an undisturbed conviction for heinous crime and have not been rehabilitated, shall be deemed infamous persons. They shall be challengable for cause on any jury; and save for their lives or misprision and seditions &c., † they shall not be tried by a jury, and shall be counted to be at large only "during good behavior," to which, for special and sufficient cause proven, they may be bound for life.

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* See page 12.

† See pages 18 and 20.

Of Appeals.—In all the cases above-mentioned, the complainants should have a right to appeal from the summary trial and judgment rendered in the "first instance," if he conceived himself aggrieved thereby. Whenever the defendant has no right to a jury, he should be allowed an appeal from the verdict and sentence of the "first instance." Evidence in appeals should be confined solely to the evidence offered, and either received or rejected in "the first instance," or which at that time was diligently sought and made a ground for an improperly rejected motion for delay. Where evidence given in the first instance cannot be produced (without fault or neglect of the party desiring its production) at the appeal, the best obtainable secondary evidence should be taken to establish what the necessary witness said in the first instance, or what subsequently unattainable evidence was originally rendered or produced in open Court. All evidence in appeals should be taken *in extenso*. The Court in Appeal should be held at the *chef lieu*, and, except where, as in the cities of Quebec and Montreal, other functionaries exist to whom it might be properly confided, should be composed of the sheriff, or in his place his deputy, or the coroner, or the chairman of the Quarter Sessions, or a barrister duly appointed to the office, and two justices of the peace,—the majority to decide. The Court on appeal should give judgment *de novo*, unless they confirmed the original judgment. All appeals to be taken within three lawful days.

Of Certiorari.—Wherever an appeal lies, *certiorari* should be allowed to arise (for cause) from its adjudication. On *certiorari*, the evidence and finding thereon being returned, the judges should impartially set aside every decision arrived at or any part thereof which might appear to them, by the return, repugnant to the evidence, whether such might be in favor of defendant or against him, and substitute a decision *de novo*, according to the evidence the return discloses. If the finding seem correct, but the order or sentence or judgment seem wrong, then they should set it aside and give judgment *de novo* on the finding, whether the same be in favor of the accused or the accuser. When *certiorari* is granted, good bail should be had, or the petitioner to remain a prisoner till the case is decided, which must be by the Queen's Bench in criminal Appeal and Error.

Of Habeas Corpus.—When a judge releases a prisoner it should be on an order, with or without bail at the Court's discretion, to submit to such judgment as might be rendered by the Queen's Bench, as in the foregoing provision, or the judge should reserve the application for the judgment of that Court, without order of enlargement, if he see no reason to grant such order. This is to be confined to persons detained under the intended Act, and them only. Thus, uniformity of decisions on points of law will be fully secured, and the interests alike of accuser and accused be secured from hasty or arbitrary action by methods not wholly strange and novel in our jurisprudence.

To Further Expedite Justice,—I would propose that sergeants-at-law should be appointed in Lower Canada by the Crown, who might be, according to commission, of one or several or all the Courts, to be composed of advocates of a certain number of years practice, or of gentlemen who had been Queen's Counsel or held other honorable office in the law before the passing of the Act, so that Canadian Courts should be in the same position as English Courts, where the sergeants are assistant judges and supply all temporary vacancies.

Of Disagreements on Juries.—Where the jury cannot agree, re-try the case at once by a fresh jury, either from the panel and a *tales de circumstantibus* (if need be), or if there be none on the panel, by a special precept to get together speedily the proper number of good and lawful men, whether on the jury list or no, and so form a jury of twenty-three men, of whom twelve shall be of the language of the defence, if prayed for by the accused, and the finding to be by twelve voices or more as the case may be. If, however, there be not twelve for *not guilty*, nor yet twelve agreeing on the degree of guilt and several degrees of guilt may be lawfully found (as, for example, murder or manslaughter or assault, any of which may be rendered on an indictment for the first), then, if on reconsideration the jury cannot find an agreement of at least twelve, the finding shall be entered on the lowest degree, and take effect as if unanimous, a special entry being made and so with every finding less than unanimous. Thus another source of delay will be cut off. The right of the prisoner as to the number of condemnatory

voices will be retained, and the "odd man" is given in favor of his language and his right. The number is that preferred for grand juries; the majority for a finding the same—the record made to follow the fact and prevent the possibility of any irreparable wrong by an error where a "partial verdict" is taken and allow "writ of error" for the correction thereof, and the present principle of the unanimity of jurors would not be trenched on, because agreement would still be expected until the contrary had been proved by the example of the fact, and then the case would be treated specially as an exception to the general principle, which would stand untouched.

In all cases except treason, misprision of treason, all seditions, and misprision of office by great public officers, or such as are at least as high as a justice of the peace, which should be excepted, parties answering indictments or suggestions should be allowed, if they chose, to prefer the Court to a jury, in which case the evidence should be taken down *in extenso* (as a guard against *error*), a process impossible before a jury, and which would make that system in practice a nuisance and a farce), and in capital cases the Court should be a special sitting of the whole Queen's Bench, absent members being supplied by the Superior Court judges, failing serjeants, as in page 24 suggested. The finding to be by majority. Debates on these latter cases at least should be secret, as the councils of grand jurors are now sworn to be (human nature needs this check against revenge where life, at least, is in question); and all such trials should be sought when issue is joined, and taken out of the way of the jurymen in attendance, so as not to delay them. The stated assemblages of Courts needing juries should be again as once they were, held in winter, and where once a-year is enough they ought to be held as formerly, if not still, in some English counties, only once a-year. Wherever an indictment for a matter within the jurisdiction of the Sessions is found at another Court, if none appear either to prosecute or to answer it, at the finding the judge shall cause proclamation to be made for any who know cause why it should not be sent to the Sessions to shew it, and if no cause appear it shall be sent down to the Sessions on the last day of the term (or assize).*

* The same whenever no cause is shewn.

Where a party desires not to have his case tried at the Sessions, though desirous of a jury, and shews cause to apprehend a failure of justice, whether he be prosecutor or defendant or traverser,* the judge applied to, or the Court if in term, shall make order on the case by any means fit to meet it, prefering not to send it to a higher Court if the objection can be fittingly disposed of some other way, as by ordering particular magistrates not to sit on it or the like; and the fixed "day" of Sessions should always precede the fixed time of meeting of any other criminal Court.

Inquests, &c.—Wherever a coroner's inquest finds murder, the party, if present, should be publicly arraigned by the coroner (whose inquisition should have the benefit of the simplifications, abbreviations and amendments of modern indictments), his plea then and there taken; if "not guilty" time and mode of trial, including the composition of the jury (if the prisoner elect for one), be then and there settled, and the return sent to the Queen's Bench and the case forthwith tried without troubling a grand jury about it as is now always done, though the law never exacts and never did exact it; and the return being sent to the Crown Office, the judge whose term of duty it shall be, shall be notified to attend, and the sheriff shall precept a special jury, and that judge and jury shall be a court for that case, and it shall by this speedy and special tribunal be disposed of, unless the prisoner has waived his jury, and then all their honors of dignity fit for the case shall have notice, and the prisoner get a special trial without delay. In all cases between the military, neither the culprit nor the injured party being a civilian, the martial law should be restored to all its former power; and all cases formerly tried by Admiralty should be restored to that jurisdiction again.

Bonds to prosecute or testify should, when called if escheated for default, be followed by the immediate arrest of the defaulter, who should be asked to shew cause why he should not be imprisoned till his bond is paid? If he excused his default by strong and special reasons, Court if minded might enter the cause shewn on record and return it into the Queen's Bench in Appeal, and the forfeiture might be there remitted or confirmed.

If the party proved that he was destitute and unable to

* See page 20.

pay (he should be admitted to oath) and the statement was not rebutted, despite of every facility being given for the same, then he should be sent to prison for contempt for any time not more than months, and then discharged; if not, failing cause, the rule should be absolute to pay or be imprisoned till payment. The principal on a bond to the peace, &c, or to appear or surrender to judgment, or maintain a traverse, should, if not attainted or sent to the Penitentiary, be dealt with in the same way, except when attainted or put to hard labor for the matter for which he gave bail, or the act by which he broke it, then "distress" (without limitations) should issue against all he had, so in all costs against "Heinous criminals."

Parties giving Bonds for Others.—On the default entered and the bail estreated, distress should issue, and if there were not distress enough, a rule, whether in term or vacation, should issue to shew cause why the defaulter should not be imprisoned for not more than months, for contempt—the period to be limited as in other misdemeanors.

Fee Fund Act.—A repeal of the Fee Fund Act, as far as practicable, without gross injustice, would harmonise with many of the foregoing suggestions, and probably effect great benefit. It should be a rule that whatever kind of imprisonment a man was last sentenced to should be the same he should in all future cases undergo, and hard labor men when from any necessity kept in a common prison should be separated from all others. In treason, felony and offences against the dead, the evidence should be taken down *in extenso*, both for and against accused, and taken in all respects with a view to use under existing Law.*

Murder, and the Body not Found.—In charges of murder, when sending the case to trial is determined on, an inquisition (if the body be not forthcoming) should be called to be *quoad* the matter in their charge, a grand jury and the prisoner discharged or presented, and plea taken and mode of trial determined on their finding,—this inquisition to be of twenty-three men, called like a coroner's inquest.

Trials without jury should regard neither season nor term nor vacation; the soonest possible day should be the fit one for them.†

* Binding witnesses as by page 19.

† See page 25.

Of Paupers' Rights.—Paupers duly sworn to be such, should be entitled to informations and warrants in the first instance in all cases, and if not depauperised (as they should be if not really paupers), they should be able to follow the case to judgment, but if cast they should elect to pay costs forthwith or be imprisoned for not above , as in misdemeanor, and put on a list of public debtors.* All men owing forfeited bonds, as above, should be put on this list, and no such public debtor, till payment, should hold lucrative or honorable offices or be admitted bail for another, and should be challengable on a jury (mind challengable only so as not to have endless difficulties after trial, such as a total exclusion would cause). A public debtor losing a cause in *Forma Pauperis* should elect to pay costs or be guilty of vagrancy.

Costs and Expenses.—All judgments under Statutes for fines or penalties should be for amount and costs as in all other cases, and there is no good reason to the contrary. Costs in traverses* should be as in appeals, but should await judgment.

Malicious arrests and prosecutions for heinous crime should be *misdemeanors*, and Courts sitting without jury might order their immediate prosecution and punishment, without prejudice to the party's action for damages. Thus the punishment would be as summary as the process, and the principle of the old Statute as to the old writ of appeal would be restored.

Of Indictments.—Every indictment should contain the name, description, and place of abode of the private party preferring it, and he should have to be called over, and his identity and the fact of his having preferred the bill should be established, and, if necessary, tried and adjudicated on, before defendant should be called on to answer, except for treason, misprision thereof and sedition only.

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* See page 20.

Page 14 omits to provide that arrest and imprisonment in heinous crime should be as in felony.