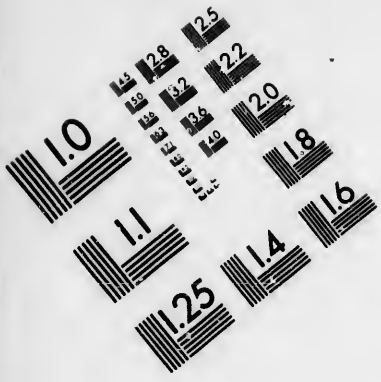

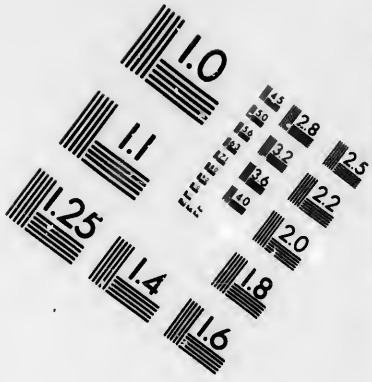

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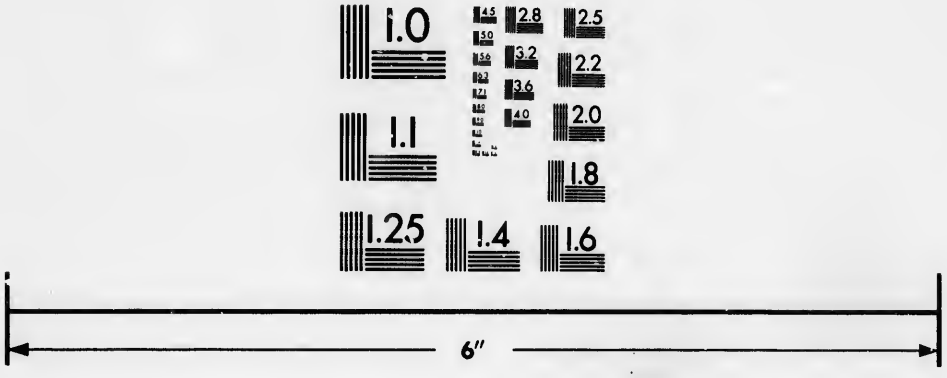

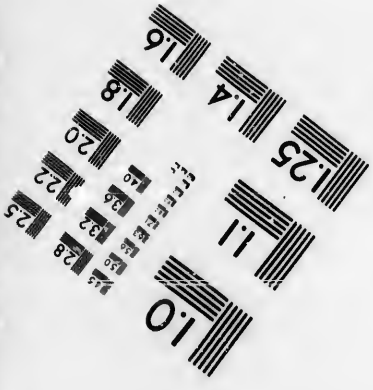

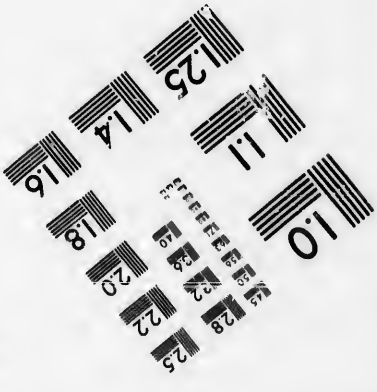

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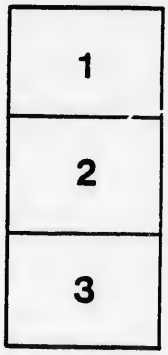

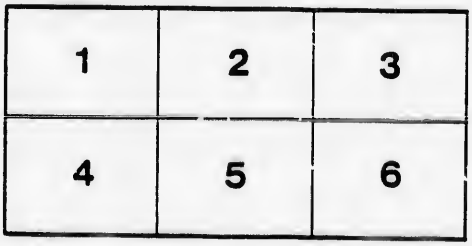

A TREATISE

ON THE

LAW AND PRACTICE

ON

SUMMARY CONVICTIONS AND ORDERS

BY

JUSTICES OF THE PEACE,

IN

UPPER AND LOWER CANADA,

WITH NUMEROUS REFERENCES TO

ENGLISH DECISIONS AND JUDGMENTS OF THE SUPERIOR COURT,

AND ON THE REMEDY BY

APPEAL AND CERTIORARI;

TOGETHER WITH

PRACTICAL FORMS.

BY EDWARD CARTER,
BARRISTER-AT-LAW.

Montreal:
PRINTED BY JOHN LOVELL, ST. NICHOLAS STREET.
1856.

TO THE

HONORABLE THOMAS CUSHING AYLWIN,

ONE OF THE JUSTICES

OF

HER MAJESTY'S COURT OF QUEEN'S BENCH

FOR

LOWER CANADA,

This Treatise,

IS,

WITH HIS KIND PERMISSION,

MOST RESPECTFULLY DEDICATED

BY

HIS FORMER STUDENT,

AND VERY OBEDIENT

HUMBLE SERVANT,

THE AUTHOR.

L. N. Fontaine
avocat
10 Oct 1864 L. Assomption

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THE ORIGIN OF THE OFFICE OF A JUSTICE OF THE PEACE; ITS PRESENT NATURE; THE QUALIFICATION OF JUSTICES

ERRATA.

Page 28, line 19,—Read "3 Esp. 198," instead of "3 *Exp.* 198."
" 81, line 8,—Read "irreconcilable," instead of "*irreconciliable.*"
" 98, lines 14 and 15,—Read "Hawk. P. C. *b.* 2," instead of "62."
" 104 and 105, lines 23 and 35,—Read "18 Vict., ch. 97," instead of "27."
" 124, line 8,—Read "if no suit," instead of "if no *such.*"
" 138, line 23,—Read "or he may," instead of "or *they* may."

§ III.

OF THE POWERS AND DUTIES ATTACHING TO THE OFFICE OF A JUSTICE OF THE PEACE, AND OTHER MATTERS INCIDENT THERETO.

L. M. Fontaine
10 Oct 1864 L. Assumption

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PREFACE.

THE duties imposed upon Justices of the Peace by the various Statutes in force in this Province have rendered their due performance a matter of extreme importance to the community at large. The benefit arising from the exercise of the Summary Jurisdiction of Justices, in those matters which the Legislature has confided to them, is incalculable, if the law be judiciously carried out; while, on the other hand, the power so conferred may become the instrument of the greatest evil and oppression society could be inflicted with, if wielded by men incompetent for that office, or ignorant of the elementary principles which should guide them in the discharge of their duties.

In England this office is seldom conferred upon those whose education does not enable them to acquire a sufficient knowledge of the principles of law by which they are to be guided, or who have not the means of providing such professional assistance as they may require. In this Province, on the contrary, the appointments to that

office have, in a great many cases, been unavoidably made from a class of men whose education and whose opportunities for improvement but little fitted them for the proper discharge of their duties.

It may, however, be said that the system is but in its infancy here, as compared with the progress and perfection it has attained in England; but even there, it was not until within the last few years that it was brought to any thing like a practical and uniform system. For centuries many points affecting proceedings before Justices were involved in doubt, from the contrariety of opinions amongst authors, and contradictory decisions of Judges; the forms of proceedings adopted were so multifarious that nothing like uniformity existed, and it was reserved for the Attorney General, Sir John Jervis, to render his name renowned in the annals of jurisprudence, by the introduction of a simple and precise Code of Law and Practice, accompanied by Forms, for the guidance of Justices in the discharge of their duties. It is said by Archbold, and other writers on Sir John Jervis' Acts,—

11 and 12 Vict., ch. 42—as to Indictable Offences,
11 and 12 Vict., ch. 43—as to Convictions and Orders,
11 and 12 Vict., ch. 44—as to the protection of Magistrates,

that he (Sir John Jervis) has, by these Acts, done more for the due administration of criminal justice throughout England than had ever yet been done by any person.

In this Province, more especially in Lower Canada, greater confusion and doubt prevailed, from the common error committed by Magistrates, of imagining that they were Judges possessing the same attributes and powers exercised by other Judges, and mixing up in the execution of their duties, the law and forms of proceedings in civil

cases. In the midst of all this confusion, Justices have had, however desirous they may have been of properly discharging their duties, but few opportunities of instruction to enable them so to do. The necessity of supplying that want has been seriously felt, and of late years satisfactorily shewn, from the circumstance that in the District of Montreal alone, out of the number of convictions removed by *Certiorari* to the Superior Court, averaging over 100 in a year, scarcely ten of that number have been sustained.

The Author having entertained the idea of writing on this branch of the law, and encouraged so to do by many of his fellow practitioners and friends, has been induced to write this work, for the guidance of Justices. Numerous references to authorities and English decisions are given, which, in so far as Justices are concerned, may be considered unnecessary; but the Author will not regret the labor he has bestowed in the collection and proper application of them, should he obtain for his work the favourable opinion and consideration of his fellow practitioners, to whom it may be serviceable as a book of reference.

The Author's first intention was to confine the work, in its application, to Lower Canada only, but he has recently altered the design of it, by adapting it to both sections of the Province, and where any difference in the law of either existed he has endeavoured to demonstrate it. He feels, however, that as respects Upper Canada he has, from his not being experienced in the practice which there prevails, need of indulgence from the professional reader. This work may not, however, prove unserviceable in Upper Canada, as the important Statute 11 and 12

Vict., ch 43, Sir John Jervis' Act, has been made law in Lower Canada by 14 and 15 Vict., ch. 95, and in Upper Canada by 16 Vict., ch. 178, and hence, in all cases to which their provisions would apply, a uniformity in the law and practice has been established in both sections of the Province.

Moreover, the principles laid down in this work, and authorities cited, will have equal application in the Upper Province; and it can here be shewn that the difference existing in the law, as affecting Justices, results chiefly from some special enactment in either section, passed subsequently to the division of the former Province of Quebec into the Provinces of Upper and Lower Canada.

In Lower Canada, the Criminal Law of England as it existed anterior to the 7th October, 1763, by the Imperial Act 14 Geo. III., ch. 83, was declared to be the law in the Province of Quebec (including Upper Canada,) as well in the description and quality of the offence, as in the method of prosecution and trial, and the punishments and forfeitures thereby inflicted.

Afterwards the Province of Quebec, by the Imperial Act 31 Geo. III., ch. 31, was divided into the Provinces of Upper and Lower Canada.

Upper Canada having thus been made a separate Province, the Criminal Law of England as it stood on the 17th day of September, 1792, was introduced therein by the Imperial Act 40 Geo. III., ch. 1.

Some alterations were made by the Legislative authority of both Provinces, until they were re-united by 4 and 5 Vict., ch. 35; and since the re-union greater changes were effected in the Criminal Law, extending throughout the Province, by the 4 and 5 Vict., chs. 24, 25, 26 and 27.

The powers and duties of Justices of the Peace have been more materially affected by the introduction into the Province of the provisions of Sir John Jervis' Acts; that relating to Indictable Offences, 11 and 12 Vict., ch. 42, in Lower Canada by 14 and 15 Vict., ch. 96, and in Upper Canada by 16 Vict., ch. 179; and that relating to Summary Convictions and Orders, 11 and 12 Vict., ch. 43, in Lower Canada by 14 and 15 Vict., ch. 95, and in Upper Canada by 16 Vict., ch. 178.

The latter are referred to in this work, having relation to the subject treated of, the exercise of the Summary Jurisdiction of Justices, and being almost altogether identical in their provisions, they are, throughout this work for facility of reference, styled the Magistrates Acts. The 11 and 12 Vict., ch. 44, relating to the protection of Magistrates, having been re-enacted for Upper Canada by 16 Vict., ch. 180, is also referred to, and several decisions had in England upon the Imperial Act are added in notes to an analysis of it, under the different sections to which they apply.

In compiling this work, the Author has had in view:

1st. The Law of England as applicable to both sections of the Province, under 14 Geo. III., ch. 83, and 40 Geo. III., ch. 1.

2ndly. Such changes in the law made subsequently in England, not extending to the Province.

3rdly. Such changes as, by Legislative authority, have been introduced in both sections of the Province.

4thly. The similarity of our Statutes to the provisions of Imperial Acts, from which in many instances they were copied, and Decisions of the Judges and Courts in England upon the interpretation of them.

5thly. The changes in the law and practice in England in Summary Proceedings, established by the important statute called Sir John Jervis' Act, 11 and 12 Vict., ch. 43.

6thly. These changes as now established in Lower Canada by the 14 and 15 Vict., ch. 95,—and in Upper Canada by 16 Vict., ch. 178, which are in almost every respect similar to Sir John Jervis' Act.

7thly. The few modifications and changes made in our Provincial Statutes, which render their provisions distinguishable from those in Sir John Jervis' Act.

Lastly. The additional powers vested in Justices by these statutes, and their application to statutes already passed and hereafter to be passed by the Legislature.

To condense these several subjects, extending over so wide a range, into the compass of a work to be of practical utility, has been the chief aim of the Author, and he has therefore found it necessary to issue the work in three parts:

The first comprising all the Proceedings preliminary to the hearing, together with various matters of importance to Justices, incident to the exercise of their Summary Jurisdiction;

The second, all the Proceedings at the hearing, the Conviction or Order, and the Proceedings subsequent thereto;

The third, the Remedy by *Appeal* and *Certiorari*, applicable to convictions, orders, and judgments of Inferior Courts.

The subjects are treated under distinct heads, in the order in which the proceedings are had; and every question likely to arise in the progress of a case, including

the Duties of Clerks to Justices, and Constables, are discussed and pointed out, so as to render the work more complete.

The Author has not omitted, what is said to be of much importance to Justices, the giving of proper Forms, and which, under the provisions of the Provincial Statutes above referred to, are the more necessary. They have been prepared with care, so as to comply with the requirements of these statutes, and the law which governs Justices in the exercise of their judicial functions. Some of them are taken from the Forms given at the end of these statutes, but as the Legislature intended them merely as a guide to Justices, to be altered and varied when necessary, so as to comply with the requirements of any special enactment, these changes have been pointed out, and the necessity for making them explained. Others again have been supplied by the Author, either taken from approved Forms, or suggested by some special provision in the Magistrates Acts.

PART I.

CHAPTER I.

THE ORIGIN OF THE OFFICE OF A JUSTICE OF THE PEACE; ITS PRESENT NATURE; THE QUALIFICATION OF JUSTICES; THEIR POWERS AND DUTIES, AND VARIOUS MATTERS INCIDENT TO THE EXERCISE OF THEIR SUMMARY JURISDICTION.

§ I.

THE ORIGIN AND NATURE OF THE OFFICE.

1. *Origin of the office.*
2. *Extension of the powers of Justices.*
3. *Creation of their summary jurisdiction.*
4. *Right of appeal created.*

1. ***Origin of the office.***—In tracing the origin of the office of a Justice of the Peace, we have to recur back to a very early period of legislation, 1327, when by the 1 Edw. III., ch. 16, this office was for the first time created. The preservation of the public peace was entrusted to these officers, who, under that statute, derived their appointment by commission from the King, a duty which, anterior to that date, was entrusted to officers known under the appellation of *custodes* or *conservatores pacis*, deriving their powers under the common law by virtue of their office, such as the Lord Chancellor, other Judges and Officers of State; and without any office, but claimed by prescription, or bound to exercise them by the tenure of their lands, and most generally by virtue of their election obtained from the choice of the freeholders.

The effect of the statute 1 Edw. III., ch. 16, which ordained that for the better maintaining and keeping of the peace in every county, good men and lawful, not being maintainers of evil, or barrators in the county, should be *assigned* to keep the peace, was that the selection of the conservators of the peace was taken away from the people, and given to the King. Their powers remained limited to the preservation of the peace, and they were called conservators or keepers of the peace, until the passing of the statute 34 Edw. III., ch. 1, giving them the power of trying felonies; and then they were known by the more honorable appellation of *Justices*. (1 Deacon, 710, 711.)

2. ***Extension of the powers of Justices.***—The office once established, the powers of Justices, with the progress of legislation and the necessity of the times, became more enlarged and extended. Without entering in detail into this matter, it may be mentioned that by successive statutes, 12 Ric. II., ch. 10, 2 Hen. V., ch. 4, and others, until the reign of Hen. VII., Justices in Sessions exercised more extensive powers in trying offenders, but always according to the common law mode of trial by Jury.

3. ***Creation of their summary jurisdiction.***—It was not until the 11 Hen. VII., ch. 3, was passed that to individual Justices, the power was conferred of hearing and determining *at their discretion* all offences short of felony, against any statute then in being upon information for the King. Under this statute the Justices were enabled to execute all penal laws without any presentment or trial by Jury. It was, however, discovered that the real intention of this statute was that of replenishing the Exchequer by the terror of arbitrary prosecutions for penalties under obsolete statutes, and one of the first acts of the succeeding reign was to repeal this statute, which was done by 1 Hen. VIII., ch. 6.

The earliest instance on record of a summary conviction by a Justice on a penal statute, is one rendered on the statute 33 Hen. VIII., ch. 6, against the practice of carrying dags or short guns, of which a precedent is given by Mr. Lambart. There appears also to have been one removed into the Court of King's Bench by *certiorari*, as early as the 43rd year of Elizabeth, 1600.

In not more than four or five instances, up to the end of the reign of Elizabeth, was the summary power of fine and imprisonment, committed to individual Justices. But in the succeeding reign, numerous statutes were passed respecting ale-houses, profane

swearing, drunkenness, game, wages, and such like, which occasioned a more frequent recourse to the exercise of the summary jurisdiction of Justices. The people gradually became more familiarized to its use; and, after the restoration, by the excise acts, and by several statutes regulating trade, and lastly by the Game Act, 22 and 23 Car. II., this practice became embodied into the jurisprudence of the country, of which it still constitutes an important branch.

4. ***Right of appeal created.***—At first no appeal existed from the decisions of the Justice, whose judgment was final. But it was found necessary to alter the law in that respect, and to confer the right of appeal, which for the first time was created by the 22 Car. II., ch. 1, called the Conventicle Act.

It is worthy of observation that the appeal so conferred by that statute was an appeal to the verdict of a Jury at the next Quarter Sessions, a method of appeal shortly after deviated from by the 22 and 23 Car. II., ch. 25, (the Game Act), which established the appeal to the Justices in Sessions, but without the privilege of a trial by Jury. This latter mode is the one which has been generally adopted in Lower Canada in every case where the right of appeal is conferred. There is one instance which can be given in our Provincial Legislation where the method of appeal to the verdict of a jury at Quarter Sessions is given. The 4 and 5 Vict., ch. 27, s. 34, providing for summary trials in cases of assault and battery, so regulates the method of appeal, but this may be explained, from the circumstance that the offence is one which may originally be prosecuted by indictment before the Sessions, and hence tried by a Jury, for in no instance upon informations for penalties or forfeitures before a Justice, does such a mode of determining the appeal exist in Lower Canada. But in Upper Canada, the right of appeal is conferred by 2 Wm. IV., ch. 6, s. 18, in those cases mentioned in the Act, determinable by a Jury, as also by the 13 and 14 Vict., c. 54, a general power of appeal is conferred in every case wherein a decision has been rendered by a Justice of the Peace, Mayor or Police Magistrate, in any matter "not being a crime;" and such appeal at the request of either party may be determined by a Jury to be empanelled for that purpose.

CHAPTER I.

§ II.

PRESENT NATURE OF THE OFFICE AND QUALIFICATION OF JUSTICES OF THE PEACE; THEIR LIABILITY AND THEIR PROTECTION.

1. *Justices how constituted.*
2. *Their qualification how regulated.*
3. *Their oath.*
4. *Penalty for acting without qualification.*
5. *How qualification affected by Municipal Law.*
6. *Whether the acts of a Justice who has not taken the oath, or qualified, be legal.*
7. *Rule in cases where they have no jurisdiction.*
8. *Liability where proceedings are defective.*
9. *Liability of Justices as regulated by our Statute Law.*
10. *Imperial and Upper Canada Statute Law.*
11. *In what manner, and when, Justices are liable.*
12. *Doctrine of liability in United States.*
13. *Their power to correct their proceedings, and when.*

1. ***Justices how constituted.***—Justices of the Peace, at the present day, are constituted such; first, by Statute, and of this class are those, who from the nature of their office, *ex officio*, are Justices of the Peace; secondly, by Commission, and of this class are those more commonly known as Justices of the Peace, assigned to keep the peace, in and for some particular District. The present form of a commission of the peace does not vary materially from the English form, which has long been in use, and which was settled, it is said, as far back as the year 1590.

2. ***Their qualification how regulated.***—The qualification of Justices in Upper and Lower Canada is now regulated by our Provincial Statute 6 Vict., ch. 3, s. 3, which provides, that "no person shall be a Justice of the Peace, or act as such, within any District of this Province, who shall not have in his actual pos-

session, to and for his own proper use and benefit, a real estate either in free and common soccage, or *en fief*, or *en roture*, or *en franc aleu*, in absolute property, or for life, or by *emphyteose*, or lease for one or more lives, or originally created for a term not less than twenty-one years, or by usufructuary possession for his life in lands, tenements, or other immovable property, lying and being in this Province, of or above the value of three hundred pounds currency, over and above what will satisfy and discharge all incumbrances affecting the same, and over and above all rents and charges payable out of, or affecting the same."

3. *Their oath.*—Before acting as such, a Justice of the Peace is required to take and subscribe, before some Justice of the Peace for the District for which he is appointed, the following oath:

"I, A. B., do swear, that I truly and *bona fide* have to and for my own proper use and benefit such an estate (*specifying the nature of such estate, whether land, and if land, designating the same by its local description; rents or anything else*) as doth qualify me to act as Justice of the Peace for the District of ————, according to the true intent and meaning of an Act of the Provincial Parliament made in the sixth year of the reign of Her Majesty Queen Victoria, and intituled, "*An Act for the qualification of Justices of the Peace*," and that the same is lying and being (or issuing out of lands, tenements, or hereditaments situate) within the Township, Parish, or Seigniory of (or in the several Townships, Parishes, or Seigniories of) (or as the case may be).—So help me God."

A certificate of which oath must be deposited, by such Justice who shall have taken the same, at the office of the Clerk of the Peace for the District, to be by him fyled among the records of the Sessions of the said District. (6 Vict., c. 3, s. 3.)

4. *Penalty for acting without qualification.*—A penalty of twenty-five pounds currency is by the 5th section imposed on any person who shall act as Justice of the Peace without being qualified according to the true intent and meaning of the Act, or without having taken and subscribed the said oath, to be recovered by civil action or by plaint or information in any Court having jurisdiction where inthe offence shall have been committed; and in such action, suit or information the proof of qualification shall be upon the defendant.

By sections 11 and 14 *notice of action* is required to be given, and such action must be brought within six calendar months next after the fact complained of.

By section 15, the provisions of the Act do not extend to Mem-

bers of the Legislative or Executive Council, the Judges of the King's Bench or Queen's Bench, the Vice Chancellor of Canada West, the Judges of the District of St. Francis or Gaspé, to any District Judge, or the Attorney General, Solicitor General, Advocate General, or to any Queen's Counsel.

By the 9 Vict., ch. 41, the qualification is dispensed with in those cases where it may become necessary to appoint Justices in remote parts, not comprised within the limits of any of the Districts as established by law. And this provision is extended to other appointments made by 16 Vict., ch. 15.

Attorneys, Solicitors, or Proctors, practising as such, Sheriffs and Coroners, exercising the duties of their office, cannot act as Justices of the Peace. (6 Vict., c. 3, ss. 2 and 16.)

5. *How qualification affected by Municipal Law.*—Our Provincial Statute is borrowed from the Imperial Statute 18 Geo.II., ch. 20. And it is only necessary with reference to this subject to notice one other provision of our Lower Canada Statute Law, affecting this branch of the subject. By the Municipal Act 13 and 14 Vict., ch. 34, s. 14, it is provided, "that where by any law of this Province in force in Lower Canada a qualification in real property shall be necessary to enable any person or persons to hold any office in Lower Canada, the Assessment Roll of the locality in which such property may be situate shall be the criterion of the value of such property." Although this Statute has been repealed by the late Municipal Road Act, attention has been drawn to it, as there may be cases arising anterior to its repeal, to which its provisions would apply.

6. *Whether the acts of a Justice who has not taken the oath, or qualified, be legal.*—The acts of a Justice who has not taken the oath of qualification have been held to be valid, his name being in the Commission, and being therefore a Justice of the Peace. (*Margate Pier Co.* v. *Hannan & Dyson*, 3 B. & A. 266.) In delivering the judgment of the Court in the case above referred to, Abbott, Ch. J., referred to the provisions of the 18 Geo. II., ch. 20, which declares, by section 2, that "any person who shall act as a Justice without having taken the oath, or without being qualified, shall forfeit, &c.," (and from which our Provincial Statute 6 Vict., ch. 3, is borrowed) said:

"It is obvious that if the act of the Justice, issuing a warrant, be invalid "on the ground of such an objection as the present, all persons who act in

" the execution of the warrant will act without any authority; a constable " who arrests, and a gaoler who receives a felon will each be a trespasser; " resistance to them will be lawful; everything done by them will be un- " lawful; and a constable, or persons aiding him may, in some possible " instance, become amenable even to a charge of murder, for acting under " an authority which they reasonably considered themselves bound to obey, " and of the validity whereof they are wholly ignorant. An exposition of " these Statutes (referring also to 51 Geo. III., ch. 36) pregnant with so " much inconvenience, ought not to be made, if they will admit of any other " reasonable construction. 'Acts of Parliament,' says Ld. Coke, 'are to be " 'so construed, as no man that is innocent, or free from injury or wrong, be " 'by a literal construction punished or endamaged.' We think that these " acts do most reasonably admit of another construction. We think the " *restraining* clauses are only prohibitory upon the Justice. By the parti- " cular Act (51 Geo. III., ch. 36) upon which this question has arisen, Mr. " Dyson having been named in the commission is declared to be a Justice, " and invested with power and authority as such. The proper effect there- " fore, as it seems to us, of the third section, is only to make it unlawful in " him to act as such, but not to make his acts invalid. Many persons acting " as Justices of the Peace in virtue of offices in corporations, have been " ousted of their offices from some defect in their election or appointment; " and although all acts, properly corporate and official, done by such persons, " are void, yet acts done by them as Justices, in a judicial character, have " in no instance been thought invalid. This distinction is well known. The " interest of the public at large requires that the acts done should be sus- " tained, sufficient effect is given to the Statutes by considering them as " penal upon the party acting."

7. *Rule in cases where they have no jurisdiction.*—A different rule prevails, with respect to the acts of Justices of the Peace, in cases where they have no jurisdiction over the matter brought before them. In such a case, the Justice, as well as the officer executing his warrant, would be liable in trespass. (*Lancaster* v. *Greaves*, 9 B. & C. 628; *Morgan* v. *Hughes*, 2 T. R. 225; *Mason* v. *Barker*, Car. & K. 100.) So that the officer is bound to take notice of the authority and jurisdiction of the Justice. (Cro. Car. 394; 10 Rep. 176; *Milton* v. *Green*, 5 East 233.)

Thus if a Justice send a warrant to a Constable to take up one for slander, or the like, the Justice hath no jurisdiction in such cases, and the Constable ought to refuse the execution of it. (Wood's Inst., v. 1, ch. 7.) As respects the liability of the Constable acting in the execution of a warrant issued by a Justice having no jurisdiction, this state of the law was found to work a great hardship on the Constable, because on the one hand he was bound to execute the warrant if legal, and on the other hand he

acted at his peril in obeying it if illegal; and therefore the Legislature, by statute 24 Geo. II., ch. 44, s. 6, sheltered the Constable acting in obedience to the warrant of a Justice, although the Justice had no jurisdiction, by directing that a verdict should be found for the Constable; and if joined in the action with the Justice, the plaintiff should recover all his costs from the latter, including those he is liable to pay to the Constable in whose favor a verdict is rendered.

8. ***Liability where proceedings are defective.*** — With respect to the proceedings of Justices, it has been held, that even in cases where they have jurisdiction, if their proceedings be bad upon the face of them, they cannot justify under them. (*Crepps* v. *Durden*, Cowp. 640.)

Therefore, where the conviction and commitmen thereon appeared upon the face of them not to be warranted by the Act of Parliament on which they were framed, they were holden to be no justification for the Magistrate in an action of trespass and false imprisonment against him, by the party convicted and committed. (*Hardy* v. *Ryle*, 9 B. & C. 603. *Goss* v. *Jackson et al.*, 3 Esp. 198.)

Also where the conviction is bad in part. (*Groome* v. *Forrester*, 5 M. & S. 320.)

So where a Warrant of Distress is founded on a bad conviction, and a levy has been made under it, the Justice is liable to an action of trespass. (*Newman* v. *Earl Hardwicke et al.*, 8 Ad. & El. 124.)

9. ***Liability of Justices as regulated by our Statute Law.***— With respect, however, to the liability of Justices of the Peace, our Statute Law has afforded them protection, but not to the same extent as is conferred in England by the 11 and 12 Vict., ch. 44, or in Upper Canada by the 16 Vict., ch. 180, which repeals 14 and 15 Vict., ch. 54, in so far as it applies to Upper Canada. As respects Lower Canada, the statute 14 and 15 Vict., ch. 54, contains important provisions affecting this question of liability, and should be carefully read by all Justices, other officers, or persons fulfilling a public duty, either under the common law, or any Act, Imperial or Provincial, being those to whom its provisions extend, and for whose protection only, it was passed. It repeals the 6 Vict., ch. 3, in so far as treble costs are concerned in actions against Justices, or public officers. By the 2nd section, its provisions not only extend to Justices of the Peace, but also to any

other officer or person fulfilling any public duty, for anything by him done in the performance of such public duty, whether such duty arises out of the common law, or is imposed by Act of Parliament, either Imperial or Provincial.

And by the 9th section, "such Justices, officer and other person "acting as aforesaid, shall be entitled to such protection and "privileges in all such cases as he shall act *bonâ fide* in the exe- "cution of his duty, although in such act done he shall have "exceeded his powers, or jurisdiction, and have acted clearly "contrary to law."

The privileges and protection adverted to are set forth in the statute, in requiring the complainant to give notice of action, specifying the cause, and limiting the exercise of the right of action to within six months after the act committed; giving the defendant the advantage of pleading the general issue, and proving any special matter; making tender of amends before as well as after action brought, and of changing the *venue* of such action from one Circuit or District to another, by making it appear that such action cannot be fairly or without prejudice tried in the Circuit or District in which the venue is laid.

10. *Imperial and Upper Canada Statute Law.*—The protection afforded to Justices in England has been very much enlarged by the 11 and 12 Vict., ch. 44, the provisions of which have been made law in Upper Canada by 16 Vict., ch. 180. From the following analysis of the Imperial Statute, it will be seen that there is cause for regret, that our Legislature has not passed a law containing similar provisions, for the protection of Justices in Lower Canada, who certainly stand in need of every protection and assistance in the discharge of their duties. To this analysis, notes are given, shewing what the law was in England and in Upper Canada before the introduction of this law, and likewise the purport of some of the decisions had in England since, upon the interpretation of it.

Section 1. For an act done by a Justice of the Peace *within his jurisdiction*, the action shall be an action on the case wherein it must be *alleged* and *proved* that the act was done maliciously and without reasonable and probable cause.

NOTE.—No distinction is made between cases where the conviction has been quashed, and where it has not: in either case, if the act complained of were done by the Magistrate in a matter of which he had jurisdiction, the

remedy must be by action on the case, in which it must be alleged and proved that the act was done maliciously and without reasonable and probable cause. The law in England, previously, under 43 Geo. III., ch. 141, and in Upper Canada under 2 Wm. IV., ch. 4, differed from the provisions of the present law, in this essential particular, that their application extended only to cases where the convictions had been quashed, from their use of the words "in case such conviction shall have been quashed;" and it was decided that the action of trespass was the proper remedy, where the conviction was not quashed. (*Grey* v. *Cookson*, 16 East 15.) And it was further held that where the conviction had not been quashed, it was not competent for the Magistrate to go into evidence to shew that the party was guilty of the offence imputed. (*Rogers* v. *Jones*, 5 D. & R. 268; 3 B. & C. 409.)

Section 2. For an act done by him without jurisdiction, or exceeding his jurisdiction, an action may be maintained without such allegation; but not until the conviction or order has been quashed, either upon appeal or upon application to the Court of Queen's Bench; nor for an act done under a warrant to compel appearance if a summons were previously served and not obeyed, &c.

NOTE.—If there be an absence of jurisdiction or any excess of jurisdiction, on the part of the Magistrate, the remedy is by an action of trespass; but there is this restriction to the exercise of it, that the conviction or order must first be quashed and set aside. The Legislature evidently intended by this provision of the law to restrain actions against Magistrates until the question of absence or excess of jurisdiction were determined by the Court. Upon this section of the Act, it has been held in England that its application extended only to cases where the act, in respect of which the action is brought against the Justice, is itself an excess of jurisdiction. (*Barton* v. *Bricknell*, 20 Law J. Rep. (N. S.) M. C. 1, and Am. Ed. Law and Eq. Rep., vol. 1, 298.) In this case the action was trespass for an illegal distress, upon a conviction which awarded a penalty to be levied by distress, and in default of distress *that the party should be set in the stocks.* The conviction had been quashed for the excess of authority in awarding the punishment in the stocks; a distress warrant had been issued, which the Justice had authority to do, but the Plaintiff never was put in the stocks. The Court held that the Justice was protected by section 1, and that section 2 applied to cases where the party brings his action for the thing which is itself the excess of jurisdiction.

(In *Ratt* v. *Parkinson and another*, 20 Law J. Rep. (N. S.) M. C. 208, and Am. Ed. Law and Eq. Rep., vol. 4, 332), Jervis, C. J., is reported to have said, that "exceeding his jurisdiction," in section 2, means assuming to do something which the Act under which he is proceeding could by no possibility justify.

Section 3. If a warrant is issued by one Justice upon a defective conviction or order made by another, the action shall not be

brought against the former, but against the latter who made the conviction.

Section 4 applies to poor rates.

Section 5. If a Justice has reason to doubt his authority on any point, he may refuse to do the act required of him, and the party requiring the performance of it may apply to the Court of Q. B. upon affidavit, for a Rule on such Justice to shew cause why such act should not be done, and upon service of such Rule, if no cause be shewn, it will be made absolute, with or without costs; the rule absolute to be served on the Justice, and obeyed by him, and no action shall afterwards be brought against him for anything done by him in the execution of it.

NOTE.—This provision is one of extreme importance to Justices, as in cases where they may have reason to doubt their authority to act, they may refuse, and leave the party to apply for an order, which, if granted, affords them the protection given by this section for anything done in the execution of it. Thus in England where a party neglected to appeal in time from a highway rate, and upon being summoned before a Justice for not paying it, shewed a seemingly good ground of exemption, upon which the Justice refused to issue a warrant of distress against him. Upon application for a rule that the Justice should issue his warrant of distress, the Court held that the party was liable to the rate, as he had not appealed against it, and therefore made the rule absolute. (*R.* v. *J. J. of Oxfordshire*, 18 Law J. 222 m.)

But this power of the Court extends only to cases where the Justices refuse to act, and cannot be exercised so as to control the manner in which they act. It was so held in England upon an application of two parties convicted by separate convictions upon a joint information, calling upon the Justices and the informer to shew cause why the Justices should not draw up a joint conviction and cancel the separate convictions. The Court rejected the application, holding that this section did not apply to a case where the Justices have not held their hands but have acted, and done what they believed their duty. (In *re Clee and Osborne*, 21 Law J. Rep. (N. S.) M. C. 112, and Am. Ed. Law and Eq. Rep., vol. 10, 365.)

By section 4, 16 Vict., ch. 180, (U. C.), the application is to be made to either of the Superior Courts of Common Law, or to the Judge of the County Court of the County or United Counties in which the Justice or Justices reside.

Section 6. No action to be brought against a Justice for executing a conviction, or order confirmed in Appeal.

Section 7. If an action be brought when prohibited, upon a simple application founded on affidavit, the Court will set aside the proceedings.

Section 8. Actions must be brought within six months, &c.

NOTE.—The same limitation as established by 24 Geo. II., ch. 24, s. 8.

Section 9. One calendar month's notice of action in writing must be given, &c.

NOTE.—Similar to sect. 1, 24 Geo. II., ch. 24.

Section 10. Action to be brought in the County where the act complained of was committed. General issue may be pleaded and special matter given in evidence.

NOTE.—Same as to venue, plea and evidence, as regulated by 21 Jac. I., ch. 12, sect. 5.

Section 11. As to tender and payment of money into Court.

NOTE.—Formerly the tender must have been specially pleaded; by this section it may be given in evidence under the general issue. When money was paid into Court, the plaintiff was at liberty to take it out, although he continued the action; but now the money must remain in Court, to abide the event of the action, and if the Jury find for the Defendant, the money so paid into Court shall be applied to the payment of his costs in the first instance.

Section 12. As to non-suits, where plaintiff fails in his proof.

Section 13. If plaintiff in any action is entitled to recover, and he prove a levying or payment of a penalty, or sum of money, or imprisonment, and seeks damages for any such causes, he shall not recover more than two-pence damages, if it be proved that he was guilty of the offence, or liable to the payment of the money, or that the imprisonment was not greater than that assigned by law.

NOTE.—In England by 44 Geo. III., ch. 141, s. 1, and in Upper Canada by 2 Wm. IV., ch. 4, s. 5, a similar provision was enacted; but in the construction of the Imperial Statute, it was held to apply only to actions brought, where the conviction had been quashed. This arose from the peculiar wording of this law, and hence instead of proceeding by appeal or certiorari to quash the conviction, the injured party brought his action of trespass, and by this means the law was evaded, and Justices left without the protection it was intended to afford to them. (*Roger* v. *Jones*, 5 D. and R. 268.)

Section 14. As to costs.

Section 15. Act to extend to England and Wales, and the town of Berwick-upon-Tweed.

Section 16. Act to take effect on the 2nd October, 1848.

Section 17. Repeals so much of 1 Jac. I., ch. 5, 21 Jac. I., ch. 12, s. 3, and 24 Geo. II., ch. 44, s. 1 and 2, and part of s. 8, as relate to actions against Justices, and altogether repeals 43 Geo. III., ch. 141.

Section 18. Act to apply to persons protected by the Statute, and parts of Statutes repealed.

Section 19. Act may be amended during the Session.

11. ***In what manner and when Justices are liable.***—A few only of the rules which obtain in England as to the liability of Justices will here be noticed. They are liable, 1st, to a Criminal Information, 2nd, to Indictment, and 3rd, to an Action.

Criminal Information.—A Criminal Information will be granted against them when they act partially, maliciously, or corruptly, or from vindicative motives. (2 Doug. 426; 1 D. & R. 443; 4 Bl. Com. 354(*n*); *Reg* v. *Badger*, 6 Jur. 994.) Or for any gross abuse of authority. (*Rex* v. *Webster*, 3 T. R. 388; 2 Chit. Crim. Law 236, 238, and 239; *Rex* v. *Brooke et al*, 2 T. R. 190.) Or for any *wilful* refusal to perform their duty. (*Rex* v. *Fox*, 1 Str. 21; *Rex* v. *Newton*, 1 Str. 415.) Or for *extortion* under colour of office. (1 Gude III., note (a); *R.* v. *Jones*, 1 Wils 7,) and likewise if they adjudicate upon a matter having a direct pecuniary interest therein (*Rex* v. *Davis*, Lofft 62,) for making a false return to a mandamus, (*Rex* v. *Spotland*, cases Temp. Hardw. 184); for a false return to a certiorari, (*Brittain* v. *Kinnaird*, 1 B. and B. 432); for proceeding against a party without a summons or warrant. (*R.* v. *Venables*, 2 Ld. Ray; *R.* v. *Allington*, Str. 678); also see 1 Salk. 181; and for antedating and order (1 Sess. Ca. 59.) But a mere *error of judgment* is no ground for applying for a Criminal Information, as whenever Magistrates act honestly and uprightly, though they mistake the law, no information will be granted against them. (*Rex* v. *Jackson and another*, 1 T. R. 653; *Rex* v. *The Justices of Staffordshire*, 1 Chit. Rep. 217.) And where an information is applied for, the question to be determined is not whether the act complained of be found, on investigation, to be strictly right or not, but whether it proceeded from an unjust, oppressive, or corrupt motive (amongst which fear and favor are generally included), or from mistake or error only; as in the latter case the rule for an information will not be granted. (*Rex* v. *Borron, Esq.*, 3 B. & A. 432; *Ex parte Fentiman*, 2 Ad. & Ell. 127.)

A notice of six days must be given to the Justice of the intended application for an information against him. (*Ex parte Fentiman*, 4 N. & M. 126; 2 Ad. & Ell. 127.) And this notwithstanding that other misconduct is charged against him. (*R.* v. *Henning*, 2 N. & M. 477; 5 B. & Adol. 666.) There Lord Denman, C. J., said: "It is an established rule of practice, that no application for a criminal information can be made against a Magistrate for anything done in the course of his office, without previous notice."

The notice may be served personally, or by leaving a copy at the Magistrate's place of residence, with his wife or some member of his family, or servant. Notices in general do not require personal service. (*Per Lord Kenyon, C. J.*, and *Buller J. in Jones dem. Griffiths* v. *March*, 4 T. R. 465.) The object of the notice is, that the Magistrate may shew cause against the application, in the first instance, if he thinks fit. There must be an affidavit establishing the due service of the notice. (1 Gude, 115.)

Indictment.—An indictment would lie, (according to the ruling in England anterior to the 11 and 12 Vict., ch. 43) against a Magistrate for any illegal act, without its being necessary, as in the case of an information, to prove corruption. (*Rex* v. *Sainsbury*, 4 T. R. 457.) Ashurst, J., in that case said: "What the law says shall not be done, it becomes illegal to do, and is therefore the subject matter of an *Indictment*, without the addition of any corrupt motives, and though the want of corruption may be an answer to an application for an information which is made to the extraordinary jurisdiction of the Court, yet it is no answer to an indictment where the Judges are bound by the strict rule of law." But no indictment will lie against a Justice for acting without a qualification, it not being a misdemeanor at common law, and punishable only under the Statute which imposes a penalty. (*Rex* v. *Wright*, 1 Burr. 543; *R.* v. *Douse*, 1 Ld. Ray 672; and 1 Salk. by Evans note (*a*) where the cases are collected.)

Action.—In *actions* against Justices, the great rule in England upon magisterial liability was this; if the Justices acted without jurisdiction in fact, or if there was an apparent want of jurisdiction upon the face of the conviction, they were liable in trespass. This rule was too frequently acted upon, to be questioned. (*Crepps* v. *Durden*, Cowp. 640; *Lancaster* v. *Greaves*, 9 B. & C. 628; *Hill* v. *Bateman*, 1 Str. 710; *Groome* v. *Forrester*, 5 M. & S. 313; *Gimbert* v. *Coyney*, M. Cle. & You. 469; *Morgan* v. *Brown*, 4 Ad. & El. 515; *Hutchinson* v. *Lowndes*, 4 B. & Ad. 118; *Ex parte Johnson*, 7 Dowl. 705; 3 M. & W. 426; *Ex parte Ormrod*, 1 Dowl. & L. 827; *Kite & Lane's case*, 1 B. & C. 101; *Rex* v. *Hazell*, 13 East 139; *Rex* v. *Stone*, 1 East 636; *Welsh* v. *Nash*, 3 East 394; *Stevens* v. *Clark*, Car. & Mar. 509; *Chaney* v. *Payne*, 1 Q. B. 712; *Jones* v. *Gurdon*, 2 Q. B. 600; *Cave* v. *Mountain*, 1 Man. & Gr. 267; *Reg* v. *Bolton*, 1 Q. B. 66; *Mason* v. *Barker*, 1 Car. & Ker. 100; *Hardy* v. *Ryle*, 9 B. & C. 603;

Weaver v. *Price*, 3 B. & Ad. 409; and *Davis* v. *Cupper*, 10 B. & C. 28.)

If, however, on an action brought, the Justices could produce a perfectly good conviction, it was a complete answer, and entitled them to a verdict. (*Lowther* v. *Earl Radnor*, 8 East 113; *Brittain* v. *Kinnaird*, 1 B. & B. 432; *Fullers* v. *Fotch*, Holt 287; *Chaney* v. *Payne*, 1 Q. B. 712; *Gray* v. *Cookson*, 16 East 19; *Sellwood* v. *Mount*, 1 Q. B. 726; *Fawcett* v. *Fowles*, 7 B. & C. 394.)

The conviction, however, to be a good defence, should be connected with the warrant of commitment, for if there was any material variance, as if it described a different offence, it was considered unavailing. (*Wickes* v. *Chutterbuck*, 2 Bing. 483; *Davis* v. *Cupper*, 10 B. & C. 28; *Rogers* v. *Jones*, 3 B. & C. 409.)

These principles, however, have been very much modified in England by the 11 and 12 Vict., of which an analysis is given, as also in Upper Canada by similar provisions re-enacted by 16 Vict., ch. 180; and it is important here to consider to what extent they may be said to be abrogated in Lower Canada by the provisions of the statute 14 and 15 Vict., ch. 54.

In reviewing this matter it is necessary to make a distinction which by our Statute is evidently contemplated, and by the Imperial Statute expressly provided for, between acts done by a Justice in a matter *without having* jurisdiction, and where having jurisdiction, he exceeds it, or acts clearly contrary to law. The words made use of in the 14 and 15 Vict., ch. 54, are that the Justice shall be entitled to its protection and privileges "in *all such cases* as he shall act *bonâ fide* in the execution of his duty, although in such act done he shall have *exceeded* his powers, or jurisdiction, and have acted clearly contrary to law," which necessarily limit its application to cases where *having jurisdiction* he exceeds his authority, or his proceedings are irregular and unwarranted by law; and will not extend to cases where the Justice had no jurisdiction whatever.

To sustain an action in any case contemplated by this provision of our Statute, it must be alleged and proved that the Justice did not act *bonâ fide*, and the averments must be similar to those of an action on the case in England, wherein malice and want of probable cause must be alleged, so as to establish that the Justice did not act *bonâ fide;* and upon the decision of that question the liability entirely depends.

But if the case does not involve an excess of authority, or the regularity of proceedings in a matter *within his jurisdiction*, then the Justice is liable, whether he acted *bonâ fide* or not, and the action would be what in England would be termed an action of trespass. Archbold, in his remarks on the second section of the Imperial Statute, says: "Where a Magistrate has no jurisdiction, his act is no more than that of any ordinary individual, done without any authority or pretence of right; and the party injured by such act has the same remedy by action against the one as against the other."

This interpretation of our Statute will moreover be found to accord with the rule established by the more definite provisions of the Imp. and U. C. Acts, the first sections of which enact, that every action brought against a Justice "for any act done by him in the execution of his duty as such Justice, with respect to any matter *within his* jurisdiction as such Justice, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause, and if at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation he shall be non-suit, or a verdict shall be given for the defendant," and by the second section, "for any act "done by a Justice of the Peace in a matter of which by law he "has *not* jurisdiction, or in which he shall have *exceeded* his juris- "diction," the injured party may have an action as theretofore, "without making any allegation in his declaration, that the act "complained of was done maliciously and without reasonable and "probable cause."

The only difference is that in Lower Canada by our Statute, if the matter be one originally within the jurisdiction of the Justice, he is entitled to protection as well for any excess of authority as for any other illegal act *bonâ fide* committed, whereas the Imp. and U. C. Acts make no distinction between a *want* and an *excess* of jurisdiction; the action in either instance is *trespass*, not *case*, and was so decided in England in an action brought against a Justice for levying a penalty *and costs*, upon a conviction for the penalty without mentioning costs. (*Leary* v. *Patrick et al.*, 14. Shaw's J. P. 334; 15 Law Times 203.) But one of the great advantages afforded by these Acts, not provided for by our Provincial Statute 14 and 15 Vict., ch. 54, is, that no Justice of the Peace can be sued until the conviction or order be quashed on

appeal or certiorari; and if confirmed, it is an effectual bar to any action brought, and sufficient to warrant the Court in setting aside the action without pleading thereto, on application supported by affidavit of the fact.

In every case where a criminal information would lie against a Justice, the remedy by action exists, as the corrupt motive which forms the basis of the one is sufficient to sustain the other. But these remedies are not cumulative, for if an action or other legal proceeding be depending against a Magistrate, in respect of his alleged misconduct, it must be waived or abandoned, before the Court will call upon him to shew cause why a criminal information should not be exhibited against him. (*Rex* v. *Sparrow and another*, 2 T. R. 198; *Rex* v. *Fielding*, 2 Burr. 719; *Rex* v. *Phillips and others*, Rep. Temp. Hardw. 241.) In the first of these cases, Ashurst, J., laid it down as an established rule, that when a person applies for an information, he is understood to waive his right to bring an action, unless the Court should, on hearing the whole matter, be of opinion that it is a proper subject to be tried in a civil action, and should specially give him leave to do so.

As applicable to the remedy by action, it is necessary to notice two provisions of our statutes,—the limitation to the exercise of that remedy, and the giving of notice.

The Limitation.—The 8th sect. 14 and 15 Vict., ch. 54, enacts, "That no such action or suit shall be brought against any Justice, "officer, or other person acting as aforesaid, for anything done by "him in the performance of his public duty as aforesaid, unless "commenced within six calendar months after the act committed," and it is similar in its terms to the 7th section 16 Vict., ch. 180, (U. C.) The same limitation was established by the 8th section of the Imp. Act 24 Geo. II., ch. 44, in the construction of which it has been held that the six months are to be reckoned exclusive of the day of committing the act, (*Hardy* v. *Ryle*, 9 B. & C. 603); excepting where the injury is a *continuing* one, as imprisonment, then the period may be calculated from the last day of it. (*Massey* v. *Johnson*, 12 East, 67; *Weston* v. *Fournier*, 14 East, 491; *Collins* v. *Rose*, 5 M. & W. 194; *Lloyd* v. *Wigney*, 4 M. & P. 222.)

The Notice.—The second section requires that a notice in writing, specifying the cause of action with *reasonable clearness*, shall be given to the Justice or left at his usual place of abode, by

the attorney or agent of the party at least one calendar month before suing out the writ, exclusive of the day of serving the notice and the suing out of the writ; and the name and place of abode of such attorney shall be written on the notice, and to the cause of action therein stated, the party shall be bound, and none other can be proved. A similar provision is to be found in the 8th section 16 Vict., ch. 180, with this difference only, that by the latter it is declared that in the notice the cause of action "shall be clearly and explicitly stated," and is similar in its terms to the 1st section 24 Geo. II., ch. 44, upon which the following decisions to be found collected in Saunders' work have been had in England, and may be considered as applicable to both statutes:

The notice must be a *formal* one. (*Lewis* v. *Smith*, Holt's C. N. P. 27; *Norris* v. *Smith*, 10 Ad. & Ell. 188.) The form of action need not be mentioned, but the cause of action must be set out *clearly* and explicitly. (*Towsey* v. *White*, 5 B. & C. 133; *Briese* v. *Jerdein*, 12 Law J. Q. B. 234; *Martins* v. *Uppcher*, 1 Dowl. N. S. 555; 3 Q. B. 662.) The notice, however, will not be construed with the same strictness as the pleadings in a cause, and it need not, therefore, be so precise in its allegations; it will be sufficient if it informs the party, *substantially* of the ground of complaint. (*Jones* v. *Bird*, 5 B. & Ald. 837.) But as the plaintiff will not be permitted to go into any cause of action except such as is contained in the notice, it is of importance that he should give a full description of the injury for which he seeks compensation. (*Robson* v. *Spearman*, 3 B. & Ald. 493; *Stringer* v. *Martyr*, 6 Esp. 134; *Aked* v. *Stocks*, 4 Bing. 509); and see *Taylor* v. *Nesfield*, Law & Eq. Rep., (Am. Ed.), vol. 26, 235, where the omission in the notice of the word "maliciously" was held fatal.

The notice must also be specific that an action *will* be brought, and should not leave this fact at all conditional. (*Norris* v. *Smith*, 10 Ad. & El. 188.) It must be endorsed with the name and address of the attorney or agent of the party. (*Morgan* v. *Leach*, 10 M. & W. 558.) It is sufficiently endorsed with the initials only of the Christian name of the attorney. (*Mayhew* v. *Lock*, 7 Taunt. 63; *James* v. *Swift*, 4 B. & C. 681.) Where the attorney is described as at his office, it is sufficient. (*Roberts* v. *Williams*, 1 Gale, 315; 4 Dowl. 483; *Stears* v. *Smith*, 6 Esp. 138; *Osborn* v. *Gough*, 3 B. & P. 551; *Taylor* v. *Fenwick*, 7 T. R. 635(*n*).) The day both of serving the notice and of bringing the action

must be excluded. (*Young* v. *Higgon*, 6 M. & W. 49; *Webb* v. *Fairman*, 3 M. & W. 473; *Reg* v. *Justices of Shropshire*, 8 Ad. & Ell. 173; *Reg* v. *Justices of Middlesex*, 2 New. Sess. Ca. 73.)

In some instances a notice may not be required, but it is safer in all cases to give it, as the necessity for a notice depends upon whether the Justice acted *bonâ fide*, and had reasonable grounds for believing that he was acting under the statute, a question which at one time in England was held to be a question of fact to be determined by the Jury, (*Mason* v. *Newland*, 9 C. & P. 575; *Rudd* v. *Scott*, 2 Sco. N. R. 631; 2 Lowders P. & E. 102); and by later decisions, that it was for the Court and not the Jury to determine that point. (*Arnold* v. *Hamel*, 9 Exch. Rep. 404; 24 Eng. Rep. 547.) But the rule in England seems to be, that the privileges and protection of the Act extend to cases in which the Justice acts as such, and under colour of his magisterial functions, and not to cases in which he had *no colour of authority*, and could not be supposed to believe that he had. (*Heseldine* v. *Grove*, 12 L. J. M. C. 10; *Wedge* v. *Berkeley*, 6 Ad. & Ell. 582; *James* v. *Saunders*, 10 Bing. 429; and see *Booth* v. *Clive*, 15 L. J. 563.)

12. *United States.*—The doctrine of magisterial liability in the United States may be gathered from the following decisions: No action lies against a Justice of the Peace for an act done judicially, and within the scope of his jurisdiction, unless he acts corruptly and from impure motives. (*Gregory* v. *Brown*, 4 Bibb, 28.) He is not responsible for an error in judgment. (*Walker* v. *Floyd*, 4 Bibb, 237; *Adkins* v. *Brewer*, 3 Cowen, 206; *Ely* v. *Thompson*, 3 A. K. Marshall, 70; *Lining* v. *Bentham*, 2 Bay. 1.) But he is liable if he acts beyond his jurisdiction, although there be no proof of malice, or of a design to oppress. (*Adkins* v. *Brewer*, supra; *Case* v. *Shephard*, 2 Johns Cases, (2d Ed.), 27 and note; *Blood* v. *Sayre*, 17 Vermont, 607.) And this rule has been applied where a Justice issued an execution in a less time after judgment than was allowed by law, (*Briggs* v. *Wardwell*, 10 Mass. 351); and to a case where a Justice, contrary to an express statute, rendered judgment in a cause in which he was interested, (*Russell* v. *Perry*, 14 New Hampshire, 152); and for issuing a warrant without a complaint to authorize it. (*Poulk* v. *Slocum*, 3 Blackford, 421.)

N. B.—For No. 13 in the contents at the heading of this section see No. 9 of section 6.

CHAPTER I.

§ III.

OF THE POWERS AND DUTIES ATTACHING TO THE OFFICE OF A JUSTICE OF THE PEACE, AND OTHER MATTERS INCIDENT THERETO.

1. *Jurisdiction how derived.*
2. *Ministerial and judicial.*
3. *Civil and criminal.*
4. *Remarks on their criminal jurisdiction.*
5. *Requirements of statute to be observed.*
6. *Justices interested should not act.*
7. *When advisable not to act, although having power so to do.*

1. ***Jurisdiction how derived.***—The jurisdiction exercised by Justices out of sessions, in the summary examination and punishment of offences, or over matters to be determined by them, without the intervention of a Jury, is not derived from the Commission, but is given by statute law; and the manner in which it must be exercised depends entirely upon the wording of the statute, which must be strictly pursued. The statute applicable to each particular case should be carefully read, and its requirements complied with. This is an inflexible rule, admitting of no exception; and there are other rules equally applying to the general system of summary convictions, which will be noticed in this work.

2. ***Ministerial and judicial.***—The powers exercised by Justices are either *ministerial* or *judicial:* ministerial, in so far as they relate to the preliminary investigation of offences cognizable by another tribunal, the issuing of a warrant, the admission of the accused to bail, or committing him for trial; but with respect to offences punishable on summary conviction, their acts are both ministerial and judicial: ministerial in causing the offenders to be brought before them, judicial in hearing and examining the evi-

dence against and for the accused, and convicting or acquitting him; and if they convict, Justices again act ministerially in issuing a warrant of distress or commitment.

3. *Civil and criminal.*—Their jurisdiction is likewise *civil* as well as *criminal.* Under the former are included all cases wherein Justices are called upon finally to hear and determine *complaints* for non-payment of assessments, rates, and other demands of a like nature under the School and Municipal Acts, and for wages in virtue of the Masters and Servants Act. Under the latter they have cognizance of all offences brought before them by *information*, punishable in a summary manner by fine, imprisonment, or the award of adequate compensation.

The proceedings in civil cases are generally matters of special enactment in the statute by virtue of which the jurisdiction is created; whereas in criminal cases they are regulated by those general rules applicable to summary convictions, and by recent legislation both are regulated, if there be no special enactment to the contrary, by the provisions of the Magistrates Acts.(*a*)

4. *Remarks on their criminal jurisdiction.*—By far the most important functions of the Justice are those where they exercise their criminal jurisdiction in summary trials, not only from the circumstance that the cause of the injured and the accused often presents points of intricacy to be determined, but also involves the decision of matters affecting the community at large. The consequence of error may in such a case be attended with serious results, for the power of imprisonment, which attaches to this branch of their jurisdiction, is one of a dangerous nature, —necessary, it is true, to the well working of the system, if judiciously carried out; but dangerous, if not acted upon with circumspection and care.

5. *Requirements of statute to be observed.*—The law has, with the view of preventing any abuse of authority, imposed certain duties upon Justices in Lower Canada, which should here be noticed. The 4 Geo. IV., ch. 19, declares in the

Preamble.—Whereas it is expedient to regulate the manner in which the Justices of the Peace shall proceed in cases of Conviction, and shall annually account for the fines by them imposed, levied and received according to law: Be it therefore enacted, that the said Justices of the Peace, throughout this

(*a*) 14 & 15 Vict., ch. 95, L. C.—16 Vict., ch. 178, U. C.

Province, shall, from and after the passing of this Act, be bound to keep, in a Register to be by them severally provided for the purpose, *true and faithful minutes or memorandums at length* of every conviction which shall at any time hereafter be by them severally made pursuant to any law or statute in force in this Province.

Section 2. Requires that in all cases the minutes or memorandums of convictions shall be signed by the Justices *who shall have been present during the proceedings which may have been had.*

Section 3. Requires that all the costs allowed in every case shall be specified in such register, the day when the execution issues, the day when the fine and costs are paid, and that the fine and costs shall be distinctly specified in the execution.

Section 6. Provides a form of conviction to be observed where no other form is directed, and which requires that the evidence *shall be stated as nearly as possible in the words of the witness,*—a requisite which does not seem to have been dispensed with by the 14 and 15 Vict., ch. 95, which does not repeal this provision of the statute.

These requirements afford protection to the accused in case of abuse, excess of authority, or where injustice has been done, as redress will be afforded to him, either by appeal, which in many cases is given by statute, or by certiorari. Unless the evidence be taken down, and that correctly, the minutes required to be taken cannot be considered "true and faithful minutes or memorandums at length" of the conviction.

In Upper Canada, Justices of the Peace must take down the evidence of the witnesses correctly, as, by 2 Wm. IV., ch. 4, s. 1, a form of conviction is given which requires that the evidence should be stated "as nearly as possible in the words used by the witness."

6. ***Justices interested should not act.***—Justices should refrain from taking any part in proceedings in which they are directly or indirectly interested, because, although their conduct may be the most honorable, it is open to suspicion. (See Anon, 1 Salk. 396. *Re Foxham Titting*, 2 Salk. 607; *R.* v. *Great Chart*, Burr. S. C. 194; 2 Str. 1173; *R.* v. *Varlpole*, 4 T. R. 71; *R.* v. *Rishton*, 1 Ad. & El. N. C. 479 (*n*); *R.* v. *Great Yarmouth*, 6 B. & C. 646.)

In the case of *Rex* v. *Gudridge*, 5 B. & C. 459, the Magistrate, although interested, had decided against his own interest, and it was held that Magistrates should not interfere in cases where they are directly or indirectly interested. So jealously have the Superior Courts regarded any proceedings where the appearance of partiality could exist, that when one of the Magistrates who heard

a case at sessions was interested in the result, the Court of Queen's Bench quashed the order, although the Magistrate withdrew before the decision was given. (*Reg* v. *Hereford* (*Justices*) 6 Q. B. 753.) In another remarkable case of *Reg* v. *Cheltenham Commissioners*, 1 Ad. & E. (N. S.) 467, three Magistrates interested joined with eight others in the proceedings which took place under an Act which took away in express terms the right of certiorari. The application for the writ was therefore resisted upon the grounds:

1st. That the writ of certiorari was expressly taken away by the Act.

2dly. That the presence of the three Justices did not affect the decision, as the result would have been the same had they been absent.

But Lord Denman, C. J., said: "We have already stated our "opinion that the clause which takes away the certiorari does "not preclude our exercising a superintendance over the proceed- "ings so far as to see justice executed. And here I am clearly of "opinion that justice has not been executed. Without going "further, it is clear that on the second day three Magistrates who "were interested took a part in the decision. It is enough to "shew that this decision was followed by an order, and I will not "enquire what the particular question was, nor how the majority "was made up, nor what the result would have been if the Magis- "trates who were interested had retired. The Court was impro- "perly constituted, and that rendered the decision invalid." In a much later case, *Reg* v. *Justices of Suffolk*, 21 Law J. (N. S.) M. C. 169, the same doctrine was held, and Lord Campbell observed that the duty of the Justice of the Peace was voluntarily to withdraw.

Some statutes contain an express prohibition on the subject: thus by U. C. Act 3 Vict., ch. 20, s. 18, no Justice of the Peace being a brewer, distiller, or retailer of liquors, or in partnership with any such, shall act, &c., or take part in the discussion or adjudication of the Justices upon any application for a license, or upon any appeal therefrom.

7. *When advisable not to act, although having power so to do.*—There are cases where Justices have no authority to act, as for instance where the statute assigns jurisdiction over the particular offence to certain Justices only, as noticed in another section of this work. But there are cases where no selection is

made by the statute, and jurisdiction is conferred upon "any Justice of the Peace;" still it may be advisable that the Justice to whom application is made should refuse to interfere, unless for urgent and satisfactory reasons, if he does not reside within the parish, township, or place where the offence was committed. Although he may have jurisdiction to take cognizance of the matter, if there are Justices in the particular locality before whom it might be brought, he should abstain from acting, and leave the matter to be acted upon by some Justice where the cause of complaint arose. Take for instance the 4 and 5 Vict., ch. 27, providing the remedy for assault and battery, or the 13 and 14 Vict., ch. 40, for trespasses: any Justice within the district may take cognizance of the offence, and convict; yet it would be manifestly unjust towards the accused, to issue a warrant or summons from one parish, township or place, to compel his attendance in another where the offence was not committed, as apart from the consideration that unnecessary expense is incurred, it deprives him of the advantage of making his defence where he and his witnesses may reside.

In England this rule is acted upon from a desire on the part of Justices not to interfere with each other's duties. In Stone's P. S. 40 and 41, we read: "In those cases which do not occur in boroughs or counties of towns, the information is usually laid before and the summons issued by a Magistrate acting for the *division* or *district* of the county where the offence was committed, although every Magistrate of the county has jurisdiction. And this practice has obtained from a very laudable determination of County Magistrates, to interfere as little as possible with the duties of each other; as it has been found that local knowledge of parties and circumstances is frequently of great importance in summary adjudications, and particularly in those petty and sometimes harassing complaints which are made for purposes of annoyance rather than justice. But the information may be legally laid before any Justice of the county or place where the offence was committed."

CHAPTER I.

§ IV.

POWERS AND DUTIES OF JUSTICES, AS RELATE TO THE RECEIVING OF INFORMATIONS.

1. *Distinction between a complaint and an information.*
2. *Mode of preparing in England.*
3. *Rules to be observed in drawing informations.*
4. *Rules of construction applicable.*
5. *Precaution to be observed in drawing informations.*
6. *Justices not to trust to their Clerks.*

1. ***Distinction between a complaint and an information.*** —With some few exceptions to be noticed hereafter, all proceedings before Justices of the Peace, for summary trial, originate by the preferring of a complaint or information. When an order for the payment of money is sought for, or a judgment upon a demand of a civil nature, this preliminary step is designated a *complaint;* while the same step is called an *information*, when it is the foundation for summary proceedings of a criminal nature, which are followed either by a conviction or an acquittal. (Stone's Petty Sessions, 35.)

According to another author, the distinction between an information and complaint is this: an information is the ground work of a charge for an offence or act punishable summarily, either by fine or imprisonment; a complaint being an application on the non-payment of money, or for the doing of some other thing, subjecting the party in either case to imprisonment in default. An information is technically said to be *laid*, a complaint to be *made;* a *conviction* is the affirmative result of an information, an *order* that of a complaint.

2. ***Mode of preparing in England.***—As to the mode of preparing and laying the complaint or information, the practice which obtains in England is, to have the same drawn up by the

Magistrate's Clerk on application at his office; but there the Clerks are expected to be thoroughly conversant with the laws relating to the duties of Justices of the Peace, and are frequently called on to advise the Magistrates in cases of technical difficulties, so that it is customary to select a Solicitor of the highest respectability and of competent legal attainments to fill this responsible situation. (Stone's Petty Sessions, p. 23.)

In this Province, Justices in the country parts have seldom the assistance of professional men acquainted with the law and forms of proceedings in summary convictions. In most instances in Lower Canada, the Clerks to Justices are Notaries, whose studies in the law connected with that branch of the jurisprudence peculiar to the duties of their office have no relation to or connection with the law which obtains in cases of summary conviction. Hence it is that in almost every instance the Justices in the country parts are entirely unassisted, and cannot depend on their Clerks for advice, much less to draw up a correct and perfect form of the proceedings.(*a*)

The frequency of summary convictions failing either in the first instance or after conviction is attributable to the defect in the information, and therefore more care is essential in framing it than is usually observed. (2 Chitty G. P. 156.)

3. ***Rules to be observed in drawing informations.***— The information should be drawn out with great care and precision, in stating the offence, as to time, place and circumstances, with the same accuracy as in an indictment, for it has been held that the same rules applicable to indictments apply with equal force to *summary proceedings* and *convictions* by Justices of the Peace. (2 Chit. G. P. 164; 1 Deacon, 303, No. 8; *R.* v. *King*, 7 Dow. & Ry. 861; *R.* v. *North*, 6 Dow. & Ry. 144; *R.* v. *Swallow*, 8 T. R. 286; *R.* v. *Payne*, 5 B. & C. 251.)

The reason of this rule is, that the institution of the office of Justice of the Peace, and investing those appointed to that office with the power and jurisdiction of trying and punishing the accused in a summary manner, is an innovation upon the common law

(*a*) The most perfect form of a conviction and return to a writ of certiorari ever made to the Superior Court at Montreal will be found in No. 185, Ex parte Delisle, and can be referred to as a model reflecting the greatest credit upon the Clerk to the Justices, J. G. Crebassa, Esquire, of Sorel.

right of every man to be tried by his peers. (*Cole's case*, Sir W. Jones, 139, 170; 1 Burns, 364.)

4. *Rules of construction applicable.*—In *Rex* v. *Calthorp*, 1 New. Sess. Ca. 542, Lord Denman said: "Proceedings in cases "of this nature, which are to deprive a man of his freedom in "a summary way, without letting him be tried by his peers, are "always construed strictly, and never supplied by intendment of "matter which does not appear on the face of them."

After a conviction nothing can be intended, so as to get rid of any defect in point of form, for everything necessary must appear on the face of the proceedings. (*R.* v. *Daman*, 2 B. & Ald. 378.) And the offence must be shewn to have been committed within the jurisdiction of the Magistrate. (*Johnson* v. *Reid*, 6 M. & W. 124.)

Another and more obvious reason of the rule, and one fully establishing its wisdom and expediency, is, that it has been found necessary, to the well working of this system of summary justice, that a conviction of a Justice of the Peace cannot be pleaded to or traversed, and must be taken as true against a defendant. (2 Hawkins P. C. c. 25, § 13; *R.* v. *Jukes*, 8 T. R. 544; *R.* v. *Little*, 1 Burr. 613; *R.* v. *Green*, Cald. 391; and *R.* v. *Payne*, 7 D. & Ry. 678.) It has been held by Mr. J. Ashurst that acting upon this principle so well established, Superior Courts ought to be even more strict in these summary matters than upon indictments. (1 Paley, p. 68.) Another rule equally well established with reference to these matters, and one which has never been questioned, is, that in Inferior Courts and proceedings by Magistrates, the maxim *omnia præsumuntur rite esse acta* does not apply so as to give jurisdiction. (1 Ld. Ray. 510; *per Holt, C. J., in Rex* v. *Fuller; R.* v. *Davis*, 5 B. & Ad. 551; *Day* v. *King*, 5 Ad. & Ell. 359; *R.* v. *Harris*, 7 T. R. 238; *Re Peerless*, 1 Q. B. 143; *Kite & Lane's case*, 1 B. & C. 101.)

5. *Precaution to be observed in drawing informations.*—Having shewn what rules apply to these summary proceedings, and how strict Courts of Justice are with respect to them, it is obvious that great care and precaution should be taken in drawing out the information, which is the very basis of the proceedings before the Justice, and upon which their validity will mainly depend. If the information be perfect, containing all the requisites necessary to its validity, the Magistrate will be less liable to fall into error. If, on the contrary, it is wanting in any particular,

such as a legal statement of the offence, the time or place of its commission, however regular the subsequent proceedings may be, or however much the accused may merit punishment, still the conviction will be subject to be reversed, as it would be impossible to frame a perfect conviction on an imperfect information.

The conviction must be of the offence charged and of no other. (1 Deacon, p. 308, No. 16; 2 Chit. G. P. 185; *Roger* v. *Jones*, 3 B. & Cres. 409; 5 Dow. & Ry. 268; *R.* v. *Soper*, 3 B. & Cres. 857; 5 Dow. & Ry. 669.) And the offence must be specifically set forth as to time, place and circumstances, for this obvious reason, that in these minor offences, as in others of a more serious nature, the rule of law is equally cogent, that no man should be tried twice upon the same charge or for the same offence, a protection which would be very insecure, if the rule adverted to could be deviated from. (1 Paley, p. 119, 120; 1 Deacon, p. 314, No. 52; 12 Dalt., ch. 2, s. 4; *R.* v. *Wheatman*, Doug. 232; *Basten* v. *Carew*, 5 D. & R. 558; *R.* v. *Eaton*, 2 T. R. 285; *R.* v. *Back*, 1 Str. 147.) Besides, it may be observed that the jurisdiction of the Justice is measured out by the complaint or information. His authority is to try the accused for the offence as alleged. The accused is summoned to answer that charge, and is expected to be prepared to meet it. But he could not be required to answer to any other charge, or one differing from that set forth; and it would be a manifest injustice to extend beyond the matter complained of, so as to render a conviction against him. (1 Paley, p. 62; 1 Deacon, p. 309, No. 23; 1 Chit. G. P. p. 204; *R.* v. *Trelawney*, 1 T. R. p. 122; *R.* v. *Harper*, 1 Dow. & Ry. p. 223.) Nor will a bad conviction be aided by a reference to the information. (*R.* v. *Stone*, 1 East, 639; *R.* v. *Crisp*, 7 East, 389.)

6. *Justices not to trust to their Clerks.*—If Justices wish to avoid falling into error, they should discontinue a practice which too frequently prevails, of allowing the person who acts as their Clerk to draw out the information, fill up the summons or warrant, and write out the conviction, which in many instances are signed by the Magistrates without their taking the trouble to examine them. The errors of the Clerk then become those of the Justice, and no system can be more pernicious; the consequence of it may be most serious to the defendant, and not unfrequently to the prosecutor, who, having a just complaint, and confiding in the expectation of obtaining redress, brings his case before a Magis-

trate; but, from negligence or ignorance on the part of the latter, in reality obtains no redress, and is mulcted in costs upon an appeal or upon certiorari.(a) With reference to this subject it may be useful to point out how many modes there are of laying informations, and to notice certain rules to be observed by Justices in receiving them, before they issue either a summons or warrant. This will be considered in the next section.

(a) The 13 and 14 Vict., ch. 36, s. 2, (L. C.), provides, that costs shall be awarded to the party in whose favor judgment shall be given upon a *certiorari*. In England costs are never given to the party prosecuting the writ.

CHAPTER I.

§ V.

POWERS AND DUTIES OF JUSTICES, AS RELATE TO THE DIFFERENT MODES OF TAKING INFORMATIONS.

1. *Different modes of laying informations.*
2. *Justices may require them to be in writing.*
3. *Provisions of the Magistrates Acts.*
4. *Rules applicable to informations on oath.*
5. *Mode of laying informations on oath.*
6. *Course to be adopted by prosecutor.*
7. *Course to be adopted by the Justice.*
8. *When the oath should be administered.*
9. *Information must be read to the party.*

1. *Different modes of laying informations.*—According to the rules laid down in authorities, informations or complaints could be made in three different ways; 1st, *Verbally*, by the informer stating his complaint to the Magistrate, who thereupon issues his summons, embodying the charge which the defendant is called upon to answer. 2dly, By information in writing, not under oath, which is said technically to be *exhibited*, and is merely required to be in writing, and signed or acknowledged by the informant in the presence of the Magistrate. 3dly, By information *under oath*, sworn to before the Magistrate.

With reference to this subject, it may be necessary to consider in what cases informations were required to be in writing, and in what cases a verbal statement to the Magistrate was considered sufficient in England. We find in 1 Archbold, J. P., p. 312, the following:

"An information is the first proceeding against an offender, punishable "upon a summary conviction. In practice, however, where it is not ex- "pressly directed to be in writing by the statute creating the offence, it is "never required to be drawn up in form, except in cases where the pro-

" ceedings are at the suit of a common informer for a penalty; in which " cases, whether the informer be entitled to the whole of the penalty or to " a moiety of it only, the Magistrate always requires an information in " writing, drawn up in regular form, to be lodged with him, before he will " grant the prosecutor a summons against the offender. In all other cases, " the Magistrate usually requires no more than a mere verbal statement of " the case by the prosecutor before the summons is granted, or a statement " of it upon oath before he grants a warrant."

2. *Justices may require them to be in writing.*—The Justice has the power in all cases to require that the information should be written out. (Saund. Sum. Con. p. 12.) Neither is he bound to prepare it, nor is he responsible to the informer for its accuracy, but is merely to receive the information, unless indeed where the statute requires that an oath of the offence should be taken, when it is incumbent on the Justice, before he issues any summons or warrant, to ascertain that a complete offence has been sworn to. (2 Chit. G. P. 155 and 156.) When prepared, the information is taken to the Justice having jurisdiction over it, and the information being signed, and sworn to if necessary, in the presence of the Justice, he affixes his signature thereto; and the summons or warrant being prepared and delivered to the constable, the information is retained to be fyled by the clerk, and produced at the time appointed for the hearing.

It is important to consider, in the next place, whether the Magistrates Acts have made any change in this respect, by requiring all informations for offences to be laid in writing, and if a verbal statement ought to be any longer continued in practice, in those cases where formerly that course was usually adopted.

3. *Provisions of the Magistrates Acts* (14 & 15 Vict., ch. 95, L. C.; 16 Vict., ch. 178, U. C.)—Upon a careful perusal of the several provisions of these statutes, it would appear certain that *all* informations for *offences* "punishable on summary conviction" must be in writing, and laid in a formal shape, before the Magistrate can take any proceedings against the party accused; and for this reason, that power is given under the second section to the Justice or Justices before whom the prosecution may be returned, to issue a warrant against the defendant, should he fail to appear, upon proof being made that the summons was duly served, and upon oath being made substantiating "the matter of such information." These are the words of the statute, and necessarily intend that all informations should be in writing.

Moreover, this section proceeds to make further provision as to issuing a warrant in the first instance instead of a summons, and makes use of the following words, which are strongly indicative of the fact that the Legislature contemplated the neeessity in every case for the information being in writing, in order practically to carry out the additional powers vested in Justices by these statutes, thus: "or upon such information *being laid as* " *aforesaid* for any offence punishable on conviction, the Justice " or Justices before whom *such information shall have been laid*" may, upon oath made substantiating the matter of such information, issue a warrant. It is therefore submitted that the provisions of these statutes have made this important change in the practice as it formerly existed, by requiring that in all cases of informations for offences the information should be in writing.

It is, however, due to the professional reader to remark that Mr. Archbold lays down a different rule as to the neeessity in all cases for a written information. In his work on Sir John Jervis' Acts, referring to the 9th section 11 & 12 Vict., ch. 43, which is the same as the 8th section of our Magistrates Acts, he says:

"The first part of this section assumes that the information is in writing, " *for otherwise no objection could be taken* for variance between it and the " evidence adduced in support of it. But there is nothing in the statute " that expressly requires that it should be in writing; and no objection " therefore can be taken that it is not in writing, unless in cases where it is " specially required to be so by the statute creating the particular offence " under consideration, or regulating the proseeution for it. In cases where " it is so required it must be in writing; in *cases where the Magistrate intends* " *to issue a warrant in the first instance, it ought to be in writing*, because " the statute requires that the matter of the information should first be " substantiated by oath or affirmation; in cases of much importance, or " where any complexity or difficulty is likely to arise, the Magistrate will " do well to require the information to be in writing; but in all other cases " a mere verbal information will be sufficient."

In view of so high an authority, it has not been without a great deal of hesitation, and after very serious refleetion, that a different rule has been hazarded in this work; but the conviction arrived at by the author from a course of reasoning upon and comparison of different seetions of the statute, induced him to lay down the rule that in all eases the information must be in writing, so that the propriety of it might be determined from the considerations upon which that ruling is based.

It is true, as Mr. Archbold says, that the statute does not in express terms declare that in all cases the information shall be in writing, but it does so by manifest implication, and by the use of words tantamount to an express declaration. It has already been shewn that the 2nd section directs that the "matter of such information" shall be substantiated upon oath, and that the Justice "before whom *such information shall have been laid*" may issue his warrant, as indicating that the information must be in writing; but by the 7th section it is enacted that in complaints where the Justice is required to make an order for the payment of money, it shall not be necessary that the complaint should be in writing. The exception, being thus limited by the statute the provisions of which are intended to regulate all summary trials, establishes the rule as to all other cases, and a distinction is thereby created between complaints for the payment of money, and informations for offences, which is readily understood when we recur to the 2nd section, which again makes this marked distinction between these two classes of cases, by enabling a Justice to issue his warrant in the first instance upon an information, which he cannot do upon a complaint without first issuing a summons.

Then, again, how are we to understand the application in practice of the rule established by the 8th section, which enacts, "That "*in all cases* of informations for any offence, or acts punishable "upon summary conviction, any variance between such informa- "tion and the evidence," as to time and place, shall not be material, unless we assume that the Legislature intended that "in all cases of informations for any offence" the information should be in writing; and be it observed that this doctrine as to variance is limited by this section to informations only, and does not extend to complaints, for this very obvious reason, that the preceding section declares that the complaint need not be in writing. Bearing in mind, then, these marked distinctions in the provisions of the statute, as applicable to informations and complaints, we have only to recur, if any further evidence were necessary, to the form of the summons, in the framing of which the Legislature has again clearly indicated that all informations must be *in writing*, and in that form *laid* before the Justice; although in complaints a verbal statement will suffice, and in that form *made* to the Justice. The words of the summons are: "Whereas information hath "this day been *laid* (or complaint hath this day been *made*)

" before the undersigned, &c.," which necessarily presuppose the *laying* of an information in writing, or the *making* of a complaint, which the statute declares need not be in writing. Then again, notice the terms of the first enactment of the statute: "That in " *all cases* where an information *shall be laid before* one or more " Justices of the Peace, &c., and also in all cases where a com- " plaint *shall be made to* any such Justice or Justices, &c., then " *in every such case it shall be lawful* for such Justice or Justices " of the Peace to issue his or their summons." Language more plain could not be used to establish, that to vest authority in the Magistrate to issue a summons, an information *in writing* must be laid before him, when taken in connection with the preamble, which declares the intention of the Legislature to have been that the duties of Justices should "be clearly defined by positive enactment."

In support of the doctrine laid down in this work, we would further call attention to the remarks made in Westoby's edition of Stone's Petty Sessions, published since Sir John Jervis' Acts, at p. 36:

" Under some particular statutes an information is not necessary to ini- " tiate the proceedings *in consequence of their being an express dispensation* " relative thereto; but in practice it is usual for Magistrates *in all cases* to " require an information *in writing* before they will issue a summons. This " document may properly be dispensed with in these cases where Justices " are authorized to convict *upon their own view* of the commission of an " offence. The propriety, however, of having a written information *in all* " *cases* to be heard and determined by Justices is obvious to every person " conversant with legal proceedings. It is of the same relative importance " in the Court of Petty Sessions, as the *declaration* in the civil, and the " *indictment* in the criminal proceedings of the Superior Courts."

The result therefore of a careful consideration of this point is, that although in England verbal informations were in some cases permitted *in practice*, yet the *law* has been and is, as laid down in Stone's work, that unless *expressly dispensed with* by some particular statute, every information should be in writing.

This principle of law was established as admitting of no doubt or exception, by no less a Judge than Lord Mansfield, in the case of *R.* v. *Fearshire*, 1 Leach C. C. 202. Upon an indictment for a misdemeanour, parole evidence was offered of the information which had been given before a Justice of the Peace, on which a warrant had issued. The defendant's counsel objected, upon the

ground that as it was the duty of the Magistrate to take informations in writing, the written information which must be presumed to have been taken was the only legal evidence; to which the Crown officer replied that in misdemeanours of light complexion the constant practice was to dispense with the form of reducing them into writing. Lord Mansfield in rejecting the evidence said:

"It is the duty of the Magistrate to take *all charges of whatsoever nature,* "*kind or complexion* they may be, in writing. In the present case parole "testimony cannot at any rate be given of the subject matter of the infor- "mation, unless it be previously shewn that the informant did not give his "deposition on oath, and that it was not reduced to writing. But, I am of "opinion that, *as it is the indispensable duty of every Justice of the Peace to* "*take the information in writing in all cases,* the presumption is, that he "has done his duty by taking it in writing, and therefore the parole evi- "dence now offered ought not to be received."

The parole evidence was accordingly rejected, and the defendant was acquitted in consequence of this objection.

4. *Rules applicable to informations on oath.*—Having disposed of the question, whether informations for offences should be in writing, in a manner to leave but little doubt that to comply with the law and the requirements of the statute, verbal informations should never be acted upon, and that the issuing of even a summons should never take place, unless a formal information in writing be previously laid before the Justice, it is necessary now to notice a few of the rules laid down in the authorities with reference to informations under oath, and the manner of receiving them.

If the statute requires that oath should be made of the commission of the offence to be charged against the party accused, then the Magistrate cannot legally act, unless such oath has been made; and this must appear by the proceedings, otherwise they will be absolutely null. (*R.* v. *Kiddy*, 4 D. & Ry. 734; *Cohen* v. *Morgan*, 6 D. & Ry. 8; *Basten* v. *Carew*, 5 D. & Ry. 558; 3 B. & C. 249; 2 Ld. Ray. 500; *Brookshaw* v. *Hopkins*, Lofft, 240; 2 Chit. G. P. 155, 158, 159, 165, 172, and 173; 1 Paley, 17, 18 and 81; also *Ex parte Aldridge*, 2 B. & C. 500; *Wilkins* v. *Wright*, 2 C. & M. 191; *Reg* v. *Scotton*, 13 L. J. M. C. 58.) Upon this principle the Superior Court at Montreal quashed the conviction in No. 12, *Ex parte Cook*, L. C. Rep., vol. 3, p. 496. But if the statute does not require the information to be on oath, then that form is unnecessary. The addition of it, however, will

not prejudice. (*Rex* v. *Wilks*, Bosc. 16; *Basten* v. *Carew*, 3 B. & Cres. 649.)

In cases of assault, malicious injuries to property, and other cases where the statute requires that the offence should be substantiated upon oath, if the party injured be so circumstanced as to be unable to see the offence committed or to identify the person, it is advisable for the informer to lay the information without oath as an exhibit, and to endorse upon or append to the information a short deposition of a person who can swear to the fact (so as to satisfy the terms of the statute,) as the Magistrate's justification for issuing the process against the defendant. Such a deposition is absolutely necessary where a warrant is issued to arrest the defendant, instead of a summons. (Stone's P. S. 40; 14 and 15 Vict., ch. 95, s. 9, L. C.; and 16 Vict., ch. 178, s. 9, U. C.)

5. ***Mode of laying informations on oath.***—It is incumbent on the Magistrate to take care that the informer or deponent do state in such oath the particular facts *as they occurred*, and that he do not swear as it is termed by the card in the *very words* of the statute;—and unless facts essential to constitute the offence complained of are apparently truly sworn, the Magistrate should not issue even his *summons*, and certainly not a *warrant*, upon a *general* information, however technically correct. (*Cohen* v. *Morgan*, 6 Dowl. & Ry. 341; 2 Chitty C. P. p. 165.)

6. ***Course to be adopted by prosecutor.***—The proper course to be adopted by the complainant or informer is for him, either alone or with his witnesses, without being influenced by passion, resentment or revenge, to state to the Justice the facts precisely as they occurred, and without urging or even soliciting a warrant against the Justice's impression, leaving the Justice to act as he thinks fit; and if he should mistake the law, or wilfully issue a warrant in a case where he ought not to have done so, then the informer and witness will be wholly free from liability, (*Cohen* v. *Morgan*, 6 Dowl. & Ry. 8); unless indeed the party imprisoned shew that the informer maliciously pressed the Justice to issue his warrant. (*Elsee* v. *Smith*, 2 Chitty's Rep. 304; 1 D. & R. 97; *Hensworth* v. *Fowles*, 4 B. & Ad. 449.)

7. ***Course to be adopted by the Justice.***—Lord Tenterden, one of the greatest lawyers that ever presided in the Court of King's Bench, frequently expressed his wish that the Justices would always, when an information is preferred, interrogate the

informer and his witnesses before he issued his summons or warrant, whether there was not some circumstance, stating each, which might, under the statute, constitute a defence, and not to proceed until he was satisfied that at least it was probable there was not a *prima facie* defence; by which means, he observed, much trouble and many frivolous informations would be avoided. (2 Chit. G. P. p. 168.)

It would be proper in all instances to follow the foregoing rules with reference to informations required by the statute to be under oath. Although it would seem that no objection can be made to an *information ready prepared* being presented to the Justice, for him to swear the informer, as to the truth; still the Justice should be satisfied, before acting upon it, that the information is as full and correct in every particular as he could desire it to be. (2 Chit. G. P. 150; *Lowe* v. *Broxtowe*, 3 Bar. & Ad. 550.)

8. ***When the oath should be administered.***—It is, however, more regular to administer the oath in the first instance, so that the matters related to the Justice may be under the sanction of an oath; and the Justice should examine the party as to the exact facts. In *Rex* v. *Kiddy*, 4 Dowl. & Ry. 734, where the Justice had taken the information and examination of the witnesses, and then administered the oath, the Court expressed its strong disapprobation of the irregularity of such practice, and said it was the duty of the Justice to administer the oath in the first instance, in order that the party should be under the sanction of an oath at the time he gave his testimony.

In the following cases it was held that the same rule applies to the taking of depositions, upon the hearing of an information; and, moreover, that the depositions ought to be taken in the *genuine language of the witness himself.* (*Cohen* v. *Morgan*, 6 Dowl. & Ry. 8. In *Re. Rix.*, 2 Dowl. & Ry. 251. *Mills* v. *Collett*, 2 Man. & Ry. 262; *Rex* v. *Marsh*, 2 B. & Cres. 717, 4 Dowl. & Ry. 260.)

9. ***Information must be read to the party.***—Another rule to be observed is, that the information should always be carefully read over by the Magistrate, or in his presence, to the party swearing to the facts. In the late case of *Caudle* v. *Seymour*, 1 Ad. & El. (N. S.) 889, which was an action of trespass against a Magistrate for causing the Plaintiff to be apprehended on a warrant, the facts were these: complaint was made to Mr. Seymour, a Magis-

trate, that the Plaintiff had injured a child (15 years of age) by bad surgical treatment; the child being unable to leave her house, the Magistrate and his Clerk went to her own dwelling. The deposition of the girl was taken by the Clerk, but not by the Magistrate, as he was not in the same apartment. The Magistrate granted his warrant, and the Plaintiff was apprehended, and was brought before the Magistrate, who afterwards dismissed the complaint. Upon an action being brought against the Justice for false imprisonment, the Plaintiff had a verdict; and upon a motion for a new trial the Court discharged the rule, holding that the Magistrate acted illegally in granting a warrant upon a deposition not sworn in his presence. Upon this point Coleridge, J., observed:

"It is far too common a practice for the Clerk to examine the witnesses " apart, and take down the answers, and then read them over to him in the " Magistrate's presence. It is true that a Magistrate here has jurisdiction " over the offence in the abstract; but to give him jurisdiction in any case " it must be shown that there was a proper charge upon oath in that case. " A man has no right, because he is a Magistrate, to order another to be taken " for an offence over which he has jurisdiction, without a charge regularly " made."

In another part the same learned Judge observes:

"A Magistrate taking depositions has a discretion to exercise: he is to " examine the witness, hear his answers, and judge of the manner in which " they are given. If he does not, how is he, supposing the charge were " felony, to decide whether or not bail shall be taken?

So, too, Patterson, J., observed:

"As to the other point, Magistrates should be careful not to commit this " part of their duty to a Clerk. Depositions of this kind are not like affida- " vits here, which are made to be used or not by a party in a cause, as he " sees fit. It is a matter of some discretion to determine how depositions " are to be acted upon, and they ought therefore to have the Magistrate's " full consideration."

In *Stevens* v. *Clark*, Car. & Mar. 509, which was an action of trespass against a Magistrate, Cresswell, J., said:

"If a Magistrate issues a warrant, he must be able to shew his informa- " tion, else there is no foundation for the warrant. There is a summons in " this case, and as the Plaintiff, it appears, was going off, the Constable takes " him on a warrant from the defendant. There is, therefore, here a warrant " without information on oath, upon which to ground it. The warrant is " executed, and therefore the whole imprisonment is illegal."

These authorities sufficiently establish that in all cases where personal liberty is concerned, Magistrates should exercise more

circumspection and care, and that in taking an information upon which a warrant is to be issued, they have a discretion to exercise, and that they should themselves judge of the weight and importance of the facts stated, and form their own conclusions, from what they see and hear, of the propriety of arresting the party complained against.

CHAPTER I.

§ VI.

POWERS AND DUTIES OF JUSTICES, AS RELATE TO THEIR SITTINGS AND THE EXERCISE OF THEIR JUDICIAL FUNCTIONS.

1. *Demeanour of Justices.*
2. *Sittings to be public.*
3. *Power of one Justice to hold sittings.*
4. *What acts may be done by one, where two or more are required to convict.*
5. *When advisable that more than one should sit.*
6. *When one or more Justices have heard a cause, whether others can interfere.*
7. *If heard before two or more, they must all be present when they conclude and decide it.*
8. *Should they differ, what course to pursue.*
9. *Their power to correct their proceedings, and when.*

1. *Demeanour of Justices.*—In the exercise of their judiciary power, Justices should so demean themselves as to avoid the suspicion that they are actuated by favor or prejudice, as nothing will tend more to advance the administration of justice, ensure respect for the law, and their authority, than the impartiality of the Justices; while on the other hand nothing can be more injurious to the proper working of the system of summary trial, and calculated to bring the bench and the law into disrepute, than an opposite course of conduct. Archbold, in his work on Justices of the Peace, vol. 2., p. 30, says: "I shall merely observe here, "that it is of the last importance, in a country like England, that "these several duties be performed temperately; that justice be "administered by the magistracy of the country, not only fairly, "but in a manner so mild, so temperate, so unimpassioned, that "every person present must be convinced that justice is adminis-"tered fairly and without prejudice."

2. *Sittings to be public.*—In all cases of *summary jurisdiction*, where Magistrates exercise judicial authority, they must sit in an *open Court*, where the public may have free admittance to such an extent as the accommodation of the place may afford. And even when a Magistrate hears a case at his private residence, as is frequently done in country parts, he must be considered as constituting a Court of Justice for the purpose, and must accordingly throw upon his doors for the admission of all parties, to a reasonable extent, who may be desirous of hearing what is going on. In 1829 it was so decided in K. B. in the case of *Daubeney* v. *Cooper*, 10 Bar. & Cres. 237.

In the 11th section of the Magistrates Acts we read: "And the room or place in which such Justice or Justices shall sit, to hear and try such complaint or information, shall be deemed *an open and public Court*, to which the public generally may have access, so far as the same can conveniently contain them."

3. *Power of one Justice to hold sittings.*—As to the power of *one* Justice alone to hear and determine a complaint or information, that must depend entirely upon the terms of the statute upon which the proceedings are had, and which every Magistrate should in the first instance carefully examine, before he undertakes the judicial cognizance of a prosecution unassisted by other Justices.

If the statute requires a conviction or other *judicial* act by *two* Justices, a *conviction* by *one* only would be void; and the two must meet and jointly together hear all the evidence, consult together, and be present when they actually conclude upon and render their conviction. (*R.* v. *Redware*, 3 T. R. 580; *Battye* v. *Gresley*, 8 East, 319; *R.* v. *Coln. St. Aldwins*, Burr. Sett. c. 136; *R.* v. *Forrest*, 3 Term R. 38; and 2 East, 244, *R.* v. *Great Marlow;* 2 Chit. G. P. 153; 2 Archbold, J. P., 31.

This principle is also clearly established by the following proviso to the 25th section of the Magistrates Acts:

"Provided always, that in all cases where by statute it is or "shall be required that any such information or complaint shall "be heard and determined by two or more Justices, or that a "conviction shall be made by two or more Justices, *such Justices "must be present and acting together during the whole of the "hearing and determination of the case.*"

4. *What acts may be done by one, where two or more are required to convict.*—Although two Justices may be required to hear a prosecution and determine the same, any one Justice may receive the information, issue a summons or warrant, and after conviction any one Justice may enforce the payment of the penalty or commit the offender. This is provided for by the statute of L. C. 4 Geo. IV., ch. 10, s. 7,—and of U. C. 2 Wm. IV., ch. 5, s. 2; and likewise by section 25 of the Magistrates Acts, which enacts, "That in all cases of summary proceedings, &c., "it shall be lawful for one Justice to receive such information or "complaint, and to grant a summons or warrant thereon, and to "issue his summons or warrant to compel the attendance of any "witnesses, and to do all other acts and matters which may be "necessary, *preliminary to the hearing*, even in cases where, by the "statute in that behalf, such information and complaint must be "heard and determined by two or more Justices, and after the "case shall have been so heard and determined, one Justice may "issue all warrants of distress or commitment thereon: and it "shall not be necessary that the Justice who so acts, before or after "such hearing, shall be the Justice or one of the Justices by whom "the said case shall be heard and determined."

5. *When advisable that more than one should sit.*—In many cases, one Justice can hear and determine a complaint or information, and render a conviction; but if it should happen that points of intricacy are likely to arise, it would undoubtedly be advisable that the attendance of two or more Justices should be procured whenever practicable. Mr. Stone, in his work, at p. 29 recommends this course, and gives as a reason "that justice may not only be faithfully and impartially administered but also *satisfactorily* to the public; and this will be more likely to result from the decision of two Magistrates acting together, than from the decision of one, be it never so fairly and honestly given."

With reference, however, to this subject it is necessary to lay down certain rules to prevent Justices from falling into error, which in this country has not unfrequently happened, resulting in the convictions being quashed.

6. *When one or more Justices have heard a cause, whether others can interfere.*—We will assume that but *one* Justice is required to convict, under the terms of the statute, but that the attendance of two or more Justices is desired. Care should be

taken that these Justices be in attendance at the *time* and *place* indicated for the appearance of the accused in the process issued against him, and that they be "*present acting together during the* "*whole of the hearing and determination of the case.*" This results from the principle established with reference to the jurisdiction of Justices, and laid down in 1 Paley, p. 10, in the following words: "That the jurisdiction in any particular case attaches in the first set of Magistrates duly authorized who *have possession and cognizance of the fact*, to the exclusion of the separate jurisdiction of all others; so that the acts of any other, except in conjunction with the first, are not only void, but such a breach of the law as subjects them to indictment."

The Act of L. C. 4 Geo. IV., ch. 19, moreover requires that "*true and faithful minutes or memorandums at length of every conviction*" should be kept by Justices, and be signed by those "present "during the proceedings which may have been had." Hence it will not do for one or two Justices who have heard a case, and the evidence adduced, afterwards to call upon a second or third Justice who has not heard the witnesses give their evidence, to assist and join in the rendering of a conviction.

For this reason, in Ex-parte Delisle, the Superior Court at Montreal, on the 20th September, 1853, quashed the conviction. The facts of the case were these: Bibaud, the prosecutor, laid an information before a Justice against the defendant, Delisle, for trespass and cutting trees on his land, on the statute 13 and 14 Vic., ch. 40, ss. 2 and 3. Witnesses were examined, and the case argued by counsel before one Justice only, whereupon an adjournment took place. The Justice being desirous of the assistance of another Magistrate, on the day appointed by the adjournment two Magistrates sat, one of whom had heard the case and the evidence of the witnesses, the other had not. But the parties again appeared, and a fresh argument was had before the two Justices, upon the evidence of the witnesses, which had been reduced to writing, and thereupon a conviction was rendered by both Justices against Delisle, who removed the record by certiorari to the Superior Court. The principal objection urged by Delisle's counsel for quashing the conviction, and adopted by the Superior Court in rendering its judgment, was that the interference of the second Justice was unwarrantable, that he had no power or authority to convict, and that he could have no jurisdiction over a

case wherein the witnesses were not sworn and examined before him.

7. ***If heard before two or more, they must all be present when they conclude and decide it.***—The application of this rule extends with equal force to other cases. For instance, should two, three, or more Justices have heard a cause and the examination of the witnesses, they must all be present at their deliberations, and at the rendering of the conviction, and this notwithstanding that under the statute *one* Justice may convict, or that a difference of opinion may arise in the opinion of two out of three sitting Magistrates. (See proviso of section 25 of the Magistrates Acts.)

It was so held in a case of *Ex parte Robertson*, decided by the Superior Court at Sherbrooke in July, 1853. The case was not one of a conviction by Justices, but a judgment rendered in the Commissioners Court, removed by certiorari; but if the rule applies to Commissioners Courts holding civil jurisdiction, it ought to apply with double force to convictions by Justices, which are invariably governed by more stringent rules. Under the Commissioners Court Act, one Commissioner is authorized to hear and determine a cause. In the case referred to, which was a *saisie revendication*, the cause was heard, and the witnesses were examined before *three* Commissioners, and an adjournment took place. Subsequently *two* of the Commissioners, in the *absence* of the third, rendered judgment for the plaintiff. The Superior Court held that notwithstanding the Act gave power to one Commissioner to hear and determine a cause, and that the judgment of *two* out of *three* Commissioners was the judgment of the majority, still as the cause was heard before *three*, the two Commissioners had no authority or jurisdiction to render a judgment *in the absence* of the third Commissioner. The authority cited by the counsel for quashing the judgment, taken from *Guyot's Répertoire*, vol. 9, verbo "*Jugement*," and adopted by the Court in quashing the judgment, is as follows: "Lorsqu'il y a plusieurs Commissaires "nommés pour décider une affaire, *ils doivent tous assister au* "*jugement*, à moins que la commission ne porte qu'ils pourront "juger en l'absence les uns des autres."

The reason of this rule is satisfactorily given in Chitty's G. P. 153: "When a statute requires a conviction or other *judicial* act "by *two* Justices, then a conviction by one would be void, and the "two must meet and jointly together hear all the evidence, and

" consult together and be present when they actually conclude " and determine upon their conviction. In *ministerial* acts to be " done by *two* Justices, it is true that it has been held to suffice, " although the signatures and actual concurrence of each take " place when they are separate; *but the circumstance of an act* " *being judicial, that is, the act of mental consideration and deci-* " *sion after discussion, makes the legal difference.*"

8. ***Should they differ, what course to pursue.***—Thus also where a case is heard before two Justices who disagree, a third Justice cannot interfere or join in the proceedings of the two so as to render the judgment of the majority. The only course that can be pursued, so that a decision may be legally had, is to adjourn the case for the purpose of being heard before another Justice *in conjunction with those who have already heard the case.* In Oake's work on Con., p. 89, we find the following: "Should there be a division of opinion on the case and the judgment, there ought to be an adjournment to procure the attendance of another Justice, when the case is re-heard, 14 J. P. 366; 15 J. P. 328."

The *re-hearing*, however, should be complete, and the proceedings should be commenced, and witnesses sworn and examined anew, as if the case had been originally called before the Bench as newly constituted. A difficulty may sometimes present itself in carrying out this in practice in every case, as the division may not be known to the parties until the day appointed for the decision, when one or both of them may be absent. What should be done in that case will be pointed out in the second part of this work, as the subject of proceedings at the hearing, to which this relates, will there be treated of.

But should there be more than two Justices at the original hearing, although there be a difference of opinion between them, an adjournment for a re-hearing is not necessary, as the majority may, *all of the Justices being present*, render a decision; the Clerk or Justices noting in the minutes the dissent of the Justice or Justices who do not concur.

9. ***Their power to correct their proceedings, and when.***—Justices have the power to alter their judgment during the continuance of their sittings, that is possessed by the Court of Quarter Sessions. (Oake's Syn. 89.) They have power also, afterwards, to correct matters of form, or state matters of fact in a more formal shape in their convictions, although an imperfect

one has been delivered to the defendant, so long as the conviction has not been returned to the Sessions. (*R.* v. *Barker*, 1 East, 186; *Chayney* v. *Payne*, 1 Q. B. 712; *Sellwood* v. *Mount*, 1 Q. B. 726; *R.* v. *Allen*, 15 East, 332; *Gray* v. *Cookson & Clayton*, 16 East, 21.) And they may return the amended conviction to the Court upon a *certiorari*, (*Sellwood* v. *Mount*, 9 Car. & P. 75); yet they cannot do this after the first conviction has been quashed, or after the defendant has been discharged, by reason of a bad conviction being recited in the warrant of commitment. (*Chayney* v. *Payne*, 10 Law J. 114 m.) In amending their convictions, however, they should be extremely careful not to falsify any of the facts themselves, since by so doing they would not only render themselves liable to an action on the case, at the suit of the party aggrieved, but to a criminal information at the instance of the Crown. (*Brittain* v. *Kinnaird*, 1 B. & B. 432.)

As this point is one of extreme importance to Justices of the Peace in the exercise of their judicial functions, it may be well to give here the remarks made by Lord Kenyon in *Rex* v. *Barker*, 1 East, 186, upon a return by a Justice of the Peace of a conviction, in an amended form, to a writ of certiorari; Lord Kenyon observed:

"If the Magistrate has done no more than return the conviction in a more "formal shape, instead of sending it up in the informal manner in which it "was drawn, and supposing the facts as they really happened will warrant "him in the return he has now made, the contrary of which is not imputed, "I am of opinion *it was not only legal but laudable in him to do as he has "done, and he would have done wrong if he had acted otherwise.* It is a "matter of constant experience for Magistrates to take minutes of their pro- "ceedings, without attending to the precise form of them, at the time they "pronounce their judgment, to serve as memorandums for them to draw up "a more formal statement of them afterwards, to be returned to the Ses- "sions; and it is by no means unusual to draw up the conviction in point "of form, after the penalty has been levied under the judgment. Nor is "there any legal objection to this method, provided the facts will warrant "them in stating what they do."

The foregoing authorities must be considered as applicable only to *convictions* and not to *orders* made by Justices, in respect of which a very different rule prevails. As soon as the Justices have put their hands and seals to an order, it becomes effective, and cannot be in any particular amended. (*R* v. *The Justices of Surrey*, 5 B. & Ad. 439.) The distinction between an *order* and a *conviction* is given in another section of this work; but on reference

to the Magistrates Acts, it will be found that the word *order* is used with reference to *complaints* "for the payment of money or otherwise," as distinguishable from the *conviction*, which applies to informations for any offence or act punishable by imprisonment or fine.

It is necessary to observe also that the power of Justices to correct matters of form, or state matters of fact in a more formal shape in their convictions, cannot be extended so as to embrace a general power of amending the proceedings before them, as they have no power to alter or amend the information, complaint, summons or warrant, without the express consent of the defendant, as shewn hereafter.

CHAPTER I.

§ VII.

POWERS AND DUTIES OF JUSTICES, AS RELATE TO THEIR SITTINGS AND THE EXERCISE OF THEIR AUTHORITY.

1. ***Must appoint a Clerk in L. C.***—Justices of the Peace in Upper Canada discharge the duties of their office unassisted by a Clerk, thereby deriving for their own advantage the fees established by law. Their power to appoint a Clerk seems to be recognized by the 14 and 15 Vict., ch. 119, which regulates the rate of fees to be paid to Justices "and their Clerks." But the Statute Law of Lower Canada renders the appointment of a Clerk indispensable, inasmuch as certain duties are assigned to the Clerk, not only by 6 Wm. IV., ch. 19, as noticed hereafter, but also by the Magistrates Act 14 and 15 Vict., ch. 95, which, by the 27th section, enacts, that the amount to be levied by warrant of distress shall be paid to the Clerk of the Justices, to be by him paid over to the parties entitled to the same; and likewise provides for the rendering of accounts by such Clerks to the Clerk of the Peace for

the district.(a) As the law has thus confided an important trust to the Clerks of Justices of the Peace, they should be careful to select fit and proper persons to discharge those duties. In their selection they should be influenced not only by the honesty of the party, but also by his fitness and capacity. An intelligent Clerk can be of the greatest assistance to Justices in the discharge of their duties, as in many instances it will happen that they have to confide, to a certain extent, in his correctness and vigilance.

2. *Power of dismissal.*—As to the dismissal of a Clerk, it has been held in England, that he may be appointed and dismissed, and another appointed in his stead, without any cause assigned; and where an attorney moved for a criminal information against Justices for having maliciously, and without reasonable or probable cause, removed him from the office of Clerk of the Petty Sessions for a certain division of the County of Kent, the Court refused it, saying "that a Clerk to Justices has no legal hold upon his office; he is only appointed to assist the Justices; it is an office during pleasure, like that of a Vestry Clerk." (*Ex-parte Sandys*, 4 B. & Ad. 863; 2 Arch. J. P. 450.)

3. *Duty of Clerk.*—The person entrusted with the discharge of the duties of Clerk should, in every case, before the day appointed for the hearing of a cause, make arrangements to secure the attendance of a competent number of Justices, where more than one Justice is required by the statute, or that, from the number or importance of the causes, the attendance of more than one may be desirable. He should also prepare an outline of the minutes of the proceedings, shewing the several cases to be heard, with the names of the parties, &c., and take care to have the original informations in readiness to be produced. Likewise he should have in readiness the statutes, to which reference may be required by the Justices in each particular case. (Stone's P. S. 80.)

The Act of L. C. 6 Wm. IV., ch. 19, s. 1, enacts, that the person performing the duty of Clerk "shall, under the dictation and order "of the Justice of the Peace, keep the register of such Justice of "the Peace, without being entitled to any remuneration for so "doing; and such Clerk shall likewise, at his own cost, (either by "employing a person to do the duty of crier, or otherwise) cause "order to be maintained during the sittings of the Court, and

(a) This provision of the Magistrate's Act of L. C. is not contained in that of U. C., 16 Vict., ch. 176.

"shall execute all the orders which shall be made by any such "Justice of the Peace in that behalf," and by section 5 no Clerk "shall in any manner represent either of the parties, or plead "before such Justice of the Peace, under a penalty of twenty "shillings currency, to be recovered and applied in the manner "mentioned in the third section of this Act."

The register which the Clerk is to keep, under the dictation and order of the Justice, must, in compliance with the Act of L. C. 4 Geo. IV., ch. 19, contain, by section 1: 1st, a true and faithful minute or memorandum at length of every conviction made in pursuance of any law or statute in force in the Province; 2nd, by section 3, all the costs allowed in every case, also the day when execution shall have been issued, to levy such costs and condemnation, and the day when the fine shall have been paid. The most responsible duties of a Clerk are those assigned by the 27th section 14 and 15 Vict., ch. 95, as to the receipt of penalties and the accounting for them, which will be noticed in the second part of this work, wherein the proceedings after conviction will be discussed, and the distinction between the law of Upper and Lower Canada, as to accounting for fines and penalties, will be shewn.

5. *As to capacity of Clerk.*—The Justices will likewise find their task a much easier one, should their Clerk be a person to whom they can confide the writing down of the "true and faithful minutes or memorandums at length of every conviction," required by law to be kept and signed by them in a register. In this is comprised the important duty of taking down correctly the evidence of the witnesses, of which more will be said hereafter in another part of this work.

Should the Clerk be incompetent, either from incapacity or from ignorance of the language of the witness, properly to discharge this duty, the Justices will not be absolved from responsibility, and in that case they must perform that duty themselves. The Legislature has thrown this duty upon them, and it must not be entrusted to a Clerk incapable of discharging it; and whether competent or not, the Justices are bound to see that the evidence is properly taken down, in order that the proper corrections be made before the examination of the witness is closed.

It is evident that a Clerk familiar with the French and English languages should be selected for this office in Lower Canada, where a mixed population is to be found in almost every parish.

5. *Clerk's fees in Lower Canada.*—The 6 Wm. IV., ch. 19, s. 1, enacts, "That no individual acting as Clerk to any Justice of the Peace, in the country parishes, shall at any time, or under any pretext whatsoever, demand or require higher fees than those hereafter mentioned, that is to say :

	£	s.	d.
For drawing up a deposition,	0	2	6
" " " warrant,	0	2	6
" " " bail-bond,	0	2	6
" making out a *committimus*,	0	2	6
" " " summons,	0	1	3
" " each copy of summons,	0	0	6
" " out a subpœna,	0	1	0
" " out each copy,	0	0	6
" entry of a final judgment,	0	1	3
" a copy thereof,	0	1	3
" a warrant of execution,	0	1	3
" each copy of an entry in the Register (for each 100 words),	0	0	6

The 3rd sect. imposes a penalty of five pounds currency for any contravention of the Act, which would include the offence of exacting higher fees than those mentioned in the Act. (Rev. Sta. L. C. 182.)

The Magistrate's Act of L. C., 14 and 15 Vict., ch. 95, by section 17, empowers Justices, in all cases of summary convictions or orders, to award such costs as to them shall seem reasonable; and by sect. 26, the Justices of the Peace, at their General or Quarter Sessions for the several districts, are empowered to make tables of fees for Clerks of the Peace, Clerks of the Special and Weekly Sessions, and Clerks of the Justices of the Peace within their several jurisdictions, to be signed by the Chairman, and approved or altered by the Secretary of the Province. The tables so approved or altered, the Secretary shall certify as proper to be demanded and received by such Clerks throughout the Province, and copies shall be sent to the Clerks of the Peace in each district, to be distributed to the Justices, and to be by them placed in the hands of their Clerks respectively; and if, *after such copy shall be received by such Clerk*, he shall demand or receive any greater fee than such as is set down in the table of fees, he shall forfeit for every such demand or receipt the sum of twenty pounds, to be recovered by action of debt in any Court having jurisdiction for that amount, by any person who will sue for the same.

The following table of fees has been made in pursuance of the said section, at Montreal, approved by the Secretary, and published on the 4th of May, 1853,—and adopted it is believed in every district in Lower Canada; but in such districts, if there be any in which tables of fees have not been distributed, under this section, then the fees established by the 6 Wm. IV., ch. 19, must govern the Clerks in country parishes:

TABLE OF FEES UNDER 14 AND 15 VICT., CH. 95, S. 26.

	£	s.	d.
For every deposition, to be paid by the party applying to make the same	0	2	6
For every warrant to apprehend, to be paid by the party applying for the same	0	2	6
For every recognizance, to be paid by each and every party or parties bound respectively on putting in such security	0	2	6
For drawing the discharge of the defendant or prisoner, on the recognizance being entered into, to be paid by each and every party bound, or by the bail, if at their request	0	2	6
For every information, *plainte* or summons, including the copy thereof for service	0	3	6
For every original subpœna	0	1	0
For every copy thereof	0	0	6
For every attendance at the return of any warrant for trial, information, summons or *plainte*, in special or weekly sessions	0	2	6
For swearing every witness in special or weekly sessions	0	0	6
For the entry of the case, and recording the conviction, acquittal or judgment	0	2	6
For the copy of any summary conviction or judgment when the same may be required	0	2	6
For certifying or taxing every bill of costs	0	1	0
For every warrant of distress, to levy any fine or penalty on judgment, with costs and charges	0	2	6
For every Rule of Court, including the copy thereof for service	0	2	6
For every special warrant or commitment of imprisonment, in lieu of any penalty or fine, or a return of *nulla bona* for non-payment of any penalty, fine or otherwise	0	5	0
For drawing up and preparing a record of conviction, and making the return to a writ of *certiorari*, to be paid by the party at whose instance such writ is issued, and before the same shall be returned or filed	1	0	0
For drawing and preparing the record of an appeal to the Court of General Quarter Sessions, to be paid by the party appellant, before the same shall be transmitted	0	10	0

	£	s.	d.
For all copies of any paper, writing or proceedings, if not exceeding one hundred and fifty words	0	1	0
(And exceeding that, at the rate of six pence for every additional hundred words.)			
For drawing up an order of dismissal	0	2	6
For drawing up a certificate on dismissal	0	2	6

6. *Fees of Justices and their Clerks in Upper Canada.*—The fees established by 4 Wm. IV., ch. 17, as stated at p. 417 of Keele's Provincial Justice (Ed. 1851), are now abolished by the 14 and 15 Vict., ch. 119, which repeals it. It is enacted by sect. 2 of the latter statute: "That from and after the passing of this "Act, the following fees, and no other, shall be taken from the "parties prosecuting, by Justices of the Peace in Upper Canada, "or by their Clerks, for the duties and services hereinafter men- "tioned, that is to say:

	£	s.	d.
For information and warrant, or for information and summons for assault, trespass, or other misdemeanour	0	2	6
For each copy of summons	0	0	6
For a subpœna, (only one on each side is to be charged for in each case, which may contain any number of names; and if the justice of the case shall require it, additional subpœnas shall be issued without charge)	0	0	6
For every recognizance (only one to be charged in each case)	0	1	3
For every certificate of recognizance, under 7 Wm. IV., ch. 10	0	1	3
For information and warrant for surety of the peace, or good behaviour (to be paid by complainant)	0	2	6
For warrant of commitment for default of surety to keep the peace or good behaviour, (to be paid by complainant)	0	2	6

And by section 3: "That the costs to be charged in all cases of "convictions, where the fees are not expressly prescribed by any "statute, other than the statute hereinbefore repealed, shall be as "follows, that is to say:

	£	s.	d.
For information and warrant, or for information and summons for service	0	2	6
For each copy of summons	0	0	6
For every subpœna to a witness (as provided in the 2nd section of this Act)	0	0	6
For hearing and determining the case	0	2	6
For warrant to levy penalty	0	1	3

	£	s.	d.
For making up record of conviction when the same is ordered to be returned to the sessions, or on certiorari.....	0	5	0
(Except in all cases where a single Justice may convict, and wherein no higher penalty than £5 can be imposed, then the following charges only can be made:)			
For a conviction.....	0	2	6
For a warrant to levy penalty.....	0	1	3
Also			
For every bill of costs in detail when demanded.....	0	0	6
For copy of any other paper connected with any trial, and the minutes of the same if demanded (every folio of 100 words)	0	0	6

The Magistrate's Act of U. C. 16 Vict., ch. 178, by section 17, empowers Justices, in all cases of summary convictions or orders, to award such costs as to them shall seem reasonable, "and not "inconsistent with the fees established by law to be taken on pro- "ceedings had by and before Justices of the Peace, under the "Act 14 and 15 Vict., ch. 119, or with the provisions of any "other Act or law in force in Upper Canada, regulating fees or "costs in proceedings before Justices of the Peace."

7. *Justices to appoint Constables.*—Besides appointing an efficient Clerk, Justices should have a sufficient number of Constables or peace officers, to execute the process to be issued by them. By the Act of L. C. 6 Wm. IV., ch. 19, s. 4, it is enacted, "That it shall be lawful for any Justice of the Peace to appoint one or more Constables if need shall be, to execute the orders of such Justice of the Peace, to which Constables such Justice of the Peace is hereby empowered to administer the requisite oath, which shall be enregistered in the register of such Justice of the Peace." (Rev. Sta. L. C. 182.) The oath may be administered in the following form:

"I, A. B., do swear that I will well and truly serve our Sovereign Lady "the Queen, in the office of Constable for the parish (or township) of——— "——— without favor, affection, malice, or ill will, and that while I con- "tinue to hold the said office, I will to the best of my skill and knowledge "discharge all the duties thereof faithfully according to law. So help me "God."

In Upper Canada, the appointment of Constables takes place in pursuance of the 10th section 33 Geo. III., ch. 2, by which it is enacted, "That it shall be lawful for Justices of the Peace, within "the respective limits of their commissions, at their General

" Quarter Sessions in April, or the greater part of them, to nomi-
" nate and appoint yearly a sufficient, discreet and proper person,
" to serve the office of High Constable in each and every district,
" and also to nominate and appoint such a sufficient number of
" persons as in their discretion will be necessary to serve the office
" of Constable in each and every parish, township, reputed town-
" ship, or place; and the said Constable and Constables, before
" they enter into their office, shall severally take the following
" oath, to be administered by any Justice of the Peace:"

You shall well and truly serve our Sovereign Lord the King (Lady the Queen) in the office of for the of for the year ensuing, according to the best of your skill and knowledge. So help you God.

" And after such service such person shall be exempt from any
" of the offices mentioned in the Act of three years." The whole of this Act, except the above section, has been repealed by 5 Wm. IV., ch. 8.

Justices should, as a matter of precaution, have one or more Constables in attendance at their sittings, for the purpose of keeping order and taking parties into custody who should wilfully molest or insult the Court. (Stone's P. S. 24.)

6. *Attendance of Constable necessary.*—It is essential that the Constable or peace officer who may have served the process issued should be in attendance before the Justices on the return day, as in the event of the defendant not appearing, he must be examined under oath as to the service of the summons, in order to justify proceedings being had *ex parte*, or the issuing of a warrant. The first section of the Magistrates Acts provides: " And every
" such summons shall be served by a Constable or other peace
" officer, or other person to whom the same shall be delivered, upon
" the person to whom it is so directed, by delivering the same to
" the party personally, or by leaving the same with some person for
" him at his last or most usual place of abode; and the Constable,
" Peace Officer, or person who shall serve the same in manner afore-
" said, *shall attend at the time and place, and before the Justices in
" the said summons mentioned, to depose, if necessary, to the service
" of the said summons.*"

Unless oath be made of such service, the Justice cannot, in the absence of the party, examine the witnesses, or proceed to a con-

viction. (*R.* v. *Allington*, 2 Str. 678; *R.* v. *Venables*, Id. 630; *Reg* v. *Simpson*, 10 Mod. 248, 341, 379; Saund. on Con. p. 32.)

The Superior Court, at Montreal, on the 20th February, 1855, in No. 463, Ex-parte Moore, quashed a conviction had *ex parte*, in the absence of the defendant, the Justice having omitted to examine under oath the Constable who served the summons, as to the service of it, although a return of service was endorsed on the summons, signed by the Constable, certifying under his oath of office the service made by him. The Superior Court regarded this return as no proof of service, and that, to comply with the requirements of the statute, the Constable ought to have been sworn and examined by the Justice as to the service, so soon as the defendant's default to appear was ascertained, and before proceeding any further with the cause. Several other judgments have been given, sustaining the same principle. Hence the necessity for the attendance of the Constable at the hearing.

7. ***Duties of Constable.***—It forms a part of the duty of Constables to assist the Justices in maintaining order and decorum, during their judicial inquiries, and the summary trial of cases brought before them. Unless order and proper decorum be enforced whilst Justices act in their judicial capacity, all respect which is due to their office, and to themselves individually, will be set at nought, and the proper discharge of their duties impeded.

8. ***Power of Justices to maintain order, and commit for contempt.***—It is proper here to examine into the power by law vested in Justices for that object. They are protected from slander and abuse in the execution of their duty. Thus a person who charges a Magistrate with acting corruptly, or partially, is liable to an action. And if said in the presence of the Magistrate, he may forthwith commit the offender for such slander or abuse, provided such commitment be made out in *writing* and duly signed. (*Aston* v. *Blagrave*, 1 Str. 617; 2 Ld. Ray. 1369.) And it must be *for a time certain;* a commitment therefore, *until the defendant is discharged by due course of law*, is bad. (*R.* v. *James*, 5 B. & A. 894; 1 Deacon, 298.)

The power of committal for such contempt must be understood as existing only in cases where the abuse or insult is offered publicly to the Justices, when acting in their *judicial capacity*, and not it seems when they are merely acting *ministerially*. (1 Str.

421; 14 East, 85; *Mayhew* v. *Locke*, 7 Taunt. 63; *R.* v. *James*, 5 B. & A. 894.)

9. *Other modes of punishing abuse or slander.*—Another mode of punishing a party for contempt, and said to be the proper course, is first to oblige him to find sureties for his good behaviour, and, in default of his so doing, then to commit him until the next Quarter Sessions, unless he sooner find such sureties, and also enter into his own recognizance for his good behaviour. (*R.* v. *Langley*, 2 Ld. Ray. 1030, per Holt, C. J.) The result of such a course being adopted, is to oblige the offender to answer to any indictment which may be preferred against him for the contempt, which in law amounts to a misdemeanour.

A Magistrate may himself punish the offender, and exercise the power of committal for contempt, or he may proceed less summarily by way of indictment against the offender, if he should think proper, instead of committing him. (*R.* v. *Collyer and another*, 1 Wils. 332; S. C. Say. Rep. 44; *R.* v. *Revel*, 1 Str. 420). And the death of the Justice will not work the discharge of the recognizance. (Id. 222, *R.* v. *Ellers.*)

Whether a Magistrate not holding any sittings, but in his private office, can commit for a contempt, does not appear to have been expressly decided. In *Petit* v. *Addington, Esq.*, Peakes Rep. 62, Ld. Kenyon, C. J., said he must own he had a leaning on his mind, but still he would not deliver or intimate any opinion, as he wished the question to be seriously considered and determined in Court.

But a Magistrate is not without redress, where the slander is intruded upon him when he is not acting judicially. He may have an action for such words as the law deems actionable, or he may cause the speaker to be bound over for his good behaviour. (W. Kel. 133, *R.* v. *Cotton*, S. C., 2 Bernard, 313.)

And for such slander uttered behind his back, it seems that suretyship for the good behaviour of the party may be required. (1 Ventr. 16; Holt's Ca. 331; 2 Salk. 698; 7 Mod. 29; 12 Mod. 514.)

But the Justice who has been slandered ought not to bind the party over; he should get one of his brethren to do it for him. (12 Mod. *ut suprà*, by Holt, C. J.; 1 Hawk. ch. 21, s. 13.) The Justice may bind the party over for a limited time, and his authority in this respect is very extensive: thus where a Justice

bound a party over to keep the peace for two years, the Court of King's Bench held that he did not exceed his authority, (*Willis* v. *Bridger*, 2 B. & A. 278); and according to Hawkins they have authority to bind over even for life. (1 Hawk. c. 60, s. 15.)

10. ***In what cases an indictment will lie.***—It has been shewn in the preceding paragraph, that for any insult offered to a Justice while acting judicially, an indictment can be preferred; but whether it will lie for slander spoken of a Justice behind his back, seems questionable. The better opinion is, that words spoken in the absence of a Justice are not indictable. (1 Hawk. ch. 1, s. 13.)

This matter was discussed in the following case: The defendant said of one G., a Justice of Middlesex, that he was a scoundrel and a liar. The words were charged in an indictment preferred against the defendant, as having been spoken of the prosecutor in his character of Justice, and with intent to defame him in that capacity. Lord Ellenborough interposed, and said, as the words were not spoken to the Justice, they were not indictable; and His Lordship referred to 2 Salk. 698, and *R.* v. *Pocock*, 2 Str. 1157. But as the matter was upon the record, Lord Ellenborough would not direct an acquittal, but left the facts to the Jury, who found a verdict of not guilty. (*R.* v. *Weltje*, 2 Campb. 142.)

11. ***Justices must not be in fault.***—The importance of maintaining proper respect for and decorum before Justices in the execution of their duty, should render them careful to be guilty of no outrage themselves, which may be the occasion of violence or abuse being used towards them. Thus, the Court refused to grant an information against a party for striking a Mayor in the execution of his office, it appearing that the Mayor struck the first blow. (*R.* v. *Symons*, Cas. Temp. Hardw. 240; Grady's C. P. p. 29.) But a Magistrate cannot be punished for words spoken in the execution of his office. (*R.* v. *Skinner*, Lofft. p. 55.)

12. ***Provisions of the Magistrates Acts.***—The foregoing review of authorities sufficiently establishes that Justices have ample power vested in them by law, to preserve order and maintain respect for their authority as Justices, whilst so acting.

Our statute contains no provision on the subject as relating to individual Justices; but by section 30 it is enacted, "That any "Inspector and Superintendent of Police, Police Magistrate or "Stipendiary Magistrate as aforesaid, sitting as aforesaid at any

" Police Court, or other place appointed in that behalf, shall have " such like powers and authority to preserve order in the said " Courts during the holding thereof, and by the like ways and " means as now by law are or may be exercised and used in like " cases, and for the like purposes, by any Courts of Law in this " Province, or by the Judges thereof, respectively during the sit- " tings thereof." A similar provision is contained in the 29th section of U. C. Act 16 Vict., ch. 178.

It is singular that these provisions should have been enacted with reference to Inspectors of Police, Police or Stipendiary Magistrates holding Police Courts, and not extended to Justices generally, acting in their judicial capacity. But the truth is, that no such provision is to be found in the Imperial Statute 11 and 12 Vict., ch. 43, from which our statutes are borrowed, and, in fact, may be said to have been unnecessarily introduced therein, as by the common law Justices have sufficient power, as we have seen, to maintain order, and punish offenders.

In addition to the authority of Justices, hereinbefore adverted to, it may be stated that in the case of *R.* v. *Cotton*, W. Kel. 133, S. C. 2 Barnard, 313, the Court held that the Magistrate may fine an offender for a contempt, and commit him in case of non-payment; and in *Collier* v. *Hicks and others*, 2 B. & Ad. 663, the Judges held that Magistrates had a discretion in common with other Courts of Justice, in regulating their proceedings, and power to maintain proper decorum during their sittings.

CHAPTER II.

§ I.

THE GENERAL REQUISITES OF AN INFORMATION.

1. ***What an information must contain.***—The information or complaint is the foundation of all the subsequent proceedings before the Magistrate, and must distinctly set forth: 1st, the *day* and *year* it is exhibited; 2dly, the *place* where it is exhibited; 3dly, the *name* and *style* of the Justice or Justices before whom it is exhibited; 4thly, the *name* of the informer and defendant; 5thly, the *time* when the offence was committed; 6thly, the *place* of its commission; 7thly, the statement and nature of the offence; and lastly, the conclusion.

2. ***Time when exhibited.***—The *day* and *year* of exhibiting the information must be specified, for the following reasons: 1st, that it may appear to be subsequent to the offence and prior to all the other proceedings; and 2dly, to ascertain that the prosecution is within the time limited by the statute. (*Rex* v. *Fuller*, 1 Ld. Ray. 510; *Rex* v. *Kent*, 2 Ld. Ray. 1546; Paley, 15; Deacon, 306; 1 Archbold J. P. 312; 1 Burns J. P. 731.)

3. ***Place where exhibited.***—The place where the information is laid must also be mentioned, to shew that the Magistrate at the time was acting within his jurisdiction. (Bosc. 24; Paley, 79;

Kite and Lane's case, 1 Barn. & Cr. 101; 1 Archbold J. P. 312; 1 Burns J. P. 731.)

In 2 Chitty's G. P. 161, it will be found that the author differs from others as to the necessity of these appearing in the information. Mr. Chitty thinks that it is not necessary they should appear by the information, but simply by the conviction. He gives, however, no authority in support of his opinion, which would appear irreconcilable with other portions of his work. For instance, at page 156 of the same work, Mr. Chitty says: "Before we consider the parts and requisites, it is a good general "rule that an information should be framed with as much care "as an indictment or declaration, and the rules affecting them "should be cautiously consulted and adhered to." A form of information is then given at the bottom of that page, in which the time and year, as well as the place of exhibiting the information, are expressly set forth.

On this point, instead of being guided by the opinion of Mr. Chitty, it would be safer to follow the authorities referred to, and to state the day and year, and place of exhibiting the information, sanctioned as it has been by a long course of precedents, and settled as well by ancient as by modern decisions. (*Rex* v. *Picton*, 2 East, 196; *Rex* v. *Chandler*, 14 East, 272; *Rex* v. *Peerless*, 1 Q. B. 143.)

4. *Name and style of Justice before whom laid.*—The *name* and *style* of the Magistrate before whom it is laid must be set forth, so that it may appear that he is a Magistrate of the district, or residing in the county or place where the offence is stated to have been committed, in order that his jurisdiction may be shewn. (*R.* v. *Johnson*, 1 Str. 261.) This is the more necessary where, under the terms of the statute, the jurisdiction is limited to the "next" or "nearest" Justice, or the Justice "residing in the county" or "municipality," as unless the Justice be so described, according to the circumstances of each case, his jurisdiction would not be made apparent. (*Sanders' case*, 1 Saunders, 263; 2 Salk. 471; *Reg* v. *Martin*, 2 Q. B. 1037; *Reg* v. *Monck*, 4 New Sess. Ca. 585; *Reg* v. *The Justices of Hertfordshire*, 1 New Mag. Ca. 256.)

5. *Name of informer.*—The name of the informer should be stated, in order that the defendant may know who is his accuser. This is indispensable where any part of the penalty is awarded to

the informer, in order that the conviction may appear to be founded upon other evidence than that of the informer, who, as a general rule, is in such a case an incompetent witness. (2 Ld. Ray. 1545; Paley, 80.)

6. *Name of defendant.*—The defendant's name must be stated; and in cases of informations against partners, the rule laid down in a subsequent part of this work must be attended to. It seems that no addition of place or degree need be made to the defendant's name. (Saunders on Con. p. 15; *Rex* v. *Barnaby*, 2 Ld. Ray. 900; 1 Salk. 181.)

7. *Date of offence.*—The *time* of the commission of the act complained of should be stated, in order that it may appear that the information has been laid in due time; also for the protection of the defendant against another charge in respect of the same matter. As all the authors agree in stating that the information is the substratum of the Magistrate's jurisdiction and in the nature of an indictment, a formal charge cannot be made, unless the time of the commission of the offence be stated. The legality of the charge depends upon its being shewn that the offence is prosecuted within the time limited by the statute, which could only be made apparent, by an express averment as to the time of its commission. (*R.* v. *Catheral*, 2 Str. 900; 14 East, 272, *R.* v. *Pullen*, 1 Salk. 369; Deacon, 307; 1 Ld. Ray. 509; 2 Chitty C. P. 162; Saunders on Con. 15; *R.* v. *Woodcock*, 7 East, 146; *Cathcart* v. *Hardy*, 2 M. & S. 534.)

8. *Mode of stating date of offence.*—As to the mode of stating the *time* when the offence was committed, it may be necessary here to make some observations. It will be found, upon reference to authorities, that it was not considered essential to name a precise day, but that the allegation might be that the offence was committed between two named days. In 2 Chitty C. P. 163, it is stated: "As that mode of stating an offence is allowed "in informations, it may be advisable, when the exact day is "doubtful, to allege that it was committed on a certain day, "without naming it, between the ——— day of ——— and "the ——— day of ———, taking care to state days sufficiently distant from each other to include the real day;" and reference is made to the following authorities: "*R.* v. *Chandler*, "1 Salk. 378; *R.* v. *Speed*, 1 Ld. Ray. 583; *R.* v. *Simpson*, "Gilb. 282; Bunb. 223; id. 232." But on reference to these

authorities, and to Paley, pp. 83, 84 and 85, where the purport of them are shewn, it will be found that these decisions proceeded upon the ground that in *trespass* a fact may be laid *diversis diebus et vicibus inter* such a day and such a day, because it is not a new action, but an increase of damages, but admitting that it would be otherwise if it were an information at common law, as every distinct offence creates a penalty. Mr. Paley, at p. 85, says: "Notwithstanding, however, that these convictions" (referring to the same cases relied on by Mr. Chitty) "were supported, it is "more regular to fix the charge to a certain day, where it can be "done." Of the same opinion is Deacon, vo. *Conviction*, p. 308.

Another reason which can be assigned for not adopting this mode of declaring the time of the committing the offence, which is a departure from the rule which obtains in indictments, is, that in England, until the passing of the 11 and 12 Vict., ch. 43, it was allowable to charge several offences in one information, committed on several days, and the information was held valid for such offences as were well laid and proved, although it might fail as to any defective or unproved count. (*R.* v. *Swallow*, 8 T. R. 284; 1 Saund. Rep.; 2 Hawk., ch. 26 and 19; 2 Chitty C. P. 169.) But by the Imperial Statute above referred to, and by the 9th section of our Provincial Statutes 14 and 15 Vict., ch. 95, and 16 Vict., ch. 178, the joinder of several offences in one information is no longer permitted, and it may therefore be considered at the present day a safe rule to hold that a precise day must be alleged in the information, although exactness in the proof of it need not be required, either under the law as it stood formerly, or under the provisions of the 8th section of the Magistrates Acts. (*R.* v. *Crisp*, 7 East, 389; *R.* v. *Huggins*, 3 C. & P. 602; *R.* v. *Simpson*, 10 Mod. 248.)

9. ***How affected by the Magistrates Acts.***—As the law now allows but one offence to be charged in the information, a rule which was sanctioned when the law admitted of several offences being charged and proved, as to the mode of stating the time, cannot be a good rule now. It is evident that the intention of the Legislature, in enacting that but one offence should be charged, was to prohibit the departure which sometimes had obtained in practice, of alleging several offences within given dates; and as but one offence can now be alleged, a time certain must be stated.

10. ***Place where offence was committed.***—The *place* where

the offence was committed must also be stated in the information, as this is necessary to shew that the offence is one over which the Magistrate's jurisdiction extends. In some of the reported cases the general proposition alone is established, that the fact which forms the subject of the conviction must appear to have arisen at some place within the jurisdiction of the convicting Magistrate, which might leave room to doubt whether the *place* should appear in the information as well as in the conviction. On this point Paley, p. 85, says: "But it has been so repeatedly held that the "information must form a complete foundation for the judgment, "and that the evidence cannot extend or supply a defective charge, "it may here be proposed as a safe rule that the locality of the "offence is to be considered a necessary part of the information." (*R.* v. *Edwards*, 1 East, 276; see also *Rex* v. *Hazell*, 13 East, 139; *Kite and Lane's case*, 1 B. & C. 101; *R.* v. *Highmore*, 2 Ld. Ray. 1220; *Clark* v. *Taylor*, 3 Esp. R. 215.)

The rule laid down by Paley may be considered indispensable in all cases where locality is the foundation of the jurisdiction, as for instance, where the statute directs that the offence shall be prosecuted before the "next" or "nearest" Justice, or the Justice "residing in the municipality" or "place" where the act complained of was committed. It will, on reflection, be found that unless the locality be alleged in the information, the jurisdiction of the Justice would not appear, and he could not safely act upon an information wanting in this particular. (*R.* v. *Chandler*, 14 East, 267.)

So also, if a particular parish or locality be an ingredient of the offence, it must be accurately described in the information, more particularly when the penalty, or any part of it, is directed to be paid to the poor of the parish, or to a particular municipality. (*Deybell's case*, 4 B. & Ald. 243, 247; *Reg* v. *Fletcher*, 13 L. J. M. C. 16; *Clark* v. *Taylor*, 3 Esp. R. 215.)

11. *Omission of statement of place not cured.*—The statement of the venue or place in the margin, will not supply the want of statement in the body of the information of the place at which the offence was committed, the insertion of it in the margin being only to shew the locality where the information was taken; and this even in cases where a form is given which does not require the statement of place. (*R.* v. *Austin*, 8 Mod. 309; 2 Ld. Ray. 1220; *R.* v. *Hazell*, 13 East, 136; 2 Chitty G. P. 164; Saunders on Con. 16; 1 Paley, 86; 1 Deacon, 308.)

CHAPTER II.

§ II.

THE STATEMENT OF THE OFFENCE.

1. ***Same precision required as in an indictment.***—The statement of the offence is that to which the attention of the prosecutor should be more particularly directed, and requires on his part that he, before laying his information, and the Justice, before he acts upon it, should carefully examine the various provisions of the statute upon which the proceedings are had, as the mode of stating the offence must necessarily vary according to its nature, and the terms and expressions used by the Legislature in creating it.

The following rules, however, apply and must be observed:

In the statement of the offence the same precision and certainty is required as in an indictment; and the information must give an *exact* and *legal* description of the offence, in order that the defendant may be enabled to rebut it, and to defend himself against a second accusation. (Bosc. 25; *Ex-parte Pain*, 5 B. & C. 251; *Re Elmy and Sawyer*, 1 Ad. & Ell. 843; *R.* v. *Marsh*, 4 D. & R. 267, per Bailey, J.)

2. *Legal description of the offence.*—The description of the offence would be neither *exact* nor *legal*, unless it contains in express terms every ingredient required by the statute. Thus if the act rendered punishable is qualified by the use of the words "unlawfully," "knowingly," "fraudulently" or "designedly," or such other words in the statute as constitute the *guilty knowledge* or the *intention*, the gist of the offence, then nothing short of a direct averment that the act was so committed will suffice. (*R.* v. *Jukes*, 8 T. R. 536; *R.* v. *Marsh*, 2 B. & C. 717; *Chaney* v. *Payne*, 2 Q. B. 712; *R.* v. *Llewellyn*, 1 Show.; *Ex-parte Hawkins*, 2 B. & C. 31; *R.* v. *Ridgway*, 5 B. & Ald. 527; *R.* v. *Denman*, 1 Chit. Rep. 152; *R.* v. *Fuller*, 1 Ld. Ray. 509; *R.* v. *Trelawney*, 1 T. R. 222; *Rex* v. *Bradley*, 10 Mod. 155; *R.* v. *Pareira*, 2 Ad. & Ell. 375; *Ex-parte Smith*, 3 D. & R. 464; *Charter* v. *Greame and another*, 18 L. J. Rep. 73; 13 Q. B. 216; *Ex-parte Askew*, 15 J. P. 485.)

3. *Examples of the rule.*—To render this more intelligible to the non-professional reader, the giving of a few examples might not be amiss. Thus the Assault and Battery Act, 4 and 5 Vict., ch. 27, s. 27, provides, "That where any person shall *unlawfully* "assault or beat any other person, it shall be lawful for any Jus- "tice of the Peace, &c., &c." The assault or the beating must be an *unlawful* assault or beating to constitute an offence, and must be so charged in the information, for the assaulting or beating of another is not always necessarily an offence, as the assault may be a justifiable one. Two convictions for assault were quashed by the Superior Court at Montreal on the 22nd May, 1855, in Nos. 969 and 975, *Ex-parte Andrew Holden*, on that ground simply, the word "unlawfully" had been omitted.

The attention of Justices in Upper Canada in particular is drawn to this point, as in Mr. Keele's last edition (1851) of his Provincial Justice, at pp. 62 and 63, a form of information under oath is given, wherein this important omission occurs. That form was adapted, when the first edition of his work issued, to the law then in force in Upper Canada, 4 Wm. IV., ch. 4, s. 1, which enacted, "That if any person shall assault or beat any other "person, it shall be lawful for any Justice, upon complaint of the "party aggrieved, to hear and determine such offence, &c." The word "unlawfully," to be found in the 4 and 5 Vict., ch. 27, is not there used; but the Act of Wm. IV. is superseded by the latter

statute, and Mr. Keele, accidentally it is presumed, has omitted to alter the form, and to make it correspond with the description of the offence in the statute, to be found at p. 60 of his work.

The use of the word "violently" will not supply the omission of the word "unlawfully," which is as essential to constitute a legal charge as the words "knowingly" or "feloniously" when used in a statute creating an offence.

Indeed, in England this doctrine has been carried much further, and it has been held that even in cases where no qualifying words are used in the statute, if the offence be one admitting of some excuse, the want of it must be expressly alleged to constitute a *legal* charge. Thus, where a conviction under the Act of Geo. IV., ch. 34, was rendered against a servant for absenting himself from his master's service, the Court decided that there should have been an allegation in the information and subsequent proceedings, that the absence complained of was without leave and lawful excuse, though the statute contained no such qualification, and made the servant liable for merely absenting himself. (In *Re Turner*, 15 Law J. (N. S.) M. C. 140.) And in another case the conviction stated that the defendant did "misdemean and misconduct himself in his said service, by absenting himself without *assigning* any sufficient reason," still it was considered insufficient, upon the ground that the accused might have had sufficient reason or excuse, although he "assigned" none. (*Ex-parte Geswood*, 22 Law & Eq. Rep. (Am. Ed.) 254.)

Another rule is that when the words of the statute are general, or where the act is constituted an offence, under certain circumstances mentioned in the statute, it is necessary to specify the particular facts and the circumstances under which the commission of the act is constituted an offence. (*R.* v. *Jarvis*, 1 East, 643; *R.* v. *Nield*, 6 East, 417; *R.* v. *Ridgway*, 5 B. & Ald. 527; *R.* v. *James*, Cald. 458; *R.* v. *Mallison*, 2 Burr. 679; *R.* v. *Speed*, 1 Ld. Ray. 583; *R.* v. *Daman*, 2 B. & Ald. 379.)

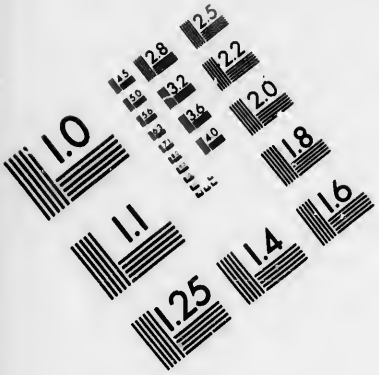
4. *Facts must be stated.*—And the facts must be stated in a direct and positive manner, and they must not be gathered from inference, or by mere statement of evidence. (*Rex* v. *Bradley*, 10 Mod. 155; *Rex* v. *Fuller*, 1 Ld. Ray. 509; *Rex* v. *Pareira*, 2 Ad. & Ell. 375; *Ex-parte Smith*, 3 D. & Ry. 464; *R.* v. *Marriatt*, 1 Str. 66.)

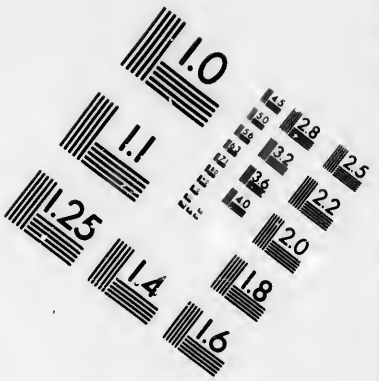
5. *Illustration of the rule.*—In illustration of this rule we will notice the case of *R.* v. *Mallison*, 2 Burr. 679, above referred to. This was a conviction upon the 22 and 23 C. II., ch. 25, s. 7, which inflicts a penalty on any one who "shall take any fish in any river, stew, pond, moat, or other waters, without the license or consent of the owner of the water." The conviction stated, in the information, that the defendant not having any lands, &c., &c., nor in any wise whatsoever *empowered, authorized or qualified*, by the laws of the realm, to take, kill or destroy, any sort of fish, fowl, or other game whatsoever, either for himself or for any other person, did, with a certain net, take and kill ten fish, contrary to the form of the statute. Several objections were taken to the conviction, but that upon which it was quashed was the omission to allege that the defendant "had not the license or consent of the owner." Lord Mansfield said: "This conviction is clearly bad. "The offence provided for by the act is stealing fish,—taking it "without the license or consent of the owner. *Taking* and killing, "in the intention of this statute, means *stealing*. But this man is "not convicted of any offence, for he is not charged with stealing, "nor even with taking and killing, the fish of another person, in "another person's pond."

Referring to some of our Provincial Statutes, the same principle will be found to apply with equal force. Take for instance the Agricultural Act, 13 and 14 Vict., ch. 40, under which prosecutions frequently occur in Lower Canada. The 2nd section enacts that "no person shall enter into or pass through any field, whether it be sown or unsown, nor along the banks of any river or rivulet, nor into nor through any garden, coppice, or other property whatsoever, *without the permission of the proprietor or other person duly authorized by him to grant such permission*, under a penalty, &c." Nearly the same words are used in the 3rd section with reference to the offences thereby created, viz: "without leave of the proprietor or his representative." The information in such cases must expressly aver that the act complained of was committed "without the permission of the prosecutor (if the proprietor) or other person duly authorized by him to grant such permission," for without these words qualifying the act no legal offence would be shewn, and the information should be dismissed, or the conviction, if there be one, quashed.

6. ***Description must be as full as that used in the statute.*** —So also the description of the offence must at least be as particular as that used by the statute, and in many cases it must be even more so; for where an act, in describing the offence, makes use of general terms which embrace a variety of circumstances, it is not enough to follow in a conviction the words of the statute, but it is necessary to state what particular fact prohibited has been committed. This rule was fully explained by the Judges in quashing the conviction in the case of *R.* v. *James*, Cald. 458. Willis, J., said: "In summary convictions the *charge* must be precisely set out. This charge is general, and does not point out "that against which the party is to defend himself. *The evidence "cannot go further than the charge.* You should have alleged the "fact in the information in the same manner as you have in the "evidence. As to the defendant's not coming in upon the summons, he was not obliged to do it; the charge was too indefinite "to call upon him to answer it." "It is not true," Mr. J. Buller said, "that in framing a conviction it is sufficient to follow the "words of the statute in all cases. In some, indeed, it may, as "where the statute gives a *particular description of the offence;* "but it is otherwise where a particular offence is included *under "a general description.* Where a particular act constitutes the "offence, it may be enough to describe it in the words of the "Legislature; but where the Legislature speaks *in general terms,* "the conviction must state *what act* in particular was done by the "party offending, to enable him to meet the charge." (See also *R.* v. *Jervis*, 1 East, 643; *R.* v. *Nield*, 6 East, 417; *R.* v. *Ridgway*, 5 B. & Ald. 527; 1 D. & R. 123; *R.* v. *James*, Cald. 458; *R.* v. *Daman*, 2 B. & Ald. 379; *Fletcher* v. *Calthrop and Tharp*, 14 L. J. Rep. 49; 6 Q. B. 880; and in *Re Fletcher*, 13 Law J. M. C. 16.)

7. ***Not sufficient to state the legal result of facts.***—Another rule is, that in describing an offence the information should not merely state the legal result of facts, but *the facts themselves*, so that the Court may be in a position to judge whether an offence was committed or not. Thus, where the offence charged was that the defendant did swear fifty-four oaths, and profanely curse one hundred and sixty curses, the conviction was set aside, the oaths and curses not having been set forth; the Court saying, "What is a profane oath or curse is a matter of law, and ought not to be





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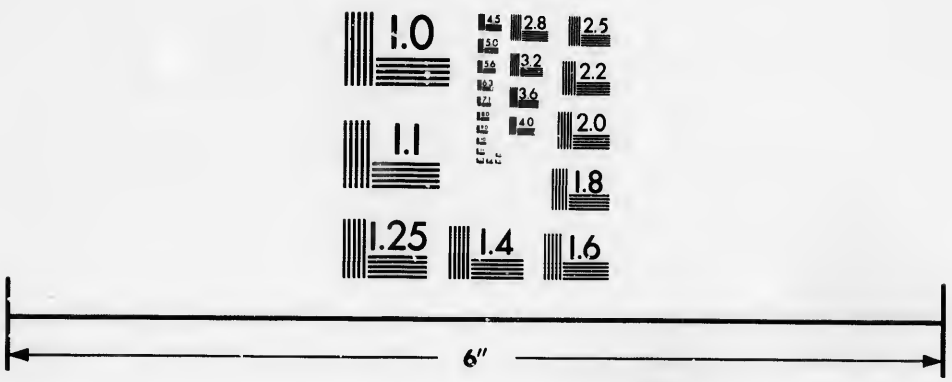

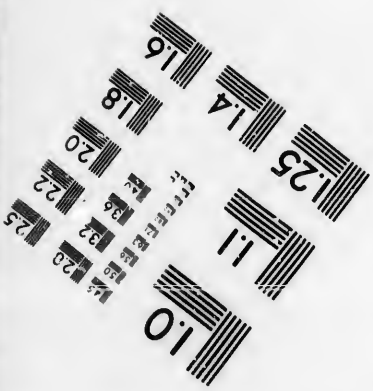

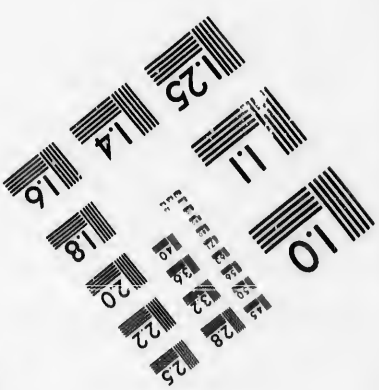

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left to the judgment of the witness." Also a conviction for robbing an orchard, which merely stated that the defendant *did rob a certain orchard* of the prosecutor, was held insufficient, because it ought to have stated of *what* and *how* the orchard was robbed, that the Court might judge whether it were a *robbery* within the meaning of the Act. (*R.* v. *Sparling*, 1 Str. 497; *R.* v. *Daman*, 1 Chit. 147; *Moult* v. *Jennings*, Cowp. 642; *R.* v. *Roberts*, 1 Str. 603; *R.* v. *Chapman*, 1 East, 647; 1 Burr. 118; and the recent case of *Reg* v. *Rowed*, 3 Q. B. 180.)

The information must also be positive, and not by way of *recital*, nor be *argumentative*. (*R.* v. *Bradley*, 10 Mod. 155; 2 Str. 900; 2 Ld. Ray. 1363; 1 Salk. 379.)

8. ***Charge must not be in the alternative.***—The charge or statement of the offence must not be in the *alternative*, as for instance that the defendant killed *or* attempted to kill,—that the defendant sold beer *or* ale. This is an incurable defect, as will be seen by the following cases. In *R.* v. *North*, 6 Dow. & Ry. 144, the information charged the defendant with having sold beer *or* ale without a license; the evidence clearly established the sale by the defendant of ale only. The conviction was removed by certiorari, and it was attempted to be shewn that as the conviction was sustained by the positive testimony of the selling of ale, and as the defendant had not objected to the information, the Court should sustain it. The conviction was, however, quashed, Bailey, J., observing:

"It does not appear to me that this is a mere formal objection; I think "it is matter of substance. The information must contain a specific charge, "without ambiguity, in order that the defendant may know what he has to "answer. Here the substantial charge, as stated in the information, is that "the defendant committed either one offence or another; i. e., that he has "sold beer *or* ale without a license. The evidence upon which the Magis-"trates convict applies to selling ale alone. Now I know of no case in "which it has been held that if the charge in the information is informally "made for being in the alternative, it can be made good by the evidence. "There are many cases in which the Court has quashed a conviction because "the information has been uncertain, although the evidence has been suffi-"ciently explicit. This defendant is called upon to answer an alternative "charge, which cannot, I think, be made certain by the evidence."

In another case, *R.* v. *Pain*, 7 Dow. & Ry. 683, the same objection was urged, and in the argument it was admitted that the alternative charge would have been bad in an indictment, but it

was contended that the rules applicable to indictments did not apply. Abbott, C. J., in quashing the conviction, said: "I know "of no authority which says that a conviction must not have as "much certainty as an indictment."

In like manner the Superior Court at Montreal, on the 2nd Dec., 1852, in *Ex-parte Hogue and Belhumeur*, (3 L. C. Rep. 94), adopted this principle. The informations were for having sold ale *or* beer, brandy, rum, whiskey, *or* other spirituous liquors; and notwithstanding the defendants were convicted on their own confession, and had paid the penalty, the Superior Court quashed the convictions.

9. ***English decisions on the subject.***—It has been constantly held in England, that an alternative charge is an incurable defect. (*R.* v. *Middlehurst*, 1 Burr. 399; *R.* v. *Stocken*, 1 Salk. 342, 371; *R.* v. *Morley*, 1 You. & Jer. 22; *R.* v. *Marshall*, 1 Mo. C. C. 158; *R.* v. *Pain*, 5 B. & Cres. 251, 7 Dow. & Ry. 678; *R.* v. *North*, 6 Dow. & Ry. 144; *R.* v. *Crowhurst*, 2 Ld. Ray. 1363; *R.* v. *Saddler*, 2 Chit. R. 519; 2 Hawk., ch. 25, s. 58.)

10. ***Certainty in statement of sums or quantities.***—It is necessary also, for *certainty* in the charge contained in the information, where the question turns upon sums or quantities, that they be expressly averred, although the proof need not be as precise as the sums or quantities laid in the information. (*R.* v. *Catherall*, 2 Str. 900; *R.* v. *Marshall*, 2 Keb. 594; *R.* v. *Gibbs*, 1 Str. 497; *Reg* v. *Burnaby*, 2 Ld. Ray. 900; 1 Salk. 181.)

11. ***Application of the rule.***—As the rule last averted to may frequently arise under our Provincial Statutes 4 and 5 Vict., ch. 26, known as the Malicious Injuries Act, and the 13 and 14 Vict., ch. 40, the Agricultural Act, it may not be amiss to shew the application of this rule to those statutes, by adverting more particularly to the case of *Reg* v. *Burnaby*, above cited, and explaining the nature of that case. This was a conviction upon the statute 43 Eliz., ch. 7, s. 1, against robbing of orchards, cutting of trees, &c. It set forth the complaint of R. B. that the defendant cut down *divers* trees of the said R. B.; upon which he was convicted, and condemned to pay so much as damages to the complainant. Exception was taken to the uncertainty of the conviction in not mentioning *the number* of the trees, which it was insisted should have been done, as a measure for the Justice to give damages by.

Holt, C. J., said:

"The nature and number of things ought to be mentioned, and much "more in a conviction where all imaginable certainty is requisite, the "subject, by this private jurisdiction, exercised by the Justice in a summary "way, being deprived of the privilege and benefit of the common law, and "of being tried in the face of the country by the judgment of his peers. "Besides the same rule that holds in trespasses holds here, viz: the ascer- "taining the damage which by the statute the Justice is to assess, and this "conviction may be pleaded in bar of an action of trespass, for the same "trespass."

For this reason the Court were unanimous in quashing the conviction.

The next requisite to a valid information is the *negative averment* as to any exemption, excuse or qualification, which accompanies the description of the offence. From the importance of this matter it will be treated of separately in the following section.

CHAPTER II.

§ II.

OF NEGATIVE AVERMENTS IN INFORMATIONS.

1. *Meaning of the term negative averment.*
2. *General rule respecting it.*
3. *As to exceptions in distinct sections, or statutes.*
4. *Must be special, and not general.*
5. *Must apply to time stated.*
6. *Consequence of omitting it.*
7. *When not necessary to be alleged.*
8. *Whether when alleged it must be proved.*
9. *Statute Law of England on the subject.*
10. *Statute Law of Lower and Upper Canada.*
11. *Observations.*

1. *Meaning of the term negative averment.*—The meaning of the term negative averment, and the necessity of its being used in informations, will the more readily be understoood by reminding the reader that many statutes, in creating an offence, contain an exemption or excuse in certain cases, either in favor of parties of a particular class, or persons under certain circumstances. These circumstances of *exemption* or *excuse*, in general, apply either to the *offence* or to the *person*. As, for instance, where an act is made punishable if committed by a person not possessing a certain *qualification*, as was in England the offence of killing game by a person not possessing an estate of a certain value, or the offence, under our statute, of selling liquor without the license required by the provisions of the Act; or where the exemption or excuse applies to the circumstances under which the act complained of was committed, as where a party, against the 13 and 14 Vict., ch. 40, s. 2, "without the permission of the proprietors or other person duly authorized by him to grant such permission," enters into any field, garden, &c.; or where the party complained of, under the 4 and 5 Vict., ch. 26, s. 24, commits

any damage or injury, &c., "not having a fair and reasonable supposition that he had a right to do the act complained of," and which exemption is contained in a proviso to that section of the statute. It is here necessary to shew:—1st, the general rule on this subject, and to distinguish between cases where the negative averment must be made in the information, and where it is merely matter of defence to be urged by the Defendant; and 2ndly, whether the informer is bound to prove it in cases where he may be bound to allege it.

2. *General rule respecting it.*—The general rule as to negative averments is this, that all circumstances of exemption and modification, whether applying to the *offence* or to the *person* originally introduced or incorporated by reference with the enacting clause, must be distinctly enumerated and negatived; but such matters of excuse as are given by other distinct clauses or provisoes need not be specifically set out or negatived. (*R.* v. *Jarvis*, 1 Burr 140, 2 Hawk, ch. 25, s. 113; 1 Paley, 114; *R.* v. *Jukes*, 8 T. R. 542; *Spires* v. *Parker*, 1 T. R. 141; *Gill* v. *Simson*, 7 T. R. 27, 1 Deacon, 312; *Steel* v. *Smith*, 1 B. & Ald. 94.)

3. *As to exceptions in distinct sections, or statutes.*—Although the *exceptions* be in a *distinct* section, or in *another* Act of Parliament, they must be specially set out and negatived, if referred to and ingrafted into the enacting clause. (*R.* v. *Pratten*, 6 T. R. 559; *Reg* v. *Matthews*, 10 Mod. 27; *R.* v. *Jarvis*, 1 Burr. 148; 1 East, 643; *R.* v. *Wheatman*, Doug. 232; *R.* v. *Silcot*, 3 Mod. 281; *R.* v. *Theed*, 1 Ld. Ray. 1375.)

In the case of *R.* v. *Pratten* this rule is exemplified. The 5th sect. of 1 J. I., ch. 22, enacted that no person should carry on the trade of a tanner, except under certain qualifications therein mentioned; the 7th sect. enacted that no person should buy or contract for any rough hides, &c., but such persons *as by virtue of that Act* might lawfully use the trade of a tanner. The conviction was upon the latter section, stating in the words of it that the defendant was not such person *as by virtue of that Act* might lawfully use the trade of a tanner, but it was held insufficient for not particularly negativing his being within any of the enumerated exemptions mentioned in the fifth section.

And where the case would admit of some excuse, for want of which there would be no *legal* offence, as in a case of a servant

proceeded against, under the Imperial Act Geo. IV., ch. 34, for absenting himself from his master's service, there must be an allegation, in the information and subsequent proceedings, that the absence complained of was without leave and lawful excuse, though the statute contained no such qualification, but made the servant liable for merely absenting himself. (In *Re Turner*, 15 Law J. (N. S.) M. C. 140. See also *Ex-parte Geswood*, 22 Law & Eq. Rep. (Am. Ed.) 254.)

4. ***Must be special and not general.***—Another rule to be adverted to is that the negative averment must be special, and not made in general terms, as that the defendant "being a person not qualified by law so to do, &c." (*R.* v. *Marriott*, 1 Str. 66; *R.* v. *Hill*, 2 Ld. Ray. 1415; *R.* v. *Jarvis*, 1 Burr. 148; 1 East, 643 note; 1 Deacon, 313; 1 Paley, 116. 1 T. R. 144.)

5. ***Must apply to time stated.***—The negative averment must also be so made as to apply to the alleged time of the commission of the offence. (*R.* v. *Silcot*, 3 Mod. 281; *R.* v. *Hill*, 2 Ld. Ray. 1415; 1 Paley, 119.)

6. ***Consequence of omitting it.***—The negative averment has been considered so essential a part of the information, that the omission of it, when necessary, has always been considered fatal, and a substantial defect, not even aided by a clause in the statute declaring that no conviction should be vacated or set aside for want of form, nor by the allegation of the thing being done *contrary to the form of the statute*, for these words are no more than the conclusion of law, which must be warranted by sufficient premises. (*R.* v. *Jukes*, 8 T. R. 542; 4 Burr. 2279; 1 Burr. 679; 1 Burr. 154, 155; 3 Mod. 280; 6 East, 417.)

Lord Mansfield, in *R.* v. *Jarvis*, 1 Burr. 148, and 1 East, 643, said: "It is now settled by the uniform course of authorities, that the qualifications must be all negatively set out, otherwise the Justices have no jurisdiction."

7. ***When not necessary to be alleged.***—But where the exemption is not contained in or incorporated with the enacting clause by which the offence is created, but is the subject of a distinct proviso, then it is not necessary to notice it in the information, it being matter of defence. (*R.* v. *Jukes*, 8 T. R. 542; *Ex-parte Smith*, 3 D & R. 461; 1 Paley, 161.)

Paley, at pp. 123, 124, gives the following illustrations of this rule: In a conviction on 3 C. II., c. 3, s. 2, for keeping an ale-

house without a license, it was objected that the Act contains a proviso (s. 5) exempting persons who had been punished by the former law, of 5 and 6 Ed. VI., ch. 25; and therefore that the fact of the defendant not having been proceeded against under that Act should have been averred; but the objection was overruled, it being matter of defence only. Also, a conviction on 9 Geo. II., ch. 23, s. 1, for retailing gin without a license, was held to be good, without an averment that it was not sold to be used in medicine, which is allowed by the distinct provision of sect. 12. (*R.* v. *Ford*, 1 Str. 555; *R.* v. *Bryan*, 2 Str. 1101.)

8. ***Whether when alleged, it must be proved.***—Whether the prosecutor be bound to adduce evidence, either *special* or *general*, to sustain the negative averment in the information, was for a long time an unsettled point in England, as will appear on reference to the cases here noted, in some of which the Judges were equally divided in opinion, as in that of *R.* v. *Stone*, where Mr. J. Lawrence and Mr. LeBlanc, against the opinion of Lord Kenyon and Mr. J. Grose, held that it was sufficient, if the allegation be made in the information, to throw the burthen of proof on the defendant. (See *R.* v. *Stone*, 1 East, 653; *R.* v. *Marriott*, 1 Str. 66; 1 Burr. 148; *R.* v. *Crowther*, 1 T. R. 125; *R.* v. *Hartley*, Cald. 175; *R.* v. *Thompson*, 2 T. R. 18; *R.* v. *Davis*, 6 T. R. 177; *R.* v. *Clarke*, 8 T. R. 220.)

But it was decided at a later period, that it was sufficient if the *information* and *adjudication* negatived the qualification, without this being done in the evidence. (*R.* v. *Turner*, 5 M. & S. 206.)

9. ***Statute Law of England on the subject.***—In England recent legislation has set that question at rest, as the statute 11 and 12 Vict., ch. 43, s. 14, states, "that if the information or complaint in any such case shall negative any exemption, exception, proviso, or condition in the statute, on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same."

10. ***Statute Law of Upper and Lower Canada.***—A similar provision is contained in our Magistrates Acts 14 and 15 Vict., ch. 95, and 16 Vict., ch. 178, by a proviso to the 13th section, which declares, in precisely the same terms as the Imperial Statute

above recited, that the negative allegation need not be proved, but that the defendant must prove the affirmative on his defence.

11. *Observations.*—It is therefore a point clearly established, that the negative averment, when necessary, must be specially set forth in the information, although the prosecutor be not bound to prove it; and this results from the above provision of our statutes, notwithstanding that they contain a clause to the effect that no conviction should be set aside for any defect of substance or form, the negative averment, as already shewn, being necessary to vest jurisdiction in the Justice.

CHAPTER II.

§ IV.

OF OTHER AVERMENTS IN AN INFORMATION.

1. *Reciting statutes.*
2. *Misreciting.*
3. *Proper mode of reciting.*
4. *Necessary to conclude against statute.*
5. *Reason of the rule.*
6. *Rules to be applied.*
7. *Consequence of omission.*
8. *Distinction in cases of felony and misdemeanour.*
9. *Conclusion against statutes.*
10. *Rule on the subject.*
11. *In case of doubt, how to conclude.*
12. *Prayer of information.*

1. ***Reciting statutes.***—It is not necessary in an information to recite the statute on which it is founded; for, if a Public Act the Judges are bound to take notice of it, but if set out, and it be misrecited, it is fatal. (Esp. P. Sta. 104.)

By 1 Wm. IV., ch. 1, s. 2, (U. C.), Acts whether public or private must be taken notice of *judicially.*

2. ***Misreciting.***—The importance of correctly reciting the statute, where that course is adopted, is clearly shewn by the following cases, in which it was held incorrect to describe a statute as passed in more years than one of the Sovereign's reign, as "in the second and third year of the reign," &c., and this notwithstanding such statute may be so recited in subsequent Acts of Parliament, as an Act of Parliament cannot in fact be passed in two years of the reign. (*Rex* v. *Biers*, 1 Ad. & Ell. 327; Hawk. P. C. 62, ch. 25, s. 104; *Nutt* v. *Stedman*, Fortescue's Rep. 372; *Beak* v. *Beverley*, 11 M. & W. 846.)

3. *Proper mode of reciting.*—The proper way to describe such a statute is to say "passed in the Session of Parliament holden in the second and third years," &c., or state at once the year in which it was passed.

4. *Necessary to conclude against statute.*—Although the prosecutor is not required to set out the statute on which he sues for a penalty, still it must appear from the information that he is proceeding under the statute; thus it must be alleged in the information that the act complained of was done "contrary to the form of the statute in such case made and provided." This rule is laid down by Lord Ellenborough, 2 East, 339, who, in delivering his opinion, expressly says that, in an *action* for a statute penalty by a common informer, as well as in proceedings by *indictment* or *information, it has been invariably holden that the fact must be alleged to be done against the form of the statute.* (2 Chit. G. P. 168; Esp. P. Sta. 107.)

5. *Reason of the rule.*—This rule arises from the nature of the demand, which has no foundation in personal injury, or in any right given to the party by common law, but is the creation of the statute. Therefore, where an information is for an *act* or *omission* that did not constitute an offence at common law, after stating the commission or omission, the information should aver that the offence was committed *contrary to the form of the statute in such case made and provided.*

6. *Rules to be applied.*—The rules affecting indictments declarations in this respect apply to informations, and must be consulted. (1 Chit. Crim. L. 290, Indictments; 1 Chit. on Pleading, 5th Edit. 405 to 407.)

7. *Consequence of omission.*—The omission of these words has been held fatal even after verdict, and not even aided by the use of these other words, "whereby and by force of the statute in such case made and provided an action hath accrued," &c. (*Lee* v. *Clarke*, 2 East, 333, 338; 3 B. & C. 186.)

8. *Distinction in cases of felony and misdemeanour.*—Although in an *indictment* or *information* for a *felony* or *misdemeanour*, the omission is now aided, after verdict or outlawry, or confession or default, by 4 and 5 Vict., ch. 24, s. 46, yet that Act does not extend to *offences* punishable by summary proceedings before Justices. It has been so held in England with reference to

a similar provision in the 7 Geo. IV., ch. 64, s. 20. (*Davies* v. *Bint*, 3 B. & C. 586; 2 Chit. G. P. 168.)

9. ***Conclusion against statutes.***—It is sometimes necessary to conclude "against the form of the statutes," &c., in the plural, as where the right of action arises under more statutes than one. It was, in the case of *Lee* v. *Clarke*, 2 East, 339, held that if a statute prohibits a thing, and another statute gives a penalty, then the information should conclude "contrary to the form of the statutes;" but where the statute is only revived, it is otherwise.

10. ***Rule on the subject.***—The rule to be observed with reference to this matter is, that where a penalty is given by several statutes, or where the penalty is given by one statute, and the remedy or mode of recovery is given by another, the conclusion should be in the plural "contrary to the form of the statutes." &c.; but where there are several statutes *in pari materia*, that is, on the same subject, and a subsequent case refers to a former one, and adopts and continues the provisions of it, the conclusion should be against the form of the *statute*. (East P. Sta. 114.)

11. ***In case of doubt, how to conclude.***—The safer course in case of doubt is to use the word *statutes* (in the plural,) which, as Mr. Chitty says, can never prejudice. (2 Chit. G. P. 169; Cowp. 683; 5 T. R. 162; 2 Leach, 585.)

12. ***Prayer of information.***—Having shewn what is necessary to a valid information, it only remains to be noticed, that informations, after alleging the offence to have been committed "contrary to the form of the statute," usually conclude "whereby and by force of the statute," &c., the offender hath forfeited and become liable to pay a named penalty or damages, according to the particular statute; and then praying that the party may be summoned, or that a warrant do issue for his apprehension, according to circumstances, to answer the premises.

CHAPTER II.

§ V.

ON AMENDMENTS, DEFECTS CURED OR WAIVED, AND VARIANCES.

1. *Statutes of Jeofails.*
2. *Rule in penal actions.*
3. *Limitation of it.*
4. *Rule in criminal cases.*
5. *Rule in summary proceedings.*
6. *What defects are, and when aided.*
7. *Imperial Statute, and construction of it.*
8. *The Magistrates Acts.*
9. *Doctrine as to variances.*
10. *General rule.*
11. *Law of New South Wales.*

1. *Statutes of Jeofails.*—Whether an amendment in matters subject to the summary jurisdiction of Justices of the Peace can take place, is a question deserving of consideration, as in many works treating of summary proceedings this point is not adverted to, and little or no information can be obtained from them with respect to it. It will be necessary to consider how far in England amendments have been allowed, under the various statutes of Jeofails.

Many defects are aided by the several statutes, 32 H. VIII., ch. 30; 18 Eliz., ch. 14; 24 J. I., ch. 13; 16 and 17 Car. II., ch. 8; and 5 Geo. I., ch. 13. Of these the statute 32 H. VIII., ch. 30, extends to penal actions; (*Wynne* v. *Middleton*, 2 Str. 1227; 1 Wils. 125, S. C.; *Richards* v. *Brown*, 1 Doug. 115.) But there is a proviso in the other statutes, that they shall not extend to criminal proceedings, nor to any writ, bill, action, or information, upon any popular or penal statutes, other than such as concern the customs and subsidies of tonnage and poundage. Then there

is another of these statutes, the 4 Geo. II., ch. 26, for turning all law proceedings into English, which contains this remarkable conclusion: "That every statute of Jeofails shall extend to all forms and proceedings in English (except in criminal cases,) and that the clause shall be construed in the most beneficial manner." (*Atkeson* v. *Everett*, Cowp. 382, 391.)

2. ***Rule in penal actions.***—Hence it has been held, in respect of amendments, that there is no difference between penal and other actions. (*Jones* v. *Edwards*, 3 M. & W. 218; *Mace* v. *Lovett*, 5 Burr. 2833; *Bonfield* v. *Milner*, 2 Burr. 1098.)

3. ***Limitation of it.***—This matter is governed by the discretion of the Court, and there is a limitation to the rule, as the Court will not allow an amendment introducing *a new charge* against the defendant, as that might be barred by the statute of limitation. (*Cross* v. *Kaye*, 6 T. R. 543; Esp. P. S. 124.)

4. ***Rule in criminal cases.***—Having shewn what the rule is with respect to penal actions, that is to say, actions for penalties before the ordinary tribunals (not before Justices of the Peace,) it may be well to consider the question as respects *criminal* proceedings.

An indictment could not be amended at common law, nor was it within any of the old statutes of amendments, (2 Haw., ch. 25, ss. 97, 98); but by modern legislation this power in England exists to a very great extent. It is so conferred by 9 Geo. IV., ch. 15, with respect to misdemeanours, and by 11 and 12 Vict., ch. 46, for any offence whatever; but as the operation of these statutes applied only to Courts of Oyer and Terminer, and general gaol delivery, the provisions were extended to Courts of Quarter Sessions by the 12 and 13 Vict., ch. 45, s. 10.

A still greater reform in the administration of the criminal law has been introduced in England by the passing of Lord Campbell's Act, the 14 and 15 Vict., ch. 100, which sweeps away the whole mass of little points and legal subtleties in indictable cases. Amendments can be made so as to render the indictment conformable to the evidence, and the criminal must undergo his trial on the merits, and the merits alone. The provisions of the latter statute have been very recently made the law of this country, having been re-enacted by our Provincial Statute 18 Vict., ch. 92.

By the Provincial Statute 4 and 5 Vict., ch. 24, s. 46, many defects in indictments or informations for a felony or misdemeanour

are aided after verdict or outlawry, or confession or default; yet, as has been shewn in the preceding section of this work, that statute cannot apply to summary proceedings before Justices of the Peace. (2 Chit. G. P. 168.)

5. ***Rules in summary proceedings.***—This question then remains to be determined: Can an amendment be made in summary proceedings before Justices of the Peace? It seems to be perfectly clear that no amendment can be made without the express consent of the defendant. If objection be taken by the defendant to any of the proceedings, the Magistrate must determine upon it; and if the objection be a valid one, the prosecutor must either withdraw the prosecution or the Magistrate dismiss it.

If the defendant consents to the amendment, it must appear by the record that it was made with his consent; on this point, in 2 Chit. G. P. p. 204, we find the following: "If the original infor- "mation was defective, and the defendant upon the hearing "expressly waived the objection, then the Justice should, before "he proceeds further, have the information made perfect, and "should state in his conviction that fact and the defendant's "waiving the necessity for a fresh summons, and then the con- "victio may state *that the defendant was guilty of the said offence* "*so charged in the said information, when the same had been so* "*amended by and with the said defendant's consent as aforesaid.*"

6. ***What defects are, and when aided.***—Although the Magistrate possesses no power to grant an amendment without the consent of the defendant, it does not follow that the whole proceedings must necessarily be set aside, for where the defendant has appeared, many defects are held and considered as waived by the defendant not availing himself of them.

We have two statutes regulating this matter which are deserving of consideration; the 4 Geo. IV., ch. 19, section 8, of L. C., and the 2 Wm. IV., ch. 4, s. 3, of U. C., enact, "That in all cases "where it appears by the conviction that the defendant has "appeared and pleaded, and *the merits have been tried*, and that "the defendant has not appealed against the said conviction where "an appeal is allowed, or if appealed against, the conviction has "been affirmed, such conviction shall not afterwards be set aside "or vacated in consequence of any *defect of form* whatever;" (and to this section of the L. C. Act above referred to, the following is

added:) "but the construction shall be such a *fair and liberal* "*construction* as will be agreeable to the justice of the case."

7. ***Imperial Statute and construction of it.***—The provision above adverted to is verbatim the same as the 3rd section of the Imperial Statute 3 Geo. IV., ch. 23, from which our Provincial Acts above referred to are copied, and it has been held in England, in the construction of that statute, that it only applies to a conviction *after* the defendant has *appeared and pleaded*, and only extends to defects in *form*. Convictions therefore *ex-parte*, where the defendant having been summoned has neglected to appear, or having appeared will not plead, or otherwise say not guilty, and defend upon the hearing, are not, when defective even in form, aided by the statute, nor are defects in *substance* in any case aided. (2 Chit. G. P., pp. 170 and 211.) At page 158 of Mr. Chitty's work it is said: "And there is no statute which aids proceedings "before Justices out of sessions *before* conviction. The 7 Geo. "IV., ch. 64, s. 20, as to indictments, does not extend or apply to "informations before such Justices; and the general Act 3 Geo. "IV., ch. 23, s. 3, regarding defects in form after conviction, still "leaves the defendant, on the hearing before the Justice, at liberty "to object to and defeat the information, in respect to many "defects of form."

The 18 Vict., ch. 27, applicable to Lower Canada, enacts that no conviction shall be set aside by the Superior Court on appeal, for any objection to an information, complaint, summons or warrant, unless such objection were made before the Justice or Justices who tried the case; which necessarily implies not only that objections may be taken, but must be urged before the Justices at the trial, as otherwise they are not available to the party on appeal, and are to be considered as waived.

8. ***The Magistrates Acts.***—We are next to consider the provisions of the statute of L. C. 14 and 15 Vict., ch. 95, and of U. C. 16 Vict., ch. 178, which, for facility of reference, are styled the Magistrates Acts. In a proviso to the first section it is stated, "That no objection shall be taken or allowed to any information, "complaint or summons, for any *alleged fact* therein, in substance "or in form, or for any variance between such information, "complaint or summons, and the evidence adduced on the part of "the informant or complainant, at the hearing of such information "or complaint, as *hereinafter mentioned;* but if any such variance

"shall appear, to the Justice or Justices present and acting at "such hearing, to be such that the party so summoned and ap- "pearing has been thereby deceived or misled, it shall be lawful "for such Justice or Justices, upon such terms as he or they shall "think fit, to adjourn the hearing of the case to some future day."

It is necessary to consider the effect of this latter provision, which seems to comtemplate two separate and distinct things: 1st. That no objection shall be taken or allowed for any *alleged fact* in the information, &c., in substance or in form; 2ndly. That no variance between the information and evidence, as to time and place, shall be material, &c. The difficulty that must arise will be the proper application of this rule, and the meaning to be applied to the words "*alleged fact.*" The application of this rule, however, cannot be made to extend to cases where, from any omission or defect, the jurisdiction of the Justice is not shewn, or no legal offence set forth. In the case of *R.* v. *Jukes*, 8 T. R. 542, the omission of a negative averment was held fatal. In *R.* v. *Pain*, 5 B. & Cres. 251, and *R.* v. *North*, 6 Dow. & Ry. 143, the uncertainty of a charge was held fatal, notwithstanding the defendant appeared and did not object; and in *R.* v. *Walsh*, 3 Nev. & M. 630, the omission of a circumstance necessary to constitute the offence was held fatal, and not aided by the 3 Geo. IV., ch. 23, s. 3.

The most that can be said of this provision of the Magistrates Acts is, that all defects which, under our Provincial Statutes 4 Geo. IV., ch. 19, s. 8, and 2 Wm. IV., ch. 4, s. 3, would be considered as aided by the party appearing and not objecting, and going to trial on the merits, must be considered as now aided and covered, whether the party appeared or made default, or whether he objected or not, since the provision of the Magistrates Acts is "that no objection shall be *taken* or *allowed*." But as respects Lower Canada there is this distinction to be made, that the Magistrates Act, 14 and 15 Vict., ch. 95, in so far as it enacts "that no objection shall be taken or allowed," is to be considered as superseded by the 18 Vict., ch. 27, as it expressly declares that no objections shall be available to a party on appeal, except those which shall have been made before the Justices at the trial of the case.

9. *Doctrine as to variances.*—Another object contemplated by the Magistrates Acts is to remove objections as to variances

between the *information* and the evidence; but this must not be extended so as to cover every description of variance, as the words of the proviso, hereinbefore recited, refer to variances "as hereinafter mentioned." The variances thereinafter mentioned are, by the 8th section, limited to two in number; 1st, variance as to *time* alleged and that proved; 2dly, as to the *place* where the offence was committed, provided the information shall appear to have been laid in proper time, and the offence committed within the jurisdiction of the Justice.(*a*)

In no other respect can a variance be held immaterial. Hence one description of offence being alleged, another cannot be proved, as this departure would render ineffectual the provision contained in the 13th section, by which a successful defendant is entitled to a certificate of dismissal, which "shall be a bar to any subsequent information or complaint for the *same matters* respectively."

But the truth is that this provision of our statutes as to variances, in respect of the *time* and *place* alleged and those proved, is not introductive of any new principle, for although it was considered desirable to be precise in the allegation as well as the proof, it would seem, from what Mr. Chitty says, that a variance of this description, between the proof and the allegation, was not always fatal. (2 Chit. G. P. 162, 163.)

10. *General rule.*—From a careful consideration of all these authorities it must be considered as certain, that although many defects are cured, and some variances held immaterial, yet in no case do Justices of the Peace out of sessions possess the power of granting amendments without the consent of the defendant, and unless he expressly waives the necessity for a fresh summons.

Some of the authors who have commented upon Sir John Jervis' Act, (11 and 12 Vict., ch. 43,) have urged as one of their chief objections to it, the omission to vest Justices with the power of granting amendments when necessary to be made; but, upon a consideration of this point, it is difficult to resist the conclusion that it is better they should not possess that power, as in many instances it might be greatly abused. This power ought more properly to be vested in the Superior Court or Judges, upon the removal of the proceedings before them, as is now the case in the Colony of New South Wales.

(*a*) This provision applies only to *informations* for *offences*, and not to *complaints*. (See *ante*, p. 53; and Oake's Syn. 62 and 63.)

11. *Law of New South Wales.*—Two years after Sir John Jervis' Acts were passed by the Imperial Legislature, they were adopted in the Colony of New South Wales, by the 14 Vict., No. 43, which contained additional and most important provisions, as affecting the proceedings of Justices in matters relating to summary convictions.

The Legislative Council of New South Wales, in passing this law, evidently contemplated the necessity that the power of amendment should be to a certain extent exercised, so as to prevent a failure of justice, where mere errors or mistakes were made, and no substantial injustice committed by Justices. It was therefore, amongst other things, enacted by this law, that the Supreme Court, or any Judge thereof, should have power, on all applications for *Habeas Corpus*, to amend "defects of form, or "mistakes not affecting the substantial merits in the proceedings "of such Justices," notice being given to the prosecutor or party interested in sustaining the proceedings; and the information, deposition, and conviction, being produced, if the offence charged, or intended in point of fact to have been charged, should thereby appear to have been established, and the judgment of the Justice or Justices thereupon to have been in substance warranted, the Court or Judge should allow the warrant of commitment, (conviction or order, if such Court or Judge should think fit,) to be forthwith amended in all necessary particulars, in accordance with the facts, and the party committed to be thereupon remanded.

A similar enactment is made with reference to applications by writ of *certiorari*, and a discretionary power is given as to costs to be awarded, where amendments are allowed. A summary relief against erroneous convictions or orders is also conferred, by vesting in the Court and Judges more extensive powers than are exercised in England under the writ of prohibition. It entitles the party convicted, within thirty days, to apply to the Court or Judge, on affidavit shewing a *prima facie* case of mistake or error, for a rule calling on the Justice or Justices, and the prosecutor, to shew cause why a prohibition should not issue to restrain them from proceeding (or from further proceeding, as the case may be,) upon or in respect of such conviction or order, rule to be returnable in term or in vacation; and if no cause be shewn, and the Court or Judge, after enquiring into the matter, and consideration of the evidence adduced before the Justice or Justices, should think that

the conviction or order cannot be supported, they may in their discretion direct that the writ applied for be issued, and make such further order in the premises as shall be just, and the circumstances appear to require. But if cause be shewn, and the mistakes or errors appear to be amendable, the conviction or order should forthwith be amended, and thereupon enforced, as if the same had so stood originally.

These provisions, it will be observed, do not confer upon Justices of the Peace the power of granting amendments, but confide this important duty to the discretion of the Supreme Court or Judge, and this very wisely and judiciously, as the amendment can only be allowed in certain cases, and it sometimes requires all the skill and experience of a person well versed in the law, properly to distinguish what are and what are not "defects of form, or mistakes not affecting the substantial merits in the proceedings."

CHAPTER III.

OF INFORMATIONS—MATTERS RELATING TO THE INFORMER, THE DEFENDANT—THE JUSTICES BEFORE WHOM THE INFORMATION SHOULD BE LAID, &c., &c.

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§ I.

OF INFORMATIONS, BY WHOM TO BE MADE, AND IN WHAT FORM.

1. *Rule to be observed.*—In whose name the information is to be laid, and in what form, is a matter to be determined by a careful examination of the statute upon which the conviction is sought to be obtained. As a general rule, any person may be the informer under a penal statute. Where, however, the injury is of a personal or private nature, or a penalty is awarded to the owner of property for an injury sustained, the injured party can alone be the complainant; and it must distinctly appear that the information is at his instance, and that the injury was done without his concurrence or authority. (*Rex* v. *Corden*, 4 Burr, 2279; *Rex* v. *Daman*, 2 B. & Ald. 378; *Fatar* v. *Beacon*, 7 Dowl. 270.)

In many instances the statute providing the remedy points out the party who is to prefer the complaint; and where this is done no one else has a right to institute proceedings.

2. ***Rule in cases of assault, &c.***—In cases of common assault and battery, the statute 4 and 5 Vict., c. 27, s. 27, is express in requiring that the complaint shall be by the *party aggrieved*, and as a general rule no *other* person can carry on a proceeding under that Act. But under particular circumstances it has been considered that the information may be laid by another person, as in the case of an assault upon an infant of tender years, an idiot, &c., where there must be a failure of justice, if the parent or guardian of the party is precluded from taking the necessary steps to bring the offender to trial. (Stone's P. S. 43.)

Although the 4 and 5 Vict., ch 26, s. 30, is not so express in this respect, as the latter statute merely requires that the summons shall be issued on the oath of a *credible witness*, yet in case of injuries to *private* property, where the damages are given to the owner, it should seem that the information must be in the name, or at least at the instance of, or with the concurrence of, the party aggrieved, to whom the damages are to be paid (unless he give evidence,) and whose private remedy by action is to be barred by a conviction on the summary proceeding and payment, imprisonment or remission by the Crown; a provision which would not have been enacted (see section 36 of this statute) if any common informer could have prosecuted. (*Rex* v. *Daman*, 2 B. & Ald. 378; 1 Chitty R. 147; *Rex* v. *Harpur*, 1 Dowl. & R. 222.)

3. ***Quitam prosecutions.***—Under many penal statutes, the clause appropriating the penalty, and that providing for the mode of recovery, are sufficiently distinct in determining who can be the prosecutor, and in what form he should prosecute. The penalties are usually given to a common informer, by the name of "whoever will sue for the same," or to the Queen, or to some public body or corporation, &c., either wholly or in certain parts or proportions, in which latter case the mode of recovery by information is called *quitam* information, the prosecutor describing himself as suing as well for our Sovereign Lady the Queen (as the case may be) as for himself.

Great care should be taken therefore in examining the statute, so that the information be laid in the name of the proper person; and where the penalty is payable to the Crown, or to a public body or corporation, either in whole or in part, that the informer sues in the form applicable to the case. Thus if the statute gives the whole of the penalty to "whoever shall sue for the same,"

any informer may sue for and recover the penalty in his own name. But if, as is more frequently the case, the penalty is in part only payable to the prosecutor, and the remainder to the Crown, or to some public body or corporation, the informer should in the information declare that he sues "as well for our Sovereign Lady the Queen," or as well for (mentioning the public body, corporation or other person entitled to a share of the penalty,) "as for himself."

The authorities on this point are sufficiently clear, and reference need only be made to one standard work to shew the necessity of a careful observance of this rule, to render the proceedings valid. (Hawk., ch. 26, s. 20.)

4. *Persons incapable of being informers.*—The rule adverted to, that any person can be an informer under a penal statute, which gives the penalty, or any part thereof, to him who will sue for the same, must be understood to apply only to persons not under any legal disability. Thus an infant cannot be a common informer, and the reason given is that by the statute 18 Eliz., ch. 5, every informer on a penal statute shall exhibit his suit in his own proper person, so that an infant cannot be considered as coming within the description required by the statute, necessary to vest the power to sue. (Esp. Penal Statutes, p. 19.)

5. *As to Corporations.*—Neither can a corporation prosecute as a common informer, unless power is specially given to them by statute. It was so held in the case of the Weaver's Company, who sued as common informers, under the statute 7 Geo. II., ch. 7. An objection being taken to their right to sue, the Court decided that, the words of the statute giving the penalty being "to *any person* or *persons* who would sue for the same," a *Corporation* could not sue. The principle of this decision is that the informer must bring himself within the words of the statute on which he sues, and answer the description required by it. The word *person* or *persons* to whom, under this statute, the power of suing for the penalty was given, was taken in its common acceptation of the words describing them as *natural persons* only. (*Weaver's Company* v. *Forrest*, 2 Str. 1241.)

5. ***Rule in cases where statute is silent.***—If the statute points out no person who is to sue for a penalty, the object of the statute must be adverted to, and if it be one of public concern, and orders anything to be done under pain of forfeiture, the pen-

alty belongs to the Crown. If the statute be of a private nature, the party grieved may sue, though not mentioned; but a common informer, or *qui tam* plaintiff, cannot. (Esp. P. S., pp. 15 and 16.)

7. ***Whether Attorneys can exhibit informations.***—By the 18 Eliz., ch. 5, s. 1, already referred to, the informer was bound to exhibit his information in person, and could not "have or use "any deputy or deputies at all." But this provision of the statute has lately been repealed in England by the 36th section of the 11 and 12 Vict., ch. 43, in the following terms: "That the fol- "lowing statutes and parts of statutes shall, &c., be and the same "are hereby repealed, (that is to say) so much of a certain Act "of Parliament made and passed in the 18th year of the reign "of Her Majesty Queen Elizabeth, intituled, "An Act to redress "disorders in common informers," as relates to the exhibiting an "information and pursuing the same in person and not by any "attorney or deputy." The Magistrates Acts are borrowed from the Imperial Statute last mentioned, and it is obvious from their general provisions, and by reference to the 9th section, that an information may be exhibited by Counsel or Attorney on behalf of the prosecutor, or by any other person authorized in that behalf, in all cases where the information is not required to be under oath, but otherwise if to be made under oath, as in cases of assault and malicious injuries to property.

CHAPTER III.

§ II.

OF INFORMATIONS, AGAINST WHOM THEY SHOULD BE LAID.

1. *Principals, agents and servants.*
2. *Rule of liability of principal for the acts of others.*
3. *Partners.*
4. *Aiders, abettors, counsellors, and procurers.*
5. *Mode of proceeding against aiders, &c.*
6. *Receivers.*
7. *Infants.*
8. *Married women.*
9. *Domestic servants and apprentices.*

1. ***Principals, agents and servants.*** —Against whom the information should be laid in many cases depends upon the words of the statute providing the remedy, and the facts and circumstances under which the offence was committed. In general, it is against the party actually present and committing or aiding in committing the offence.

The principal who instigates or causes the injury, although absent, may be proceeded against and convicted for the act of his agent or servant. The maxim *qui facit per alium, facit per se*, has been held to apply under these circumstances. (*Mitchell* v. *Torup*, Parker's R. 227; *R.* v. *Dixon*, 3 M. & S. 7; *Atty. Genl.* v. *Siddon & al.*, 1 Tyr. Rep. 41.)

2. ***Rule of liability of principal for the acts of others.*** —A difficulty may sometimes arise in ascertaining whether the illegal conduct complained of has been the voluntary and unwarrantable act of the agent or servant, in which case the master would not be liable; or whether he has been merely the instrument in carrying out the orders or intentions of his master, so as to fasten the liability on the latter.

The facts and circumstances of each case must serve as a guide to the Justice, and he can seldom err in determining the liability of the master, if it be shewn with reasonable certainty that the agent or servant acted in pursuance of the injunctions or by the assent of the employer, judging from the nature of the act, the object with which that act was done, and the participation, if any, of the master in it. The extent of the authority conferred by the master may also be gathered from the nature and character of the business in which the servant or agent is from time to time employed, or from an implied acquiescence of the master, whenever he benefits by the unlawful act of his servant. (*Atty. Genl.* v. *Siddon*, 1 Cromp. & Jer. 220; *Atty. Genl.* v. *Riddle*, 2 Cromp. & Jer. 493; *Regina* v. *Dean*, 12 M. & W. 30.)

3. *Partners.*—Upon the same principle partners are frequently liable to penalties for the acts of their servants or partners, in the course of their employment or joint trade, although absent and not actually authorizing the commission of the offence. (Comyn's Rep. 616; 5 Burr. 2686; 5 T. R. 649.)

In informations against partners care must be taken to name the defendants; merely stating the name of the firm, as for example "Harrison & Co.," is insufficient. The Court refused to entertain a conviction in which the defendants were so described, and treated it as a nullity, even as against the partner named. Neither of the defendants objected to the conviction on that ground, but Lord Kenyon said the Court are bound to take care that summary proceedings before Magistrates be regularly conducted, whether the parties object to them or not, and in that case the Court could not tell, upon the face of the proceedings, but that the delinquency of Harrison's partners, who were not before the Court, might have been imputed to him. (*R.* v. *Harrison*, 8 T. R. 508.)

Should the names of all the partners not be known, any individual may be selected and sued by himself, if the alleged offence be the joint and several act of all the partners. Although, in general, acts or omissions in the course of the partnership trade implicate those only who are guilty of them, yet, on the principle what one does by another he does by himself, the act of one partner becomes the act of his co-partners, and the individual partner is considered the servant of the co-partnership. (Watson on Part.

235; *Mitchell* v. *Turbot*, 5 T. R. 649; Bul. N. P. 189; 2 East, 569, 572.)

The 4th section of the Magistrates Acts seems also to provide for this, by declaring that whenever in any information it may be necessary, "for any purpose whatever," to name partners, the naming of one of them as associated with another, or others, as the case may be, is sufficient.

4. *Aiders, abettors, counsellors, and procurers.*—Anterior to the passing of the Magistrates Acts, except where by some special enactment an accessory was made liable, (e. g. the 4 and 5 Vict., chs. 25, 26 and 27,) there were no accessories in offences punishable by summary conviction, nor indeed in any criminal case below the degree of felony, all were principals or nothing. (See 1 Hale, 613; 12 Rep. 81; *Evans' case*, Fost. 73; 4 Bla. Com. 36.) But now, by the 5th section of the Magistrates Acts, it is enacted, "That every person who shall *aid*, *abet*, *counsel* or *procure* the commission of any offence which is or hereafter shall be punishable on summary conviction shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable, on conviction, to the same forfeiture and punishment as such principal offender is or shall be by law liable."

This provision of the Magistrates Acts is the same as that contained in the 5th section of the Imperial Act 11 and 12 Vict., ch. 43, which has been criticized by several writers, and amongst others Mr. Saunders, who says: "This section introduces a novelty "into the summary jurisdiction of Justices, and creates for their "adjudication a large body of offences not heretofore cognizable "by any tribunal. By this enactment every person who shall "aid, abet, counsel, or procure the commission of any offence pun-"ishable on summary conviction, may thereby subject himself to "the same punishment; thus a man who is a party to the drunk-"enness of another may be convicted as an aider; so by encou-"raging another to profane swearing, and in all the other cases, "great and small, in which Justice may summarily convict." Whatever the novelty of the enactment may be, the propriety of it cannot be questioned, and no better proof of its utility need be adduced than the very instances of its application given by Mr. Saunders.

5. *Mode of proceeding against aiders, &c.*—It is necessary to observe that the 4th section of the Magistrates Acts authorizes the proceedings and conviction to be had against the aider, abetter, counsellor or procurer, together with the principal offender, or separately, and either before or after his conviction. In every case, however, whether the proceedings be had against them collectively, or without the principal being joined, it is necessary the information should first state the offence of the principal, and then the offence of the aider or counsellor. In like manner, the prosecutor must first prove that the principal offence was actually committed, and then the offence of aiding or counselling, &c. To counsel a man to commit an offence, if it be not afterwards actually committed, is not an offence within this section. (Arch. Jcr. Acts, 113.)

In offences partaking of felony, the accessory before the fact, could not be tried, unless the felony had actually been committed; but soliciting or inciting a person to commit a felony is a misdemeanour at common law, (*R.* v. *Higgins*, 2 East, 5,) punishable with fine or imprisonment, or both. (Arch. J. P. 6.)

In misdemeanours all are considered principals, 4 and 5 Vict., ch. 25, s. 53; and under the section referred to of our Magistrates Acts, the offence of the aider or counsellor, and that of the principal, are to be regarded as but one offence, for unless the principal be liable, the aider or counsellor cannot be punished, and his punishment, when the offence is established, is the same as that of the principal.

In England, since the passing of the 11 and 12 Vict., ch. 43, it has been doubted whether several offenders can be joined in the same information, and whether the offence of each is not a separate offence, the 10th section prohibiting the joinder of several offences in one information. (14 J. P. 470.) But Mr. Archbold's opinion is that where two or more are jointly charged with an offence, it is but one offence within the meaning of this section, an opinion borne out by the section which provides for the prosecution of the aider together with the principal.

It is, moreover, a well established rule that where several persons are charged with an offence, although it be in its nature *several*, they cannot claim to have their cases heard separately. (Oake's Syn. 77.)

6. ***Receivers.***—Another class of offenders who may be tried summarily before a Justice of the Peace are receivers. This provision of the law is to be found in the 52nd section 4 and 5 Vict., ch. 25, by which receivers of any property stolen or taken in violation of sections 30 to 35 inclusively, are made liable to the same forfeiture and punishment imposed by those sections upon the principal offender.

7. ***Infants.***—The general rule is, that infants above seven years may be convicted and punished for all trespasses and wrongful acts unconnected with contract. The presumption of law, however, is in favor of an infant under the age of fourteen years, in deeming that under that age he is not *doli capax;* but this presumption may be rebutted by facts clearly shewing that at the time of committing an offence he was capable of distinguishing between good and evil, in which case he is liable to conviction and punishment. (*York's case*, Fost. 70.)

8. ***Married women.***—For trespasses and torts unconnected with contract, married women are equally liable with other persons, if they have committed the offence complained of, without the coërcion actual or implied of their husbands. (*R.* v. *Croft*, 2 Str. 1120; *R.* v. *Hammond*, 2 Leach, 499; *R.* v. *Williams*, 10 Mod. 335; *Reg* v. *Cruse*, 8 C. & P. 541; 2 Mo. C. C. 53.)

In Lower Canada these rules, as respects infants and married women, must receive a more extensive application, as they, under our French system of jurisprudence, can in certain cases validly contract. As for instance, a minor emancipated by marriage or otherwise, a married woman separated as to property, trading on their own account, may validly contract and render themselves liable for any act done by them in the course of their trade and business. A more important question, however, and one deserving of consideration, is whether a minor or married woman can be summarily punished, under statutable or police regulations, for any infraction of a contract of service or apprenticeship. This will now be considered and discussed.

9. ***Domestic servants and apprentices.***—It has been doubted in England, whether, as married women and infants cannot legally contract, they can be properly convicted under the 4 Geo. IV., ch. 34. as servants refusing or neglecting to perform the duties or engagements entered into by them. It is said, if an intended contract for service be, in fact, nugatory by reason of infancy or

coverture, no legal proceedings can be taken to enforce such supposed contract, or to punish for its breach or non-performance. In 2 Chitty G. P. 152, note (*n*), no other authority is referred to than a decision of the Justices of the borough of Newcastle, A. D. 1833.

A similar question must often arise under our L. C. Act 12 Vict., ch. 55, regulating masters and servants in country parts. It was raised before the Superior Court at Montreal, in *Ex-parte Chevalier*, but not expressly decided, as the conviction was quashed on another ground. At the argument the Court were not apparently disposed to entertain the objection that a domestic servant, a minor, could not be punished for an infraction of his contract of service. Our statute has evidently contemplated conferring on master and servant reciprocal rights and liabilities, irrespective of the age of the parties. In many instances domestic servants are minors, having power to enforce their contract by suing for wages, and how can they, with any semblance of justice, be permitted to repudiate that contract so as to free themselves from liability. In deciding this question the nature of the contract of service should not be lost sight of, nor the innovation upon the common law, created by our statutes, in conferring on minors the right to enforce in their own names their contract during minority.

Since the foregoing observations were written, the author has, from the importance of this point, made further research into authorities, some of which are here given to establish the correctness of the foregoing observations and of the opinion herein expressed. In Oake's Syn. 55, after remarking that it has been doubted whether a minor is competent to enter into a contract of service, it is stated: "But the prevailing opinion is strongly in "favor of their power to do so, and consequently of the jurisdic- "tion of Justices in case of their misbehaviour, if the contract "is not deficient in mutuality." (*Reg* v. *Lord*, 17 Law. J. Rep. (N. S.) M. C. 181; 12 J. P. 759.)

In *Wood* v. *Fenwick*, 10 Exch. 202, the same point was raised, and although not determined, the case having been decided on another ground, still the opinion of the Court was very clearly expressed at the argument. Lord Abinger, C. B., said: "There "can be no doubt that, generally speaking, a contract by an infant "to receive wages for his labor is binding upon him;" and when the counsel remarked that at all events he might determine it at

any time by notice, Lord Abinger replied: "That would be a "contradiction in terms, because to say that he may contract is "to say that he may bind himself by the contract; how then can "it be determined at his election the next day?" In another case Bayley, J., said: "An infant may make a contract for his "own benefit; he may therefore make a contract for hiring and "service, for that will be beneficial to him. It will give him a "right to sue for wages. If he does not perform his contract, "although no action may lie against him, *he will be liable to the "statutable regulations applicable to masters and servants.*" (*R.* v. *Inhabitants of Chilesford*, 4 B. & C. 94; 6 D. & R. 161; see also *Gray* v. *Cookson*, 16 East, 13.)

These authorities seem to place the question beyond all doubt, and to establish as a principle which ought to be followed that although a minor may in an action avoid a contract, not because it is *void* but *voidable* only, still, for infractions of his contract of service, punishable by statutable regulations, he must be held liable.

CHAPTER III.

§ III.

OF INFORMATIONS, BEFORE WHOM THEY SHOULD BE LAID.

1. *Rule to be observed.*
2. *Rule in certain cases.*
3. *Jurisdiction must appear upon the proceedings.*
4. *Where the statute is imperative.*
5. *Where the statute is merely directory*
6. *Illustrations of the rule.*

1. ***Rule to be observed.***—Justices of the Peace are by commission appointed to act in and for their respective districts, and although the majority of penal statutes give authority generally to all Justices of the Peace, without distinction, which implies an equal power in all to receive an information and to adjudicate upon it, within the limits of their commission, yet some statutes point out Justices of a particular description, before whom the information or complaint should be laid by the words "*next* Justice," or "the Justice *nearest* to the place where the offence is committed,"—or words of the same import.

It is therefore absolutely necessary that the clause of the statute providing the remedy should be carefully examined, and the words used properly considered, where there is an apparent selection of Justices, and the power not vested in any or all without distinction, so as to determine whether such selection be *imperative* or only *directory*.

2. ***Rule in certain cases.***—It is a well established principle, that as the power vested in Justices of the Peace is of a special kind, where any matter is referred to a particular description of Justices, the authority of all others is excluded by that express designation. (Dalt. ch. 27, s. 8.)

Therefore, where a statute refers a matter to the *next* Justice, no other but the one answering that description has any authority to receive the information or take cognizance of it. (*Saunders' case*, 1 Saund. 263, 2 Keb. 559.)

The same rule will apply if the words be "Justice *nearest* to the place where the offence has been committed;" but should the words used be "Justice *in or near* the place where the offence was committed," then any Justice of the county may take cognizance of the matter, as these words are not *restrictive* but *directory*, and a Justice, although not the *next*, can act. (2 Keb. 559; 3 Keb. 383; 1 Saund. 263; Bac. Ab. Tit. *Justice of the Peace*, E. 5; 2 Burn, J., 59; *Talbot* v. *Hubble*, 2 Str. 1154; *Blankley* v. *Winstanley*, 3 T. R. 279; Paley, p. 453.)

3. ***Jurisdiction must appear upon the proceedings.***—As Justices have no jurisdiction except that conferred upon them by the statute, care should be taken that the special power so exercised by them appear upon the face of their proceedings, and that the authority conferred upon them was strictly pursued. (2 Salk. 475; 5 Burr. 2686; 1 Burn, J., 729; Paley, 45; Deacon, vo. *Conviction*, 302; 1 Str. 261.)

4. ***Where the statute is imperative.***—Therefore, where the statute has made a selection, and such selection be *imperative*, by assigning the cognizance of the offence to the *next* Justice, or to the Justice *nearest* to the place where the offence was committed, it must appear by the information that the Justice before whom it is laid is the *next* or *nearest*, as also by the conviction rendered by him that he is the *next* or *nearest* Justice; and this fact must be expressly stated, otherwise the conviction would be absolutely null. Without this the jurisdiction of the Justice would not be shewn, and the rule is, nothing is presumed in favor of a conviction, but the intendment shall be against it. (*Saunders' case*, 1 Saund. 263; Dalt. ch. 6; *Kite and Lane's case*, 1 B. & C. 101; *R.* v. *Dobbyn*, 2 Salk. 473; *R.* v. *Price*, Cald. 305; 2 Chitty C. P. 155, 183, 184; 2 Dowl & Ry. 212; *Reg* v. *Martin*, 2 Q. B. 1037; *Reg* v. *Morice*, 1 New Sess. Ca. 585; *Reg* v. *Justices of Hert.*, 1 New. Mag. Ca. 256; Deacon, C. L., vo. *Conviction*, 302, 307.)

5. ***Where the statute is merely directory.***—If the selection made by the statute be merely directory, by mentioning Justices

in or *near* the place, they need not be so described. (*R.* v. *Price*, Cald. 305; 3 Bac. Abrid. 793, Deacon, 307.)

6. ***Illustrations of the rule.***—Having shewn how necessary it is that a careful examination of the statute should be made, so that the information should be laid before the proper Justice, a precaution to be observed not only by the prosecutor in laying his information, but also by the Magistrate before he takes any action upon it, it may serve to illustrate this subject, to refer to some of our Provincial Acts, to which the foregoing observations will apply.

By 45 Geo. III., ch. 10, prohibiting the sale of liquors on Sundays, the 3rd sect., providing the remedy, states, "That the fines and forfeitures imposed by this Act shall be recovered before one of His Majesty's Justices of the Peace *nearest* to the place where the offence against this Act shall have been committed."

By the 14 and 15 Vict., ch. 82, the Pawnbrokers Act, it is provided by the 12th section, that any Justice of the Peace resident *at* the place *nearest* to the place where the offence is committed may grant his warrant to apprehend the offender.

By the School Act, 9 Vict., ch. 27, s. 52, power is given to any Justice of the Peace residing *within the locality or county;* and by the 12 Vict., ch. 50, s. 16, amending it, the jurisdiction is vested in either two Justices of the Peace *in the county*, or in the Circuit Court.

By the 12 Vict., ch. 55, (Master and Servants Acts,) the 8th section gives power to *any* Justice to determine any contravention of the preceding sections of the Act; whereas by the 9th section the complaints therein referred to can only be made before *one of the nearest* Justices of the Peace *to the residence* of the party complained against.

And by the 18 Vict., ch. 100, s. 77, (Municipal Act,) all rates, assessments and penalties, (except in cases where special provision to the contrary is made,) shall be recoverable before any one of the Justices of the Peace *in the local municipality where the person sued resides*, other than the chief officer of such municipality; and if there be no Justice of the Peace in such local municipality, then before any one of the Justices of the Peace *in an adjacent* municipality.

This suffices to shew with what care the statute should be consulted, so as to determine the all-important question of juris-

diction before it is too late, as in these and all other like cases any Justice or Justices, not being "the nearest to the place," or "resident in the place nearest to the place where the offence is committed," or not "residing in the county, &c.," have no authority or jurisdiction to act, and a conviction by them would be invalid. So also a conviction, although rendered by one or more Justices having jurisdiction as being "the nearest" or "resident," &c., would be null, unless this particular fact or circumstance, which alone confers jurisdiction, be expressly stated and shown in the proceedings, and more particularly in the conviction. (1 Paley, 80)

CHAPTER III.

§IV.

OF INFORMATIONS, WITHIN WHAT TIME THEY SHOULD BE LAID

1. *Former rule as to limitation.*
2. *Present rule.*
3. *Under particular statutes.*
4. *Calendar and lunar months.*
5. *When a conviction must be had within a certain time.*
6. *When sufficient, if information be laid within a certain time.*
7. *Proceedings must not be antedated.*
8. *Rule formerly as to computation of time.*
9. *Present rule.*
10. *Limitation how pleaded.*

1. ***Former rule as to limitation.***—Until the passing of the Magistrates Acts the rule has been that, unless otherwise provided for by the statute upon which the proceedings are had, every suit or information in which the *whole* penalty is given to the Crown must be brought within *two* years after the offence committed; but where the penalty is partly given to the informer, the informer must sue for it within one year after the offence committed, and if no such or information is brought by a common informer, the Crown may sue for it within two years after that year ended. This is expressly enacted by the Act 52 Geo. III., ch 7, (Rev. Sta. L. C. 183), borrowed from the 31 Eliz., ch. 5, which contains exactly the same provisions. The Act 7 Wm. IV., ch. 3, (U. C.) by the 3rd sect., enacts that "all actions for penalties, damages or sums of money given to the party grieved, by any statute now or hereafter to be in force," must be brought within one year after the passing of the Act, or within two years after the cause of such actions or suits, but not after.

2. *Present rule.*—As respects proceedings cognizable before Justices of the Peace, the 10th section of the Magistrates Acts enacts, "That in all cases where no time is already or shall here- "after be specially limited for making any such complaint, or "laying any such information in the Act or Acts of Parliament "relating to such particular case, such complaint shall be made, "and such information shall be laid *within six calendar months* "from the time when the matter of such complaint or information "respectively arose."

This section is verbatim the same as the 11th section of the Imperial Act 11 and 12 Vict., ch. 43, from which it is copied, and it is only necessary to observe two things: first, that its application only extends to cases where the statute upon which the proceedings are had contains no clause limiting the period within which the information or complaint is to be made; secondly, that in cases where its application would, from such omission in the particular Act, extend, proper attention should be given to the words "and such information *shall be laid* within six *calendar* months," &c., for reasons which shall be sufficiently shewn and explained.

3. *Under particular statutes.*—In almost all penal acts, creating forfeitures and penalties, and more particularly in the more recent statutes, the information is required to be laid *within three calendar months after the commission of the offence.* But it is necessary that the informer as well as the Justice should carefully examine the particular statute upon which the proceedings are had, for any error on this point would subject them to be overturned at any stage. The necessity for this precaution will be obvious from the following observations.

4. *Calendar and lunar months.*—By some statutes the words of limitation are *calendar* months, in others the word "calendar" is omitted, in which latter case the rule of law is that the word *month* shall be construed to mean *lunar* month, of four weeks to the month. (*R.* v. *Bellamy*, 1 B. & C. 500; 3 Burr. 1455; 2 Dowl. & Ry. 727; 2 Chit. G. P. 147; 1 Paley, 16.)

5. *When a conviction must be had within a certain time.*—Also some statutes require that the party shall be *convicted* within a limited time, in which case the *conviction* must take place *within* that time. The laying of the information merely, or the summoning of the accused, within the period, will not be sufficient;

and although the final hearing and conviction should be delayed to a period beyond the time limited, in consequence of an adjournment at the defendant's own request, still the conviction would be invalid. (*Dowell* v. *Benningfield*, 1 Car. & Mar. 9; *Rex* v. *Bellamy*, 1 Bar. & C. 500; *Rex* v. *Tolley*, 3 East, 467; 2 Chit. G. P. 147; *Rex* v. *Peckham*, Comb. 439; Saund. on Con. 5; Deacon, vo. *Conviction*, 326; Paley, 16 and 206.)

6. ***When sufficient, if information be laid within a certain time.***—Where the words of the statute are that the informa- shall be *laid*, or that the offence shall be *prosecuted*, or that the prosecution shall be *commenced*, within a named time, or equivalent expressions, then it will be sufficient that the information or complaint should be *laid* within the proper time, although the conviction should take place after the expiration of the limited period. (*Rex* v. *Barrett*, 1 Salk. 383; Deacon, 327; 2 Chit. G. P. 147; Paley, 15, 32 and 206.)

In a very old case of *Price* v. *Hundred of Chewton*, in Somersetshire, the writ was tested five days before it was sued out, and an objection was taken, inasmuch as, if the time of suing out the writ was to be considered the commencement of the suit, it was too late; but on a search for precedents, and the constant practice being ascertained, the Court held the writ good from the *teste*, and the plaintiff was allowed to proceed in his action. (Esp. Pen. Sta. 78 and 79.)

7. ***Proceedings must not be antedated.***—Justices, however, should be careful not to antedate any of their proceedings, as, in many instances, the effect of it might be to deprive the defendant of the benefit of the limitation created by the statute. The Act 18 Eliz., ch. 5, s. 1, has expressly provided against this abuse, by enacting, "That upon every information which shall be exhibited "on any penal statute, a special note shall be made of the very "day, month and year of the exhibiting thereof into any office, or "to any officer, which may lawfully receive the same, *without any* "*antedate thereof to be made*, and that the same information be "accounted and taken to be of record from that day forward, and "not before. And that no process be sued out upon such infor- "mation, until the information be exhibited in form aforesaid, &c. "And that every Clerk making out process contrary to this Act "shall forfeit forty shillings, &c."

8. *Rule formerly as to computation of time.*—Whether the day of committing the offence should be *included* or *excluded* in the computation of time is a question which has given rise to contradictory decisions in England. The rule formerly laid down was that when a statute directs that the prosecution shall be commenced within a specified number of days or months "*from the committing of the offence*," the day on which it was committed should be *included* in the calculation; but that when the Act prescribed the limitation *from the day* of doing the act, then the whole of that day should be excluded. (Per Parker, C. J., in *R.* v. *Green*, 10 Mod. 112; *but Powys, J., dissented, and Eyre, J., said it was a point which had never been settled.*) In *Rex* v. *Adderley*, Doug. 456, it was ruled that if time be limited from *an act* done, the day is inclusive, but if from *the day* of doing an act, it is exclusive.

It was also so ruled in an action against a Justice of the Peace, by holding the day on which the act complained of was committed to be *inclusive*. (*Clark* v. *Davy*, 4 Moore, 465.)

9. *Present rule.*—But these decisions have since been overruled, and the day of committing the offence is to be *excluded* in the computation of time. (*Pellew* v. *Inhab. of Wonford*, 9 B. & C. 134; *Hardy* v. *Ryle*, 9 B. & C. 603, *overruling the decision of Clark* v. *Davy*. See also 4 Man. & Ry. 300; 2 Campb. 254; 5 T. R. 283; 3 B. & Ald. 581.)

Chitty, p. 149, referring to the latest decisions, says: "These "recent decisions appear sufficiently to establish that, in general, "as regards summary proceedings for offences or injuries of a "private nature, the rule will now be to *exclude the first day.*" And Mr. Stone, in his work, p. 42, says: "With respect to the "*day* on which the offence was committed, the better opinion "appears to be that *it is not included* in the calculation of time."

10. *Limitation how pleaded.*—The defendant is not bound to plead the limitation of the statute, but may urge it under the general issue. (Per Holt, C. J., Shaw, 354; Esp. Pen. Sta. 78.)

CHAPTER III.

§ V.

OF INFORMATIONS, WHEN JUSTICES ARE BOUND TO PROCEED UPON THEM, AND WHEN THEY CAN ACT WITHOUT ANY.

1. *In what cases bound to act.*
2. *In what cases not bound.*
3. *Recent Statute Law of England and Upper Canada.*
4. *Where Justices may act without an information.*
5. *Rule where no previous information has been laid.*

1. ***In what cases bound to act.***—If a clear charge be laid before a Justice, and there be no reasonable ground for doubting his jurisdiction or the propriety of exercising it, the Justice *ought* to receive the information and issue his summons or warrant when proper, and cause the charge to be heard. If the Justice should refuse he may be compelled by *mandamus*, as otherwise the law would remain unadministered. In referring to Justices sometimes the statute makes use of the words "authorizes and empowers," in other instances, "required and enjoined," in which latter case the Justices are at least bound to proceed to *a hearing*, however they may decide. (*R.* v. *Wrottesly*, 1 B. & Adolph. 648; *R.* v. *Broderip*, 3 B. & C. 239; 7 D. & R. 861; 1 Str. 413, 530; *R.* v. *Benn*, 6 T. R. 198; *R.* v. *Justices of Buckinghamshire*, 1 B. & C. 485; 2 D. & R. 689; *R.* v. *Robinson*, 2 Smith, R., 274; *R.* v. *Greame*, 2 Ad. & Ell. 615.)

2. ***In what cases not bound.***—But if the Justice has *reasonable ground* for *doubting* his jurisdiction, the Court will not compel him to do an act which might subject him to an action. Upon this subject Abbott, C. J., in the case of *R.* v. *Broderip*, above cited, said: "If the conviction itself is not valid in law, for not "having been founded on *oath*, and the Magistrate issues his war- "rant to apprehend the party, he will be liable to an action of

" trespass, and we cannot compel him to put himself in a situation " of so much responsibility. If a Justice of the Peace criminally " forbears to discharge his duty, he is amenable for his conduct " by information, as for a public offence; but that is a very " different thing from commanding him to do that which may " subject him to an action." (See also Saunders on Con. 52; 1 Paley, 17, 18.)

The circumstance alone of the defendant insisting that the Justice has no jurisdiction is not sufficient to excuse the Justice in not proceeding. (*R.* v. *Wrottesly*, 1 B. & Adolph. 648.)

3. ***Recent Statute Law of England and Upper Canada.*** —In England an Act has recently been passed, the 11 and 12 Vict., ch. 44, and re-enacted for Upper Canada by 16 Vict., ch. 180, which contain a very wise provision on this subject, and it is to be regretted that some provision of a similar kind is not to be found in our Lower Canada Statute Law. By sect. 5 it is enacted:

" That in all cases where a Justice or Justices of the Peace shall refuse to " do any act relating to the duties of his or their office as such Justice or " Justices, it shall be lawful for the party requiring such act to be done to " apply to Her Majesty's Court of Queen's Bench, upon an affidavit of the " facts, for a rule calling upon such Justice or Justices, and also the party " to be affected by such act, to shew cause why such act should not be done; " and if after due service of such rule, good cause should not be shewn " against it, the said Court may make the same absolute, with or without " or upon payment of costs, as to them shall seem meet; and the said Jus- " tice or Justices, upon being served with such rule absolute, shall obey the " same, and shall do the act required; and no action or proceeding what- " soever shall be commenced or prosecuted against such Justice or Justices " for having obeyed such rule, and done such act, so thereby required as " aforesaid." (*See note on Analysis of Imperial Statute in section* II. *of chapter* I., *ante, p.* 31.)

4. ***Where Justices may act without an information.***— Although in general a Justice has no authority to act unless an information be laid before him, to form the basis of his subsequent proceedings, (Paley, 17), still by some particular statutes an exception to this rule is created, by authorizing the Justice to convict *on his own view.* The Game Act, 8 Vict., ch. 46, s. 3, also many other Provincial Acts, confer that power. In such cases, however, the Justice's *view* must be expressly stated in the conviction, and if omitted it would be void. (*Rex* v. *Justices of Kent*, 10 B. & Cr. 477; *Jones* v. *Owen*, 2 Dowl. & Ry. 600.)

Another instance of this exception to the general rule is to be found in some of our statutes; as for example, by the 55th section of the 4 and 5 Vict., ch. 25, and by the 28th section of the 4 and 5 Vict., ch. 26, any person *found committing* any offence against the said Acts, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant or any person authorized by him, and forthwith taken before some neighbouring Justice of the Peace, to be dealt with according to law. Also, by the 2nd section of the 13 and 14 Vict., ch. 40, any land-holder, or his representative or servant, may arrest without a warrant any person taken in the act, or contravening this section, and carry him, or cause him to be carried, forthwith before one of the nearest Justices, who may decide summarily the complaint.

5. ***Rule where no previous information has been laid.*** —In all such cases, however, the Justice should be extremely cautious in drawing his conviction, so that the facts and circumstances under which the party was apprehended and brought before him might appear upon his conviction, and that the special power vested in him by the Act has been strictly pursued. The reason is that, as a general rule, the summary jurisdiction of Justices can only be exercised where an information has been laid before them, and the accused has been either summoned or apprehended upon warrant; and where under a special enactment these requirements are dispensed with, and the rule departed from, the conviction, in the absence of any previous information, summons or warrant, must shew the special facts and circumstances which, under the statute, justify such a departure from the general rule. Upon this point the principles laid down and authorities cited in the third section of this chapter will apply. (See also *Rex* v. *Allason*, 2 Str. 678; *R.* v. *Venables*, 2 Str. 630; 6 T. R. 538; 3 T. R. 338; *Wilkins* v. *Wright*, 2 C. & M. 101; *Bracey's case*, 1 Salk. 475; *R.* v. *Corben*, 4 Burr. 2218.)

CHAPTER IV.

OF THE PROCEEDINGS PRELIMINARY TO THE HEARING.

§ I.

THE SUMMONS.

1. *Necessity for a summons.*
2. *When a conviction can be had without any.*
3. *The form of the summons.*
4. *The requisites of a summons how directed, and offence how stated.*
5. *Must appoint a certain time and place for the defendant's appearance.*
6. *Rule as to statement of time, with reference to the delay.*
7. *Too short delay, when aided.*
8. *Rule as to indication of place*
9. *Rule in certain cases, as to indication of Justices, or number of Justices, before whom defendant should be summoned.*
10. *Summons must be dated.*
11. *By whom signed, and when.*
12. *Must be sealed, and in what manner.*

1. *Necessity for a summons.*—No conviction or order can be made whereby the interests of any party may be affected, unless an opportunity of being heard is afforded to him, which is done either by a summons or warrant being issued against him, and this notwithstanding that the Act of Parliament upon which the proceedings are founded is silent as to any previous summons. (*Rex* v. *Benn*, 6 T. R. 198; *R.* v. *Venables*, 2 Ld. Ray. 1407; *Reg* v. *The Guardians of the Totnes Union*, 2 New Sess. Ca. 82; *Painter* v. *The Liverpool Gas Co.*, 3 Ad. & Ell. 433; 8 Mod. 163; 1 Hawk. ch 64, s. 60.)

2. ***When a conviction can be had without any.***—If the defendant voluntarily appears and is present during the hearing, has a full opportunity of being heard, and does not require time, he may be convicted without any previous summons. (*Rex.* v. *Aikin*, 3 Burr. 1785, *Rex* v. *Stone*, 1 East, 964, *per Ld. Kenyon.*)

3. ***The form of the summons.***—As to the form of the summons, the rule to be observed, since the passing of the Magistrates Acts, is that where the particular Act of Parliament upon which the proceedings are had does not prescribe a form of summons, then the form given in the Magistrates Acts must be adopted. (See form in the Appendix.) But should the Act of Parliament in question prescribe a form of summons, then that and no other must be adopted. (*R.* v. *Steventon*, 2 East, 365; 2 Deacon, 315; *R.* v. *Croke*, Cowp. 30.)

4. ***The requisites of a summons how directed, and offence how stated.***—The requisites of a summons are pointed out by the 1st sect. of the Magistrates Acts. It must be directed to the defendant. In England two forms were in use, one directed to the defendant, the other by way of precept to the constable. It must state shortly the matter of the information or complaint. By this is meant that the substance of the charge or offence must be set forth in the summons, and the safest course will be to copy the whole charge as in the information set forth. For this purpose in procuring printed forms, care should be taken that a blank, in that part intended for the statement of the matter of the information, sufficiently large, should be given, to admit of the whole charge being set forth.

The statement of the charge or offence in the summons is a requisite prescribed by the statute, and must be followed. In England it has always been done. (2 Chit. G. P. 175; 2 Deacon, 315; Saunders on Con. 26.) In Lower Canada, a practice has prevailed and is still sometimes followed, of omitting all statement of the offence or charge in the summons, and simply referring to an information, declaration or statement annexed, thereby assimilating the proceedings to those in civil suits before the ordinary Courts. This practice is entirely erroneous, and has arisen from ignorance or a mis-conception of the jurisdiction exercised by Justices, and the principles of law by which they are to be guided. The information or complaint are never served; they remain with the Justice or his Clerk.

5. ***Must appoint a certain time and place for the defendant's appearance.***—The next requisite of a summons is that a certain *time* and *place* should therein be set forth for the appearance of the defendant to answer. As to *time*, with analogy to other proceedings, a certain hour of a named day should be stated, and this is clearly implied by the form of summons given in the statute.

Although the hour be stated, still the defendant must, if the Justice or Justices be not ready to proceed at the appointed hour, wait during all reasonable hours of the same day. (1 Doug. Rep. 198; Tidd, 9th Ed. 579; also *Rex* v. *Dyer*, 1 Salk. 181; *R.* v. *Picton*, 2 East, 196.)

The summons should also name a day certain for the defendant's appearance, for if it should name an impossible day, as on *Tuesday* the 17th April when the 17th April fell on *Friday*, no proceedings could be had thereon unless the party appear and defend. (*R.* v. *Dyer*, 1 Salk. 181; *R.* v. *Hall*, 6 Dow. & Ry. 84; *R.* v. *Stone*, 1 East, 649.)

6. ***Rule as to statement of time, with reference to the delay.***—The time appointed in the summons for the appearance of the party must be regulated by circumstances. The Act sometimes requires a certain interval to elapse between the service and the day of hearing, in which case care must be taken that the summons does not name a day too early; and where the statute mentions so many days "at least," they are intended to be *clear* days. (*Zouch* v. *Empsey*, 4 B. & Ald. 522; *Reg* v. *The Justices of Shropshire*, 8 Ad. & Ell. 173; *Mitchell* v. *Foster*, 12 Ad. & Ell. 472; *Reg* v. *The Justices of Middlesex*, 2 New Sess. Ca. 73; 1 New Mag. Ca. 336.)

But should no time be mentioned in the statute upon which the proceedings are had, then the rule which obtained in England, and prescribed by our Magistrates Acts, must prevail, and the time allowed in the summons must be a *reasonable* time, regulated by the circumstances of the case, as for instance the distance from the defendant's residence. The second section provides, that if the party served does not appear, and it be proved on oath that such service was made a *reasonable* time before the time therein appointed for appearing, then it shall be lawful for the Justice, &c., &c., to issue his warrant, or to proceed *ex-parte*.

It may be useful here to notice that in England it has been held that a summons to appear immediately upon the receipt

thereof is insufficient. (*R.* v. *Mallison*, 2 Burr. 681.) So also, to appear on the same day. (*R.* v. *Johnson*, 1 Str. 261.) Neither should the summons be to appear on the following day, as is clearly shewn by the following remarks in 2 Chit. G. P. 176:

"The precise time will generally depend on distance, and the other cir-
"cumstances of each particular case. With analogy to other branches of
"the law, a man ought not to be required *omissis omnibus aliis negotiis*
"instantly to answer a charge of a supposed offence necessarily less than an
"indictable misdemeanor, on the same day, or *even the next day*, and should
"be allowed not only ample time to obtain legal advice and assistance, but
"also to collect his evidence; and even the convenience of witnesses should
"be considered: and therefore, in general, several days should intervene
"between the time of summons and hearing."

7. *Too short delay, when aided.*—If the defendant appears and does not ask for further time, his appearance will cover the defect as to insufficient delay. "But," says Chitty, "should he not appear, the Justice must inquire into the time and circumstances of the service of the summons, and unless it appear to have been quite sufficient, should of his own accord adjourn the hearing, and issue a fresh summons reciting the former. If a Justice should wilfully proceed to convict without a previous sufficient summons, or without enlarging the time when required, he may be prosecuted by information or indictment for the misdemeanor." (*R.* v. *Venables*, 2 Ld. Ray. 1407; *R.* v. *Simpson*, 1 Str. 46; *R.* v. *Stone*, 1 East, 642.)

8. *Rule as to indication of place.*—The summons must also distinctly state the *place* where the defendant is to appear. The first section of the Magistrates Acts not only requires it, but it has been held in England that if a *certain place* is not specified in the summons for the appearance of the party, he commits no default by not appearing, and the Magistrate cannot proceed in his absence. (*R.* v. *Simpson*, 2 Str. 46.)

9. *Rule in certain cases, as to indication of Justices, or number of Justices, before whom the defendant should be summoned.*—It is necessary to observe that the 1st section of the Magistrates Acts states that the summons shall require the defendant to appear "before the same Justice or Justices or before such other Justice or Justices of the same district as shall then be there," and for this obvious reason that, under some particular statutes, the authority to hear and convict is given to the Justice

who issued the summons, and in some cases to *two* Justices; and although *one* Justice may lawfully issue a summons where *two* are required to render a valid conviction, still the form of summons should be varied in this particular, so as to conform to the particular statute, by requiring the party's appearance either before the *same* Justice or before *two* Justices, according as it may direct. (Stones P. S. 59.)

To illustrate this matter more fully we will refer to the case of *Jones* v. *Gurdon*, 2 Ad. & Ell. 600, where it appears that by statute 52 Geo. III., ch. 93, two Commissioners or a Justice of the Peace were authorized, upon complaint made to him or them, to summon the accused and witnesses before *him* or *them*, and on appearance to hear and determine, &c.; and one Justice had issued a warrant, and a second, before whom the proceedings at the hearing were had, convicted the party and committed him for want of goods to satisfy the penalty. It was held by the Court that the Magistrate who received the information alone had jurisdiction to convict, and that the other acted wholly without jurisdiction, and was liable to an action of trespass.

Lord Denman, C. J., in giving judgment, entered very fully into the law of the case, and the following is deserving of a careful perusal. His Lordship said:

"It may be conceded that, in general, where no provision is made to the "contrary, the original information or complaint may be made to one Jus- "tice, and another may hear and determine the matter. The statute 3 Geo. "IV., ch. 23, s. 2, in the latter part of that section, recognizes that course of "proceeding very distinctly. This case, however, depends not upon the "general rule, or upon the statute 3 Geo. IV., ch. 23, but upon the words "of rule 13 of statute 52 Geo. III., ch. 93, schedule (L.), which gives the "jurisdiction. The words are, that it shall be lawful for any one Justice, "being also a Commissioner, to summon the person accused to appear before "*him* (not adding "or any other Justice and Commissioner," or any equiva- "lent words,) and upon appearance or default, to proceed.

"We are of opinion that this rule does not authorize any Justice to hear "the matter except that one to whom the information or complaint is made, "and that the statute 3 Geo. IV., ch. 23, s. 2, does not make any difference, "inasmuch as that statute contains no enactment that one Justice may sum- "mon and another hear, but only recognizes such a course of proceeding "incidentally; the enactment being only that when the law requires two "or more to hear, one only may take the information. This being the con- "struction which we feel ourselves bound to put upon rule 13 in 52 Geo. "III., ch. 93, it follows that the defendant had no jurisdiction in the parti- "cular case."

Patteson, Williams, and Coleridge, Js., concurred in this judgment, and a verdict for £10 damages was entered up against the Magistrate, defendant in that action.

This decision has a most perfect application to our law in the Province, as section 2 of the Imp. Act 3 Geo. IV., ch. 23, adverted to by Lord Denman, is precisely the same as 4 Geo. IV., ch. 19, s. 7, (L. C.), 2 Wm. IV., ch. 4, s. 2, (U. C.), re-enacted in almost similar terms by the 25th section of the Magistrates Acts.

10. *Summons must be dated.*—The date and place of issuing the summons should be correctly mentioned, and precaution taken that the summons be not dated of a day prior to that when the information was laid, for if this error be committed and the party do not appear, all subsequent proceedings would be void. (*R.* v. *Kent*, 2 Ld. Ray. 1546.)

11. *By whom signed, and when.*—The summons should be signed by the Justice issuing the same. Upon this point it is necessary to observe that it would be extremely dangerous for Justices to sign summonses in blank, to be filled up by the Clerk, and issued without the Magistrate being cognizant of the charge. This would amount to a gross breach of magisterial authority, as no person should be exposed to this summary jurisdiction, unless the charge or complaint has first been submitted to a Justice, in whom the law has vested certain powers, as for instance, that of examining into the charge, that it amounts to a legal offence, and is one over which he has jurisdiction. The law requires that the Justice must himself sign the summons after he has heard the charge, and not suffer his Clerk to sign the same, or to issue any ready prepared summons. (*R.* v. *Stevenson*, 2 East, 365; *R.* v. *Constable*, 7 Dow. & Ry. 663.)

12. *Must be sealed, and in what manner.*—To comply with the terms of the Magistrates Acts, the summons or warrant must be sealed. As to the manner of sealing any documents required to be under the seal of Justices no rule exists. It suffices if the manner of sealing be one adopted by the Justice. In Oake's Syn p. 31, we read: "The seal or mark intended as a seal on sum-"monses, warrants, convictions, orders, commitments, &c., may "be any impression, or otherwise in ink, made at the time by the "Clerk, or by the printer, and adopted by the Justice or Justices "signing the document." (See *R.* v. *St. Paul's Covent Garden*, 14 Law J. Rep. (N. S.) M. C. 109; 9 J. P. 441.)

CHAPTER IV.

§ II.

BY WHOM SERVICE OF SUMMONS SHOULD BE MADE.

1. *Provisions of 6 Wm. IV., ch. 19.*
2. *Provision of the Magistrates Acts.*
3. *Service need not be made by Constable or Bailiff.*
4. *What persons should be selected.*
5. *Appointment of Constables.*
6. *What should be done if Constable be related to either party.*
7. *Fees of Constable in L. C.*
8. *Fees of Constable in U. C.*
9. *How punished for neglect or misbehaviour.*
10. *In what manner protected.*

1. *Provisions of 6 Wm. IV., ch. 19.*—As applicable to Lower Canada, it is enacted by this Act, that any Justice of the Peace may appoint one or more Constables to execute the orders of such Justice of the Peace, to whom the Justice must administer the requisite oath, (*ante*, p. 74), and enregister the same in the register kept by such Justice; and by section 6, that all Bailiffs of the Court of King's Bench, by virtue of the Act, are authorized to execute all orders of Justices of the Peace, within their respective districts, without its being necessary that they should be appointed Constables. (Rev. Sta. L. C., p. 182.)

2. *Provision of the Magistrates Acts.*—It is enacted by section 1 of these statutes, with reference to the service of a summons, as follows: "And every such summons shall be served by a Constable or other peace officer, or *other person* to whom the same shall be delivered."

3. *Need not be made by Constable or Bailiff.*—In Lower Canada, under the Act of Wm. IV., it was necessary that service should be made by a person appointed Constable and sworn as such, or by a Bailiff appointed by the Court for the service of

process in civil cases. It is not, however, any longer necessary that the service should be made by either a Constable or Bailiff, but it may be made by any "other person to whom the same shall be delivered," in the terms of the 1st section of the Magistrates Acts.

4. ***What persons should be selected.***—It is necessary, nevertheless, that Justices should be cautious not to entrust the execution of a matter of so much importance to any person indiscriminately. The party employed should be a person knowing how to read and write, and one in whom the Justice can confide for a true statement under oath of the service, in case proof of it should be necessary.

5. ***Appointment of Constables.***—In another part of this work, (*ante*, p. 74), the appointment of Constables has been noticed, and Justices would act more prudently by employing them to execute or serve any process they may issue. In Lower Canada, they may with advantage employ Bailiffs to serve summonses issued by them, from these officers being familiar with the discharge of that duty but where they issue a warrant it must be delivered to a Constable as required by 3rd section of the Magistrates Acts. (*See No. 9 of section 5 of this chapter.*) It would therefore be advisable for the Justice to make the Bailiff a Constable, administer to him the oath, and record it in his register. Or they may deliver the warrant, if to be executed within the parish, to any captain or other inferior officer of militia, who by law are, within their respective parishes, public and peace officers. (27 Geo. III., ch. 6; Rev. Stat. L. C., p. 180.)

The advantage of having Constables to execute the process and all orders of Justices is the more apparent, when it is considered, that the Magistrates Acts require the attendance before the Justices, at the hearing, of the person who has served the summons, so that proof of service may be made if the party fails to appear, as no warrant can be issued, nor proceedings *ex-parte* had, without such proof.

6. ***What should be done if Constable be related to either party.***—Justices should avoid employing for the service of process a person related to either of the parties; not that there is anything in the law which would render the service invalid for any such cause, but it is a wise precaution to adopt, so as to guard against abuse, more especially where personal liberty is concerned,

as in cases of arrest. In Lower Canada, a Justice of the Peace, having the power at any time to appoint a Constable, the selection or appointment of another should be made, where the one appointed happens to be related to either party.

7. *Fees of Constable in L. C.*—The 6 Wm. IV., ch. 19, enacts:

"That no Bailiff or Constable employed to execute the orders of "any Justice of the Peace, shall, at any time, or under any pretext "whatever, demand or require higher fees than those hereinafter "mentioned, that is to say:

	£	s.	d.
For executing any warrant of arrest,	0	5	0
For his assistant (*recors*),	0	2	6
For seizure and sale under execution (publication included),	0	7	6
For his assistant on do.,	0	2	6
For a seizure only, not followed by a sale,	0	3	9
For his assistant on do.,	0	1	3
For service of any summons, *subpœna* or order,	0	1	3
For every league travelled to serve the same (distance in returning not to be reckoned),	0	1	0
For each official return of illegal resistance,	0	2	6
For his assistant,	0	1	3

"Provided always, that whenever any Bailiff or Constable shall "serve several summonses or *subpœnas* for *the same* complainant, "at the same time and on the same road, he shall only be entitled "to travelling expenses as far as for one journey, and the fees for "the service."

8. *Fees of Constable in U. C.*—Under the provisions of the 8th Vict., ch. 38, applicable to Upper Canada, Constables' fees, have been established by the Judges, as follows:

	£	s.	d.
Arrest of each individual upon a warrant, (to be paid out of the district funds, or by the party, as the case may be),	0	5	0
Serving summons or subpœna,	0	1	3
Mileage, per mile (to be paid as above stated),	0	0	6
Attending assizes or sessions, per day,	0	5	0
Attending any Justice on trials, under the Summary Punishment Acts, or on the examination of prisoners charged with any crime, for each day necessarily employed,	0	5	0
Mileage in going to serve summons or warrant, when the service has not been effected; the Justices in sessions to be satisfied that due diligence has been used, (to be paid, &c., as above stated),	0	0	6

	£	s.	d.
Taking prisoners to gaol, exclusive of disbursements necessarily expended in their conveyance (to be paid as above stated) per mile,	0	0	4
Summoning Jury for inquest,	0	10	0
Attending inquest for each day other than the first,	0	5	0
Serving (personally) notice of appointment of Constable,	0	2	6
Levying upon distress warrant, and returning the same, where charge not provided by law,	0	5	0
Advertising and selling under distress warrant, where a charge not provided by law,	0	5	0
Travelling to make distress, or to search for goods to make distress, and no goods are found, when charge not otherwise provided by law, per mile,	0	0	4
Appraisement, whether by one appraiser or more—on each pound in value of the goods,	0	0	4

9. *How punished for neglect or misbehaviour.*—In Lower Canada a Constable who exacts higher fees than those allowed by 6 Wm. IV., ch. 19, would, by section 3, be liable to a penalty not exceeding five pounds currency, recoverable in a summary way before any Justice of the Peace of the district, on legal proof, one moiety whereof to be awarded to the prosecutor with reasonable costs, and the other moiety to belong to Her Majesty. (Rev. Sta. L. C., p. 182.)

The 27 Geo. III., ch. 6, (L. C.), providing for the annual appointment of Constables in towns by the Justices at Quarter Sessions, imposes, for neglecting or refusing to perform the office, a penalty of twenty pounds, to be recovered in any Court of Record, by bill, plaint or information, with costs of suit. (Rev. Sta. L. C., p. 180.)

In Upper Canada, a Constable *wilfully* and *knowingly* demanding or receiving any higher fee or allowance than those established by 8 Vict., ch. 38, is, by section 4, liable to a penalty of ten pounds to any person who shall sue for the same by action of debt, bill, plaint or information, in any Court of competent jurisdiction.

Constables are liable to be indicted for refusing to be sworn or take upon themselves the office. (2 Hawk., ch. 10, s. 35.) The law renders it their duty to execute the office, and the legal warrant of Justices of the Peace, with reasonable despatch, alacrity and care; and for any omission, misconduct or extortion. they can be punished, on indictment, by fine or imprisonment. (Chitty, Off. Const. 129.)

If a statute imposes a duty upon a Constable, and he neglects to perform it, he is punishable by indictment, unless the statute

prescribe a particular course of proceeding against him. (2 Hale, P. C. 85, 1 Salk. 181.)

A Constable who omits to take an offender liable to arrest, where he has a reasonable opportunity to arrest him, is subject to punishment for his neglect; but a Constable is not responsible for the escape of an offender, unless he has had him in *actual* custody, that is, so far in his power, he having surrendered, as to have been able to lay his hands on him. (2 Hawk., ch. 19, ss. 1–27.)

Constables may, for any misbehaviour or neglect of duty, be dismissed from their office, as, in such manner as they are chosen, by the like authority can they be removed. This power, exercised by Justices of the Peace, has been confirmed by the uninterrupted usage of many years, and cannot now be disputed, but is presumed to have been grounded on sufficient authority. (Chit. Off. Const., p. 6.)

For any breach of duty, or for having exceeded their authority, Constables are also liable to an action at law, subject to various legislative provisions for their protection in particular cases.

10. *In what manner protected.*—The most important statute passed in England, for the protection of Constables, is the 24 Geo. II., ch. 44. Anterior to its passing, Constables were bound to take notice of the authority of Justices, and if they executed a warrant of a Justice, issued in a matter not within his jurisdiction, they were liable; (*ante*, p. 27.) The object of the above statute was to remedy this, and to afford the Constable ample protection in all cases where he acted by virtue of a warrant and *in obedience* to it. The 6th section directs that the jury should find for the Constable, *notwithstanding any defect of jurisdiction in such Justice or Justices;* and section 8, that no action should be brought unless commenced within six calendar months after the act committed.

In the construction of this statute it has been held that a Constable acting in *obedience* to a warrant was entitled to *absolute* protection, under section 6, at whatever time the action might be brought against him; and that section 8 was intended to absolve him from responsibility after the lapse of six months, where he had acted *not in strict obedience to his warrant*, but *bonâ fide*, and in *supposed* obedience to it. (Chit. Off. Const., pp. 122, 125.)

But he is responsible for any illegal act, where he has no warrant, or having a warrant, should he commit an unlawful action, not thereby required to be performed. (Id., p. 123.) Therefore,

he will be liable if he arrests the wrong person, (3 Burr. 1768); or for executing a warrant out of the Magistrate's jurisdiction, without express authority in the warrant so to do, (2 M. & S. 259); or if under a warrant of distress he be guilty of an excessive distress, (4 B. & Ad. 113); and it has been held that in cases of that description the Constable is not within the protection of the Act.

By the statute 7 J. I., ch. 5, made perpetual by 21 J. I., ch. 12, "a Constable or other officer sued for anything done by virtue of his office, is entitled to double costs, if he obtains a verdict, or if the plaintiff be non-suit or suffer a discontinuance."

This, however, is no longer the rule in this Province, as the 1st section of 14 and 15 Vict., ch. 54, declares:

"That so much of any such Act or Acts now in force in this Province, "whether public, local, or personal, as confers any privilege either as to "notice or limitation of action, or as to amount of costs, or as to pleading "the general issue, and giving the special matter in evidence, or as to the "*venue* of the action, or as to tender of amends or payment of money into "Court, upon any Magistrate, public officer, or other person, for any act "done, either by virtue of his office, or under the provisions of any such "Act or Acts, be and the same is hereby repealed."

The subsequent sections are made to apply not only to Justices of the Peace, but also to any "other officer or person fulfilling any public duty, whether such duty arises out of the common law, or is imposed by Act of Parliament, either Imperial or Provincial." In Upper Canada its provisions, as respects Justices only, have no application now, (*ante*, p. 28); but as respects all other officers, Constables and others, they apply to both sections of the Province, and what has been said (*ante*, pp. 28 *et seq.*) with reference to the liability and protection of Justices under this statute, will apply to Constables also.

At common law it is an indictable offence to assault a Constable in the execution of his office.

CHAPTER IV.

§ III.

IN WHAT MANNER THE SERVICE OF SUMMONS SHOULD BE MADE.

1. *The error which prevails in Lower Canada as to service.*
2. *The method followed in England.*
3. *Our Statute Law on the subject.*
4. *Rule to be observed as to service.*
5. *The distinction between it and the rule in civil cases.*
6. *Time when service can be made.*
7. *Not on a Sunday.*
8. *When a warrant cannot be executed on a Sunday.*
9. *When it can.*
10. *Return of service of summons unnecessary.*

1. *The error which prevails in Lower Canada as to service.*—In Lower Canada an erroneous practice has prevailed with reference to the service of a summons issued by Justices, by adopting the course which obtains as to service of civil process issued from a Court of record exercising civil jurisdiction. Thus a copy of the summons, certified by the Justice or his Clerk, is served on the defendant, and a return made on the original, which Justices have regarded as sufficient evidence of service, to justify their proceeding by default to the hearing and adjudication of the information or complaint. That this mode of proceeding is altogether illegal, will be satisfactorily established by a reference to the authorities hereinafter given.

2. *The method followed in England.*—In England there are two modes of service resorted to, applicable to the form in which the summons is issued. Where the summons is directed to the Constable, or a third person, a copy of it plainly and legibly written on paper should be served on the party accused; if directed to the defendant, the *original* should be served upon him,

and a copy kept by the party serving it. (1 Archibold, J. P., vo. *Conviction*, p. 316.)

Saunders on Con., at pp. 26 and 27, says: "When the summons is directed to the defendant himself, it is usual for the Justice to sign a duplicate also, one of which the Constable delivers, and the other he retains, endorsing upon it the circumstances of the service; where, however, no duplicate is delivered to the Constable, he should make a copy for his own use, and deliver the original to the defendant. When the summons is directed to the Constable, as a precept, it is *his* duty to make a copy of it *verbatim*, which copy he should serve upon the defendant, himself keeping the original, and indorsing on it a memorandum of the service."

3. ***Our Statute Law on the subject.***—If any doubt on this point could exist, it is at once removed by a reference to the 1st section of the Magistrates Acts, which declares that every summons "shall be served by a Constable or other peace officer, or other person to whom the same shall be delivered, upon the person to whom it is so directed, by *delivering the same* to the party personally, or by leaving the same with some person for him, at his last or most usual place of abode; and the Constable, peace officer, or person who shall serve the same, shall attend at the time and place, and before the Justices in the said summons mentioned, to depose, if necessary, to the service of the said summons." The original summons is here meant, and not a copy. The form of summons given by these statutes is a summons directed to the accused himself, and must be left with him; otherwise the requirements of the statutes are not complied with.

In Westoby's edition (1850) of Stone's Petty Sessions, at page 61, referring to the Imperial Statute 11 and 12 Vict., ch. 43, from which our statutes are borrowed, it is stated:

"The summons is generally, in practice, made out in duplicate, both of "which are signed and sealed by the Magistrate, and delivered to the Con- "stable, peace officer, or person directed to serve it; one of these is served "on the defendant by delivering it to him personally, or by leaving it with "some person for him at his last or most usual place of abode; the other is "endorsed by the person who served the summons, with a memorandum of "service, and retained by him for production at the Petty Sessions, where "he is required to attend at the hearing of the case, to *depose* to the due "service of the summons on the defendant, in case of his non-appearance, "and the consequent necessity of issuing a warrant for his apprehension, or "proceeding against him *ex-parte*."

4. *Rule to be observed as to service.*—The rule to be observed is therefore clearly established, that a copy made out by the Constable or person entrusted with the service, is to be served on the party accused, in those cases only, where the statute under which the proceedings are had, prescribes a form of summons addressed by way of precept, to the Constable or person charged with making the service; but where no such form of summons is prescribed by the statute, then the form given by the Magistrates Acts is to be observed, which is a summons addressed to the defendant, and an original summons signed and sealed by the Justice must be served. A copy may be made and retained by the Constable who serves the original; but the better course to be adopted is for the Justice to make out duplicates signed and sealed, one of them to be served and the other retained by the Constable, for production at the hearing.

5. *The distinction between it and the rule in civil cases.*—The distinction between this mode of effecting service in proceedings before Justices, and that which obtains in Civil Courts, will be the more readily understood, when it is borne in mind that the information or complaint is never served; it remains with the Justice by whom the summons is issued, and the substance of it is embodied in the summons. If the accused appears, the information or complaint is read to him, and he is called upon to answer it. In civil cases the summons contains nothing more than the injunction to appear and answer to a declaration or petition annexed.

6. *Time when service can be made.*—There is no rule which requires that the service shall be made before sun-set, nor between certain hours. The law is that the service shall be made at a reasonable time.

7. *Not on a Sunday.*—A summons cannot issue nor be served on a Sunday. If it bear date on a Sunday it is wholly void. (*Hanson* v. *Shackleton*, 4 Dowl. 48.)

8. *When a warrant cannot be executed on a Sunday.*—Nor can a warrant to apprehend for non-payment of penalty under a conviction or for non-payment of money, under a Justice's order, be executed on a Sunday, for it is in the nature of an execution in a civil action. (*R.* v. *Myers*, 1 T. R. 265; 1 Arch., J. P., p. 122.)

For the same reason a warrant to compel the attendance of a person to answer to an information for the recovery of a penalty, or a complaint for the recovery of money, cannot be executed on a Sunday.

9. ***When it can.***—But a warrant may be executed on a Sunday, if it be to apprehend for treason, felony, or a breach of the peace. (21 C. II., c. 7, s. 6.)

The words "breach of the peace" have been holden to include all offences which are impliedly against the peace; and thus a warrant to apprehend a man, that he might find sureties for his good behaviour, has been held to be within the meaning of the above statute, and can be executed on a Sunday. (*Johnston* v. *Colston*, T. Raym., 250; 1 Arch., J. P., p. 122.)

Therefore in all cases of assault and battery, the warrant may be executed on a Sunday.

10. ***Return of service of summons unnecessary.***—In Lower Canada, a great absurdity has prevailed, with reference to proceedings before Justices, by assimilating the method of service, and proof of it, to the law and practice which under our French system of jurisprudence prevails in civil Courts. What is called a *return* of service, made out in the form of a bailiff's return, has erroneously been regarded as authentic. It need only be remarked that as the service of a summons may be made by any person "to whom the same shall be delivered," it is not necessary that a formal return of service of a summons should be written out by the Constable or person who has served it. A memorandum of the service is to be made or endorsed by him, and he must attend before the Justice on the return day, so that if the defendant does not appear, or any objection be made by him on his appearance to the sufficiency of the service, he may be examined under oath as a witness by the Justice to prove the time and manner of service. Where the Constable is thus examined, this, being a necessary part of the proceedings at the hearing, should be recorded by the Justice or his Clerk, and a minute made of it, and in Lower Canada entered in the Register in which by law must be recorded "true and faithful minutes or memorandums at length of every conviction." The deposition given by the Constable should be taken down, as those of other witnesses, in the language used by him.

CHAPTER IV.

§ IV.

UPON WHOM SERVICE SHOULD BE MADE.

1. *Rule in England prior to 11 and 12 Vict., ch. 43.*
2. *Rule established by the Magistrates Acts.*
3. *Reason for its being made personally if possible.*
4. *What should be done if personal service cannot be made.*

1. ***Rule in England prior to 11 and 12 Vict., ch. 43.***—Anterior to the passing of the 11 and 12 Vict., ch. 43, the rule in England was, that the service should be made *personally* on the defendant, unless expressly dispensed with by the statute under which the proceedings were had. (2 Chit. G. P., p. 177; 10 Mod. 345; *R.* v. *Chandler*, 14 East, 268; *R.* v. *Colamins*, 8 Dow. & Ry. 344; and *R.* v. *Hall*, 6 Dow. & Ry. 84.)

2. ***Rule established by the Magistrates Acts.***—But by that statute, as likewise by the 1st section of the Magistrates Acts, the summons may be served by delivering the same to the party personally, or by leaving the same with some person for him at his last or most usual place of abode.

3. ***Reason for its being made personally if possible.***—It is desirable, however, that the service should be made personally if possible, for when not personally served, and the defendant makes default, the Justice should require proof from the Constable, that it has been delivered to the wife, child or some immediate servant of the defendant, so as to afford a reasonable presumption of its having come to his hands, before proceeding further with the case. The propriety of this is obvious, when it is considered that the defendant may, upon conviction, be fined or imprisoned. (*R.* v. *Clement*, 4 B. & A. 218.)

4. ***What should be done if personal service cannot be made.*** —Where a personal service cannot conveniently be made, the Constable should leave the summons with a person most likely to deliver it to the defendant, such as his wife, servant or other inmate of his residence, so as to prevent the issuing of a warrant for the defendant's apprehension, or the case being heard *ex-parte* in his absence, by his appearing in obedience to it.

Where personal service has not been made, and the defendant fails to appear, the Justice should exercise great precaution before proceeding *ex-parte* or issuing a warrant, by minutely enquiring into the circumstances under which the service was made, and if from his examination under oath of the Constable or person who made the service, there be reason to suspect that the summons may not have reached the defendant, his duty is, as already shewn, to issue a fresh summons returnable at some future day. (See *ante*, p. 134.)

CHAPTER IV.

§ V.

ISSUING A WARRANT INSTEAD OF A SUMMONS.

1. *General observations.*
2. *What the rule was in England.*
3. *Present statute law.*
4. *Distinction made between informations and complaints.*
5. *Due service of summons how determined.*
6. *In what cases a summons should precede a warrant.*
7. *Where a warrant should be issued in the first instance.*
8. *Requirements of a warrant.*
9. *To whom directed.*
10. *How executed, and power of Constable in the execution of it.*
11. *Duty of Constable in cases of arrest by warrant.*
12. *His duty in cases of arrest without warrant.*

1. *General observations.*—It is of the utmost importance that the Justice should properly discriminate between those cases where he should issue a warrant in the first instance, instead of a summons, and those where he should abstain from so doing. In some instances it is his duty to issue a warrant, in others a matter of discretion, and in others again unwise and even illegal for him to adopt that course.

2. *What the rule was in England.*—In England the rule has been that unless the warrant be expressly, or by strong implication, given by the particular statute, or the offence include a breach of the peace, or is of an indictable nature, the Justices had no functions to issue a warrant, either in the first instance or in default of appearance to the summons. (*R.* v. *Simpson*, 10 Mod. 341; *Bane* v. *Methuen*, 9 Moore, 161; 1 Stra. 41.)

3. *Present statute law.*—But now in England, by 11 and 12 Vict., ch. 43, and in this Province, by the Magistrates Acts, in every case of information or complaint, if the party fails to appear,

and due proof be made upon oath of the service of the summons, the Justice may issue a warrant for the apprehension of the defendant; and in cases of *informations for any offence punishable on conviction*, upon oath or affirmation being made substantiating the matter of such information, the Justice may issue his warrant in the first instance, instead of a summons.

4. ***Distinction made between informations and complaints.*** —This section, as well as the 9th section of the same statute, be it observed, make a marked distinction between an information for an *offence*, and a complaint brought for the recovery of a sum of money. It is only in cases of *informations for offences*, that a warrant can be issued in the first instance, and then only when oath is made substantiating the matter charged. In complaints, on the contrary, a summons must first issue, and if the party make default, it is discretionary with the Magistrate to issue his warrant or not. Taking care, however, if he does, that a proper service of the summons be established by the examination upon oath of the Constable or person who served it, and that the substance of the complaint be likewise proved on oath, before he issues a warrant. (*Ante*, p. 53, and Oake's Syn., p. 62.)

Many persons are apt to consider the words *information* and *complaint* as synonymous terms, whereas they are not, but are as different in their meaning and application as the words *conviction* and *order*. Any one reading the different provisions of the Magistrates Acts with attention, will be convinced that the *information* is a charge *laid* for an *offence* punishable on summary conviction, and that a *complaint* is *made* where a Justice "may make an order for the payment of money, or otherwise." (Section 7 of Magistrates Acts.) Mr. Oake says: "Here is meant a complaint "upon which a Justice is or shall be authorized by law to make "an order for the payment of money, or otherwise, (ss. 1, 8, 10 of "11 and 12 Vict., ch. 43,) and these words "*or otherwise*" seem "to apply to cases where the order is for the doing of some other "act than paying money, on disobedience of which imprisonment "follows." (Oake's Syn., p. 62.)

The prosecutor of an information is called the *informant*, and of a complaint the *complainant*. The decision of the Justices, where the informant succeeds, is called a *conviction*, and when given in favor of the complainant, an *order*.

The rules laid down in this work, as to informations, for the most part apply to complaints; and the same particularity as to the facts is required, as in an information. Mr. Oake, on this subject, further remarks: "What has been said in regard to infor-" mations,—as to the time of making the complaint,—by whom " to be made,—when to be on oath,—will equally apply to com-" plaints, except as no warrant in the first instance can be granted " on a complaint, that part as to the oath will be inapplicable." (Oake's Syn., p. 62.)

5. *Due service of summons how determined.*—It must appear that the summons was "duly served" upon the defendant "a reasonable time" before the time appointed for his appearance. If the particular statute upon which the proceedings are had does not appoint a delay for service, then the Justices must determine whether a reasonable time has been given between the service and day appointed for the appearance of the defendant, judging from the circumstances of each particular case, and the distance of the party's residence. If it appear that a reasonable time has not elapsed, or if there be no proof of the service of the summons, or reason to doubt its having reached the defendant, the Justice should not issue his warrant; all he can do is to issue another summons if required, returnable at some future day. (Arch. Jer. Acts, p. 102; also see No. 7, section 1, *ante*, p. 134.)

6. *In what cases a summons should precede a warrant.*—If there be no reason to apprehend that the defendant will evade the process judging from his circumstances or position in life, his being a householder or proprietor, then it is more proper to issue a summons instead of a warrant. So also in all cases of offences under penal statutes, where a portion of the penalty goes to the informer, the better course is to issue a summons, and if the party summoned fail to appear, upon due proof of service having been made, affording him a reasonable time to appear and make his defence, the Justice may proceed *ex-parte* to the hearing and decision of the case in his absence.

In England it has been held that even where a statute authorizes the issuing of a warrant upon complaint, yet if it be for the non-payment of money, or for a penalty, it is better for the Justice to issue his summons in the first instance, and he *ought* to do so. (*R.* v. *Martyn*, 13 East, 61.)

7. *When a warrant should be issued in the first instance.*—In cases where Justices have the power of issuing a warrant in the first instance, they must be governed by the circumstances of each case, as to the propriety of so doing. It is usual to issue a warrant for offences including a breach of the peace, such as assault; also for malicious injuries to property, and offences of that class. So it is proper in the first instance to issue a warrant, if the Justice, from his knowledge of the defendant, or other circumstances, is satisfied that he will evade the service or is likely to abscond. (Stone's Petty Sess. 65; Arch. Jer. Acts, 103.)

It is necessary in every case that the Justice should carefully examine the provisions of the statute upon which the proceedings are had, with the view to this inquiry, namely: whether the statute expressly directs the issuing of a summons or warrant, or whether it is silent as to both or either of those modes of proceeding. The necessity for this precaution is obvious, for if the statute be positive in directing that a warrant shall issue or that a summons shall be resorted to, the Justice must act accordingly.(*a*) But should the statute be silent on the subject, then *in cases of informations for offences*, the discretionary power vested in Justices by the Magistrates Acts should be properly exercised, having regard to the nature of the offence, the character and position of the defendant, and the circumstances of each case.

8. ***Requirements of a warrant.***—Every warrant should shew on the face of it that the Justice issuing it has jurisdiction. (In *Re Peerless*, 1 Ad. & El. (N. S.) 173.)

The Magistrates Acts require, by section 3, that the warrant should state shortly the subject matter charged against the defendant, who must be either named or described in the warrant. But it is not necessary that it should be returnable on any particular day, and it remains in force until executed.

It should be signed and sealed by the Justice, and must not be issued unless a formal information on oath, within the terms of the statute, is first laid before the Justice; otherwise he would expose himself to an action even for a slight and temporary imprisonment, if the party were arrested on a warrant improperly issued. (*Caudle*

(*a*) If the statute directs the issuing of a warrant, then, in the cases mentioned above, No. 6, he may, according to the authority there given, lawfully issue a summons.

v. *Seymour*, 1 Ad. & E. (N. S.) 889; *Stevens* v. *Clark*, Car. & Mar. 509.)

9. *To whom directed.*—The warrant, by the Magistrates Acts, may be directed to all or any of the Constables or other peace officers of the district within which the same is to be executed, or to such Constable and all other Constables within the district within which the Justice or Justices issuing such warrant hath or have jurisdiction, or generally to all Constables within such last mentioned district. They differ, in this respect, from the Imperial statute, that the latter provides that the warrant may be directed either to any Constable or *other person* by name, &c., thus allowing the execution of the warrant to be made by a person not a Constable or peace officer. On this, Archbold remarks: "It may "be directed to any person by name; and if such person be a "Constable or other peace officer, within the jurisdiction of the "Justice granting the warrant, he must execute it, and is punish- "able for not doing so, and he may execute it at any place within "the jurisdiction; but if he be not a Constable or peace officer, "although he may execute it at any place within the Justice's "jurisdiction, *he is not compellable to do so, nor can he be pun- "ished if he do not.*"

The Legislature of Canada has therefore very properly omitted the words "or other person," in respect of warrants, although they are retained in the first section with reference to the service of a summons. But the reason for making this distinction is very obvious. The service of the summons in many cases need not be proved, as the party may appear and answer; and even where he does not appear, the party who served the summons, whether a Constable or not, is simply a witness, called upon, as other witnesses are, to testify before the Justice "concerning the information or complaint." On the other hand, the execution of a warrant is of more importance, requiring in every case proper skill and judgment, and in some instances a certain knowledge of the law as to what steps can be taken to secure the apprehension of offenders, which can only be acquired by a Constable or peace officer accustomed to the discharge of that duty. Moreover, the Constable is an officer bound to discharge his duty, can be compelled to perform it, and punished for either neglect or refusal, as shewn in the 2nd section of this chapter.

10. ***How executed, and power of Constable in the execution of it.***—The Constable or peace officer may execute the warrant at any place within the Justice's jurisdiction; or, in cases of fresh pursuit, (that is to say where the offender escapes out of the jurisdiction of the Justice into the next adjoining district or territorial division, whilst the Constable is in actual pursuit of him,) the Constable may follow him into such adjoining district or division, to the distance of seven miles from the border or confines of the jurisdiction, without having the warrant backed.

Where the Constable is not in fresh pursuit, or in fresh pursuit beyond the seven miles, or that the offender has removed to any place within the limits of Upper or Lower Canada, as the case may be, he must obtain authority to execute the warrant by getting it backed by a Justice of the Peace within whose jurisdiction the defendant shall be or be suspected to be; and to obtain it, it is necessary only that the handwriting of the Justice who issued the warrant should be proved upon oath, and thereupon the Justice to whom the application is made will endorse the warrant, authorizing its execution within his jurisdiction, and such endorsement will be a sufficient authority for the arrest of the offender, and bringing him before the Justice who issued the warrant, or some other having the same jurisdiction.

The Justice is *bound* to back the warrant if the handwriting of the Justice who signed it, is proved on oath. (1 East, 117.)

It is usual for the Constable to touch the accused with his hand, saying, "I arrest you in the Queen's name," or words of a similar import; although to constitute an arrest it is not necessary that the Constable should actually touch the person against whom the warrant issues; it is sufficient if the Constable confine him in a room, and tell him he is arrested. (Cas. Tem. Hardw. 301; Bull N. P. 82.)

Bare words, however, will not make an arrest. (1 Salk. 79.)

As a general rule, if the warrant be addressed to a Constable by name, he cannot authorize others to execute it, though any one may lawfully assist him. (2 Hawk., ch. 13, s. 29; 2 Hale P. C. 115.)

When he employs others to assist him, he should be so near as to be acting in the arrest, in order to render an arrest by virtue of the warrant legal. (Cowp. 66; *Price* v. *Peek*, 1 Scot. R. 205; 1 Bing. N. C. 380, S. C.)

In the execution of a warrant for a penalty partly payable to the Crown, the Constable may break open any door to effect his purpose; likewise to retake a party who has escaped from custody, even in the house of a third party, but he should first signify to those in the house the cause of his coming, and request them to give him admittance, and shew his warrant if demanded. (2 B. & Ald. 592; 2 Hawk., ch. 14, ss. 1, 5, 9 and 11.)

Once in the house, the Constable, if he be locked in, or otherwise prevented from retiring, may lawfully break out by any means in his power. (2 Hawk., ch. 14, s. 11.)

In no case is a Constable required to part with the warrant out of his own possession, for that is his justification. (1 East P. C. 316; 2 Ld. Raym. 1196.)

But in all cases cognizable by Justices in a summary manner, excepting cases involving a breach of the peace, the Constable must produce the warrant if demanded, unless the arrest be had in pursuance of some special enactment authorizing an arrest without warrant.

Whether a Constable having arrested a party under a warrant, and suffered him to go at large, upon his promise to come again or find sureties, can afterwards arrest such party on the same warrant, appears to have been doubted. But if the offence be one which the public justice requires should be punished, such as a breach of the peace, it would seem that such second arrest can be made. (2 Hawk., ch. 13, ss. 9, 19; Peake's Rep. 234.)

It is certain that after a departure with leave of the Constable, if the accused returns into his custody, he may lawfully detain him in pursuance of his original warrant. (2 Hawk., c. 13, s. 9.)

It has been said, however, that in cases of assault of a trifling nature, where the party is respectable and known, the Constable may take his word for his appearance before the Magistrate. (*Hardy* v. *Murphy*, 1 Esp. Rep. 295; *Arrowsmith* v. *Lemesurier*, 2 N. R. 211; 1 Chit. Crim. L. 59.)

11. ***Duty of Constable in cases of arrest by warrant.***— The arrest being made, it is necessary that the Constable should bring the party before the Justice, according to the import of the warrant, and if the Constable do not do so, or be guilty of unnecessary delay, it is a breach of duty for which he can be punished. (2 Hale P. C. 119; 4 B. & C. 596.)

But if the time be unseasonable, as in or near the night, whereby he cannot attend the Justice, or if there be danger of a rescue, or the party be too ill to be brought up, he may, as the case may require, secure him, or detain him in a house until it be reasonable to bring him. (2 Hale P. C. 119, 120.)

He should not handcuff him, unless there be reason to expect he will use violence, or attempt to escape. (*Wright* v. *Court*, 4 B. & C. 596.)

12. ***His duty in cases of arrest without warrant.***— There are cases where the statute, in reference to particular offences, authorizes an arrest without a warrant, as already shewn in another part of this work. Where this is done it is absolutely necessary that the party apprehended should be brought immediately or as soon as possible before a Magistrate. It has been held by the Court of Queen's Bench in England, that if a Constable or other person, in cases of arrest without warrant, should take an offender elsewhere than to the *nearest* Magistrate, he loses the protection of the law. (*R.* v. *Curran*, 3 C. & P. 397.)

CHAPTER IV.

§ VI.

PROCURING THE ATTENDANCE OF WITNESSES.

1. *Former defects in the law.*
2. *Provision of Lower Canada Statute.*
3. *Provision of Upper Canada Statute.*
4. *Provision of Magistrates Acts.*
5. *Service how made on witness*
6. *Power to issue warrant in case of default.*
7. *Issuing warrant in the first instance.*
8. *Commitment of witness.*
9. *How a summons or warrant obtained.*
10. *Allowance made to witness.*
11. *When the allowance to witnesses should be made.*
12. *What expenses witnesses may exact beforehand.*
13. *How tender of expenses should be made.*

1. *Former defects in the law.*—Until recently in England a Justice of the Peace had no power either to summons a witness, issue a warrant against him, or punish him for his refusal to be sworn or to answer, unless that power was expressly given by some special enactment in the statute creating the paticular offence under enquiry. That such should have been the state of the law until the passing of the 11 and 12 Vict., ch. 43, seems to be extraordinary. The usual course pursued was to apply at the Clerk's office for a summons, which was signed by the Magistrate, and then served in the ordinary way. If the witness appeared and gave his evidence, the party's object was attained. But where the witness failed to appear, the Magistrate could afford no relief. To obviate this defect, it became necessary to have recourse to a rather inconvenient practice, that of applying at the Crown Office in London for a subpœna, which, if the witness disobeyed, subjected

him to the penalty of an attachment. (*Reg* v. *Greenaway*, 2 New Sess. Ca. 103; *Reg* v. *Carey*, Ibid, 105. Corner's Pra. C. O. 256; 1 Arch., J. P., 319; 1 Paley, 33.)

2. *Provision of Lower Canada Statute.*—Likewise in Lower Canada the same defect in the law existed, until the passing of the 9 Vict., ch. 5, (1846) the preamble of which declares: "Whereas in Lower Canada *there exists no law* to enforce "the attendance of witnesses before Magistrates in certain cases; "and whereas it is expedient to provide for the same;" and it is thereby enacted:

"That if any person who shall be summoned as a witness upon any com- "plaint, information or investigation, lawfully brought before any Justice or "Justices of the Peace, in that part of this Province which heretofore con- "stituted the Province of Lower Canada, shall refuse or neglect to appear "at the time by such summons appointed, having no just cause for such "neglect or refusal allowed by such Justice or Justices; it shall be lawful "for *such Justice or Justices*, on proof of such summons having been "served, to issue a warrant, under his hand and seal, or their hands and "seals, to bring such persons before him or them; and if any witness "appearing, or on being brought under such warrant as aforesaid, before "any *such Justice or Justices*, shall refuse to be examined, or to answer on "oath such questions as may be lawfully put to such witness concerning "the matter before such Justice or Justices, without having some just "cause for such refusal allowed as aforesaid, it shall be lawful for *such "Justice or Justices*, by warrant under his hand and seal, or their hands and "seals, to commit such person to the common gaol of the district wherein "the said Justice or Justices have jurisdiction, there to remain for any time "not exceeding ten days, at the discretion of the Justice or Justices."

3. *Provision of Upper Canada Statute.*—In Upper Canada this defect was remedied at an earlier period, A. D. 1838, when by 1 Vict., ch. 16, section 3, it was enacted:

"That it shall be lawful for such Justice, at the request of the party "complaining or complained against, to summon all parties as witnesses, "and to administer an oath to them touching the matter of such complaint, "or the defence against it; and if any person or persons so summoned shall "not obey such summons, without any reasonable or lawful excuse, or refuse "to be examined upon oath or affirmation, (being a person by the laws of "this Province entitled to affirm,) then every such person so offending shall "forfeit and pay a sum not exceeding forty shillings, to be ordered, levied "and paid in such manner, and by such means, and with such power of "commitment as is hereinbefore directed as to such orders and judgment to "be given by the party or parties in the original complaint, excepting so "far as regards the form of the order, as hereinafter provided for."

4. *Provision of Magistrates Acts.*—But now in Upper as well as Lower Canada, another and more important enactment on the subject, differing essentially from the provisions of the foregoing statutes, is to be found in the Magistrates Acts, section 6 of which enacts:

"That if it be made to appear by oath or affirmation, to any Justice, that "any person *within his jurisdiction* is likely to give material evidence for "the prosecutor or defendant, and will not voluntarily appear as a witness, "such Justice may issue his summons under his hand and seal, requiring the "witness to be and appear at the time and place to be therein mentioned, "before the said Justice, or before *such other* Justice or Justices of the Peace "for the said district as shall then be there, to testify what he shall know "concerning the said information or complaint."

5. *Service how made on witness.*—The same section provides also that the service of the summons may be either personal on the witness, or left for him with some person, at his last or most usual place of abode.

In England it would appear that an original subpœna, and not a copy, is served on the witness, (Oake's Form., p. 30); and the Magistrates Acts, in pointing out the mode of service, do not say that a copy shall be served, but makes use of these words: "After "proof upon oath or affirmation of such summons having been "served upon such person, either personally or by leaving *the* "*same* for him with some person at his last or most usual place "of abode," &c. This provision is the same as that enacted with reference to the service of summons upon a defendant, and what has been said (*ante*, p. 145) on this subject will apply to the service of summons on a witness.

6. *Power to issue warrant in case of default.*—If the witness fails to appear, and no *just excuse* be offered for such neglect or refusal, then, proof being made of the service of the summons, *the Justice or Justices before whom* he should have appeared are empowered to issue a warrant to bring the witness before them, at a time and place to be mentioned in the said warrant. (Section 6, Magistrates Acts.)

Urgent domestic business is no excuse for non-attendance, (*Goff* v. *Mills*, 2 D. & L. 23); provided the witness has been duly summoned, and a reasonable sum for his expenses has been tendered to him.

7. *Issuing warrant in the first instance.*—Or if the Justice be satisfied, by evidence upon oath, that it is probable the witness will not attend unless compelled so to do, he may issue his warrant in the first instance, instead of a summons.

8. *Commitment of witness.*—And if the witness refuses to be sworn, or being sworn refuses to answer such questions concerning the premises as shall be put to him, without offering some just excuse for such refusal, *any Justice of the Peace then present*, and having jurisdiction, may commit the party so refusing, to the common gaol or house of correction for the district, there to remain for any time not exceeding ten days, unless he shall in the meantime consent to be examined and to answer concerning the premises.(*a*)

There is a marked distinction between the provisions of these statutes and those of the 1 Vict., c. 16, and 9 Vict., c. 5. By the latter, the coërcive power could only be exercised by the Justice or Justices *who issued the summons;* the warrant must be issued by him or them, and he or they only who issued the summons could commit. So also, the imprisonment was not determinable by the submisssion of the witness to be examined or to answer.

Whereas, by the Magistrates Acts, the Justice or Justices before whom the witness should have appeared, and who may not be the same who issued the summons, have the power of issuing the warrant, and any Justice present at the hearing may commit, upon refusal to be sworn or to answer, for such time not exceeding ten days, as such Justice may appoint, unless the witness should sooner submit to be sworn or to answer. And power is moreover given to issue a warrant in the first instance. But the power of issuing a summons or warrant is, by the statutes, conferred subject to certain restrictions which it may be well to consider.

9. *How a summons or warrant obtained.*—In order to obtain a summons for a witness, an oath or affirmation must be made that the party to be summoned resides or is within the district within which the Justice has jurisdiction, that he is likely to give material evidence for the prosecutor or complainant, or for the defendant, and that deponent verily believes that he will not appear voluntarily for the purpose of being examined as a

(*a*) As to power of committal of a volunteer witness, see No. 12 of this section, p. 164.

witness. This is required in order to prevent persons from being vexatiously summoned who know nothing of the matter. As soon as this oath or affirmation is made, the Justice will grant the summons, and it must be served on the witness, either personally or by leaving the same for him at his last or most usual place of abode. (Arch. Jer. Acts, p. 118.)

The 1 Vict., ch 12, and 9 Vict., ch. 5, do not require this oath for issuing a summons, but as the Magistrates Acts contain a clause repealing all former enactments inconsistent therewith, the provisions of these former statutes have been superseded; and a Justice of the Peace should in every case conform to the recent law, by requiring the oath before issuing a summons.

The propriety of strictly conforming to this law is obvious, for if the witness do not attend, the Justice may be required to issue a warrant against him, which he is authorized to do and can only do by conforming to the special authority, and the manner in which it is to be exercised, as pointed out by section 6 of the Magistrates Acts.

When a warrant is applied for against a witness, consequent upon his non-attendance in obedience to a summons, it becomes the duty of the Justice, before issuing it, strictly to enquire into the circumstances of the service, and the Constable who served it should be examined under oath, as, to use the terms of our statutes, it is only "after proof upon oath or affirmation of such summons having been served" that the Justice can issue a warrant.

It has been held that the summons must be served on a witness a reasonable time before the day of trial, (2 Str. 1054; *Hammond* v. *Steward*, 1 Str. 510); and that the sufficiency of service is a question for the Judge. (*Barten* v. *Wood*, 2 Moo. & R. 172.)

In like manner, it is only where no *just excuse* exists for the non-attendance of a witness, that the Justice has power to issue a warrant against him, for if a sufficient excuse be offered, or should it appear that the service was insufficient, he should not issue a warrant, but adjourn the case to another day, and issue a fresh summons for the witness' attendance on that day. So also, for the reasons hereinafter stated, if the witness resides at a distance, and would be entitled to claim more than for mere *loss of time*, viz: his *expenses*, the Magistrate, before issuing a warrant, should be satisfied that a reasonable sum for his expenses was tendered to the witness.

When a warrant is applied for against a witness in the first instance, instead of a summons, the affidavit made in that case to obtain it must establish that he is likely to give material evidence on behalf of the party, and "that it is probable that such person "will not attend to give evidence, without being compelled so to "do;" and it must likewise appear by the affidavit, that the witness, *at the time*, resides or is within the jurisdiction of the Justice, in the same manner as in the case of a summons; yet if he happen to be out of the jurisdiction when the Constable goes to execute the warrant, the warrant in that case may be backed in the usual way, so that he may be apprehended upon it, at any place within or out of the jurisdiction.

10. ***Allowance made to witness.***—The expenses of witnesses may be taxed, and allowed to a reasonable extent by the Justice or Justices at the hearing, as part of the costs to be paid by the party against whom costs are awarded. If, instead of a conviction, the proceedings be dismissed, or the defendant acquitted, these costs must be paid by the prosecutor or complainant. In like manner they must be paid by him, should the conviction, if one be rendered against the defendant, be satisfied by his going to prison. (Stones P. S. 77.)

In Lower Canada the amount to be allowed a witness is not regulated by any law; but the practice in civil cases is to allow the witness within the limits of the town half a dollar for every day's attendance, and from the country, one dollar per day, from the time he leaves until he returns, beside his actual travelling expenses. By 17 sect., 14 and 15 Vict., ch. 95, power is given to Justices to award such costs as "shall seem reasonable," so that they have a discretion to exercise; and from the circumstances of each case, the position in life of the witness, the time he has lost, and the expenses he may have incurred, they must, to a *reasonable* extent, make him an allowance.

In Upper Canada this matter is settled by positive enactment, applicable to cases of assault, trespass, or misdemeanor. The 2nd section 14 and 15 Vict., ch. 119, says:

"And, that in all cases where persons are subpœnaed to give evidence "before Justices of the Peace in case of assault, trespass, or misdemeanor, "such witness shall be entitled, in the discretion of the Magistrate, to receive "at the rate of two shillings and six pence for every day's attendance, where "the distance travelled in *coming to and returning* from such adjudication "does not exceed ten miles, and three pence for each mile above ten."

A witness residing beyond a distance of five miles would be entitled to claim, under the above provision, three pence for every extra mile beyond the five he would have to travel, as well going to the hearing as in returning from it.

11. ***When the allowance to witnesses should be made.***— The allowance to be made to witnesses should be ascertained by the Justices at the time of the hearing, as they possess no power to give costs generally, to be taxed by their Clerk or other officer. (*Selwood* v. *Mount*, M. S. Q. B. E., 1841. 1 Ad. & El. N. C. 726.)

This is, moreover, rendered necessary by the 17th section of the Magistrates Acts, which, with reference to the awarding of costs, requires that "the sums so allowed for costs shall in all cases be "specified in such conviction or order, or order of dismissal."

12. ***What expenses witnesses may exact beforehand.***—It may be well to call attention to the difference existing between the 6th section of the Magistrates Acts, relating to the summoning of witnesses, and the corresponding clause (section 7) of the Imperial Act 11 and 12 Vict., ch. 43. In the latter, after stating how the service upon a witness is to be made, are to be found these words: "And that a reasonable sum was paid or tendered to him for his "costs and expenses in that behalf." Why they were omitted in the section above referred to of our statutes is not easily explained, for our Provincial Legislature has, in all other respects, borrowed the exact words of this clause of the Imperial Act.

But this provision as to the tendering of costs to the witness when summoned, does not appear to have been introductive of any new principle, but confirming only a doctrine which obtained in England before this Act was passed, and must be considered as law in this Province, notwithstanding our Magistrates Acts are silent with respect to it.

Thus we find, in Saunders' work, published two years before the passing of the 11 and 12 Vict., ch. 43, this principle laid down, that a witness has the right to require that his actual expenses be advanced to him before obeying the summons; and if he demands his expenses, it is imperative on the party seeking his evidence to advance such sum as may be necessary to defray them. But the witness has no right, upon being served with the summons, to demand any money for his *loss of time*, as this is a matter to be settled by the Justices on the hearing of the case. (Saund. on Con. 28; Stone's P. S. 77 and 78.)

We also find in the authorities, that a witness is not obliged to attend unless his reasonable expenses are paid or tendered to him, not only for going to but also for returning from the trial, (Tidd's Pr. 856); and if he attend in obedience to the summons, he may refuse to be sworn until paid. (*Newton* v. *Harland*, 1 Man. & G. 956.)

But should the witness appear voluntarily before the Justice, he ought not to exact payment before giving his evidence, as the Justice, having a discretionary power in respect of costs, may make him an allowance after his examination is closed, to be included in the costs to be awarded; but should he refuse to be sworn unless paid, the party seeking his evidence must do so, as the Justice can exercise no control over a person not summoned or brought before him by legal process.

A volunteer witness, once sworn, may be committed for refusing to answer without just excuse, as he is then a witness subject to the authority and control of the Justices presiding; but that a witness appearing, neither in obedience to a summons nor brought under a warrant, cannot be committed for refusing to be sworn, seems to be certain, notwithstanding Mr. Archbold, in his notes on the 7th section of 11 and 12 Vict., ch 43, (see Arch. Jer. Acts, pp. 118 and 119,) appears to convey the idea that he can be committed. He says:

"But supposing him *before the Magistrate*, either *voluntarily* or brought "by warrant, if he then refuse to be examined on oath or affirmation, or if "he refuse to take such oath or affirmation,—or if, having taken such oath "or affirmation, he refuse to answer any of the questions put to him,—and "if in these cases he offer no just excuse for his refusal,—any Justice of the "Peace then present may commit him."

Mr. Archbold must be understood to mean *voluntarily*, i. e., in obedience to a summons previously served on the witness, as the power of committal can only exist where there is a wilful refusal to obey a lawful authority properly exercised, and there can be no contumacy on the part of a person under no legal obligation to obey. This view of the matter will appear to be fully established, by an attentive consideration of the provision in the 6th section of the Magistrates Acts, which, using the words of the 7th section of the Imperial Act 11 and 12 Vict., ch. 43, enacts: "And if, on the appearance of such person *so summoned* before the said last mentioned Justice, either *in obedience to such summons*, or upon being

brought before him or them by virtue of the said warrant, such person shall refuse to be examined, &c.," any Justice of the Peace then present may commit him.

13. *How tender of expenses should be made.*—The tender of money should be made by the Constable or other person serving the summons, at the time of the service, and *to* the party himself, if personal service be made, or to some person for him at his last or most usual place of abode, if he be absent. The legal mode of making a tender is by production of the money, stating what it is for, and the amount, and without any condition being mentioned, as requiring a receipt, &c. (Roscoe's Law of Evidence, 332, 333.) And these expenses of the witness will form a part of the costs attending the conviction or dismissal, as the case may be. (Oake's Syn., *Note* (*p.*) 72.)

In Upper Canada, in those cases to which the 2nd section of 14 and 15 Vict., ch. 119, would apply, the tender should conform to the allowance thereby established for witnesses.

END OF PART I.

APPENDIX.

EXPLANATORY REMARKS.

The Forms that are here given are those which refer to the subject matter of this part of the work. Many other Forms will be supplied when the second part is issued; but as the Author has had in view to render each part in itself a complete work, he has considered it more advisable to append to each its appropriate Forms. Notes are added to almost all of them, explanatory of their use and application, and references given to such portions of the work as should be consulted.

No. I.

Information without oath.

Province of Canada, District of (*or* County *or* United Counties of) } Be it remembered that on this day of in the year of our Lord one thousand eight hundred and , at the of in the (county *or* district) of , A. B., of the said of C., in the said (district *or* county) of Yeoman,

If preferred by an attorney or agent, say:—by D. E., his duly authorized agent [*or* attorney] in this behalf,

cometh before me, the undersigned, one of Her Majesty's Justices of the Peace in and for the said (district *or* county,)

If the particular statute assigns jurisdiction to Justices of a particular locality only, (see ante, pp. 120 et seq.,) and not to any Justice generally, then insert here as follows:—residing in the parish (*or* county) where the offence hereinafter mentioned was committed;

or

being the Justice *nearest* the place where the offence hereinafter mentioned was committed; or *such other words as may conform to those used in the statute to designate the Justice before whom the proceedings are to be had.*

and complaineth against F. G., of the of in the said (county *or* district) of , (laborer,) for that he, the said F. G., within the space of (*the time limited by the particular statute, but if none be therein mentioned then insert* six calendar months) to wit: on the day of now *last past*, at the of, in the said (county *or* district) of , did unlawfully, &c., (*here state the offence committed, so as to be within the terms of the statute or statutes under which the Information is laid,*) contrary to the form of the statute (*or* statutes, *see ante*, pp. 99 & 100,) in such case made and provided. And thereupon the said A. B. prayeth that the said F. G. may be summoned to answer the said charge, and further dealt with according to law.

A. B. *or* D. E.

Exhibited before me, the day and year, and at the place above mentioned. }

(*Justice's signature.*)

No. 11.

Information on oath.

Province of Canada, District of (*or* County *or* United Counties of) } The Information of A. B., of the of in the (county *or* district) of , Yeoman, taken and made upon oath before me, the undersigned, one of Her Majesty's Justices of the Peace in and for the said (county *or* district) of

Here, if necessary, insert any particular designation of the Justice required, as noted in Form No. I.,

this day of in the year of our Lord one thousand eight hundred and , at the of , in the said (county *or* district,) who saith, that within the space of (*the time limited by the particular statute, but if none be therein mentioned then insert* six calendar months) to wit: on the day of last (*or* instant,) at the of aforesaid, in the said (county *or* district,) D. E., of the of in the said (county *or* district,) (laborer,) did unlawfully, &c., (*here state the offence committed, so as to come within the terms of the statute under which the Information is laid,*) contrary to the form of the statute (*or* statutes, *ante*, pp. 99 & 100,) in such case made and provided. And thereupon the said A. B. prayeth that the said D. E. may be summoned to answer the said charge, and further dealt with according to law, (*or, in case of a warrant being issued in the first instance, insert, instead of* "summoned," *the word* "apprehended,")—and hath signed.

Taken and sworn before me, the day and year, and at the place above mentioned. }

(*Justice's signature.*)

N. B.—This Form will apply where the statute requires the Information to be on oath, even for the purpose of obtaining a summons, which is sometimes the case; or where a warrant is to be issued in the first instance.

No. III.

Deposition to substantiate Information exhibited.

Province of Canada,
District of (*or* County *or* United Counties of) } Informant, vs. Defendant.

The Deposition of A. B., of in the (county *or* district) of , Yeoman, taken upon oath this day of in the year of our Lord one thousand eight hundred and , at the of in the said (county *or* district) of , before me, the undersigned, one of Her Majesty's Justices of the Peace in and for the said (county *or* district) of , before whom the annexed (*or* within) Information was exhibited, who saith as follows: The said Information having been read to me, I declare that the matter alleged and charged in the said Information by the said Informant, against the said Defendant, is true and well founded in fact; and have signed (*or*, and I declare I cannot sign my name.)

Taken and sworn before me, the day and year, and at the place above mentioned.

(*Justice's signature.*)

N. B.—The use to be made of this Deposition is explained *ante*, p. 56. Its application will extend to cases of trespass and others, where the offence must be charged upon oath, and the party injured, who must prosecute, has not seen the offence committed. The only course he can pursue is to *exhibit* his Information according to Form No. I., and bring one of his witnesses cognizant of the fact to swear to the above Deposition. If a *warrant*, instead of a summons, is to be issued, the prayer of the Information must be altered, by inserting the word "apprehended" instead of "summoned."

No. IV.

Information Qui tam.

Province of Canada, District of (*or* County *or* United Counties of) } Be it remembered that on the day of in the year of our Lord one thousand eight hundred and , at , in the said of , A. B., of , in the said of , (*laborer*,) who, as well for our Sovereign Lady the Queen (*or* for the municipality of , *or as the statute may require*,) as for himself, doth prosecute in this behalf, *personally*

If preferred by an agent or attorney, instead of personally, say:—
by C. D., his duly authorized agent [*or* attorney] in this behalf,

cometh before me, the undersigned, one of Her Majesty's Justices of the Peace in and for the said (county *or* district,)

Here follow the directions given in the Form of Information No. I., *to shew that the Justice is one before whom the Information may be laid.*

and as well for our Sovereign Lady the Queen (*or* for the said municipality, *or as the case may be*,) as for himself, informeth me that E. F., of the of , in the said of , (*laborer*,) did within the space of (*the time limited by the particular statute, but if none be therein mentioned, then insert* six calendar months) last past, to wit: on the day of one thousand eight hundred and , at the of , in the said of , (*here state the facts and circumstances of the offence as defined by the statute*,) contrary to the form of the statute (*or* statutes, *ante*, pp. 99 & 100,) in such case made and provided; whereby and by force of the statute (*or* statutes) in such case made and provided, the said E. F. hath forfeited, for his said offence, *the sum of*

If the statute does not fix the penalty, but leaves it in the discretion of the Magistrate, then instead of the words "the sum of," say:—
a sum of money not exceeding pounds currency.

Wherefore the said A. B., who sueth as aforesaid, prayeth the consideration of me, the said Justice, in the premises, and that the said E. F. may be convicted of the offence aforesaid, and that one moiety of the said forfeiture may be adjudged to (*our said Lady the Queen, or as the case may be*,) and the other moiety thereof to the said A. B., according to the form of the statute (*or* statutes)

in such case made and provided; and that the said E. F. may be summoned to answer the premises, and make his defence thereto.

Exhibited before me, the day and year, and at the place above mentioned.
(*Justice's signature.*)

A. B. *or* C. D.

N. B.—Refer to what is said on the subject of this Information, *ante*, pp. 110 & 111.

No. V.

Information against an Aider or Abettor.

After stating the offence of the principal according to the Form of Information No. I *or* II, *including the words* "contrary to the form," &c., *charge the aider thus:* "And that H. I., of (laborer,) was then and there present, ("maliciously," *or as the statute may be,*) aiding and abetting the said to do and commit the said offence, contrary to the form of the statute (*or* statutes) in such case made and provided;" *and add the prayer in Forms referred to above, praying that both, or the aider or abettor only, be summoned, as the case may be.* (See *ante*, p. 116.)

No. VI.

Information against Counsellor or Procurer.

After stating the offence of the principal according to the Form of Information No. I *or* II, *including the words* "contrary to the form," &c., *charge the counsellor or procurer thus:* "And that H. I., of , (laborer,) before the said offence was committed as aforesaid, did ("maliciously," *or as the statute may be,*) counsel and procure the said to do and commit the said offence, contrary to the form of the statute (*or* statutes) in such case made and provided;" *and add the prayer as in Forms referred to above, praying that both, or the counsellor or procurer only, be summoned or arrested, as the case may be.* (See *ante*, p. 116.)

No. VII.

Complaint without oath.

Province of Canada, District of (*or* County *or* United Counties of) } Be it remembered that on this day of in the year of our Lord one thousand eight hundred and , at the of , in the (county *or* district) of , A. B., of the said of in the said (county *or* district) of , (*servant,*)

If preferred by an attorney or agent, say:—by D. E., his duly authorized agent [*or* attorney] in this behalf,

cometh before me, the undersigned, one of Her Majesty's Justices of the Peace in and for the said (district *or* county,)

Here follow the directions given in the Form of Information No. I, *so that the Justice before whom the complaint is made may appear to be one who answers the designation given in the statute.*

and complaineth against F. G., of the of , in the said (county *or* district) of , (laborer,) for that he, the said F. G., on the day of now *last past*, at the of, in the said (county *or* district) of , was (*here set out the matter of complaint, shewing the nature of the demand with precision, and alleging a refusal to pay or to comply, as the case may be*) contrary to the form of the statute (*or* statutes, *ante*, pp. 99 & 150,) in such case made and provided; and thereupon the said A. B. prayeth that the said F. G. may be summoned to answer to this complaint, and that such order may be made in the premises as to law and justice may appertain.

Made and exhibited before me, the day and year, and at the place above mentioned. } A. B. *or* D. E.

(*Justice's signature.*)

N. B.—As to the distinction between a *Complaint* and an *Information*, see *ante*, pp. 45 & 150. It is not necessary that it should be made in *writing*, unless required so to be by some special enactment; (section 7, Magistrates Acts.) It is, however, advisable to make it in writing in all cases.

No. VIII.

Complaint on oath.

Province of Canada, District of (*or* County *or* United Counties of) } The Complaint of C. D., of the of in the of (*servant,*) made and taken upon oath, before me, the undersigned, one of Her Majesty's Justices of the Peace,

Here follow the directions given in the Form of Information No. I, *so that the Justice before whom the complaint is made may appear to be one who, under the statute, has jurisdiction.*

this day of in the year of our Lord one thousand eight hundred and , at the of in the said of , who on his oath saith, that at the of in the said of on the day of last past (*or* instant,) F. G., of the in the of was (*here insert the matter of complaint, shewing the nature of the demand with precision, and alleging a refusal to pay or to comply, as the case may be,*) contrary to the form of the statute (*or* statutes) in such case made and provided; and thereupon the said C. D. prayeth that the said F. G. may be summoned to answer to this complaint, and that such order be made in the premises as to law and justice may appertain.

Taken and sworn before me, the day and year, and at the place above mentioned. } (*Complainant's signature.*)

(*Justice's signature.*)

N. B.—In setting out the matter of complaint in this and the preceding Form, the same particularity is required as in an Information for an offence, as the same rules, with very few exceptions, apply to both, (*ante*, p. 150); and it is also to be observed that but *one matter* of complaint can be set forth. (*Section 8 of the Magistrates Acts.*)

No. IX.

Summons to the Defendant upon an Information and Complaint.

Province of Canada,
District of (*or* County *or* United Counties of) } To A. B., of (laborer,)

Whereas information hath this day been laid (*or* complaint hath this day been made) before the undersigned, (one) of Her Majesty's Justices of the Peace in and for the said (district *or* county, &c.,) of , for that you (*here state shortly the matter of the information or complaint;*) these are therefore to command you, in Her Majesty's name, to be and appear on at o'clock in the forenoon, at , before such Justices of the Peace for the said (district, county *or* united counties,) as may then be there, to answer to the said information (*or* complaint,) and to be further dealt with according to law.

Given under my hand and seal, this day of in the year of our Lord , at in the (district, county *or* united counties,) aforesaid.

J. S. [L. S.]

N. B.—This Form corresponds with those given in the Magistrates Acts, and may be used without any alteration, if the particular statute contains no special provision to render a change necessary. See what is said on this subject *ante*, pp. 134 & 135.

No. X.

Memorandum of service of summons.

On the day of one thousand eight hundred and at o'clock (*or* between the hours of and) in the noon, I served the within named with a duplicate of this summons, by leaving the same with himself personally (*or* by leaving the same with his *wife, servant, or as the case may be*, for him at his usual place of abode,) in the of, in the of

FEES—Service, 1s. 3d.
Travel,

(*Signature.*)

N. B.—As to fees for service, see *ante*, p. 130; and as to the mode of effecting service, see pp. 145, 147 & 148.

No. XI.

Summons to the Defendant with necessary variations.

Province of Canada,
District of (*or* County *or* United Counties of) } To A. B., of (laborer,)

Whereas information hath this day been laid (*or* complaint hath this day been made) before the undersigned, (one) of Her Majesty's Justices of the Peace in and for the said (district *or* county, &c.,) of , for that you (*here state shortly the matter of the information or complaint;*) these are therefore to command you in Her Majesty's name, to be and appear on at o'clock in the forenoon, at before

1.—*Me.*

2.—*Me and such other Justice or Justices of the Peace for the said* (*district, county* or *united counties,*) *as may then be there.*

3.—*Me or such other Justice of the Peace residing in the county* (or *municipality*) *of as may then be there.*

4.—*Such two or more Justices of the Peace for the said* (*district, county* or *united counties*) *as may then be there.*

to answer to the said information (*or* complaint) and to be further dealt with according to law.

Given under my hand and seal this day of in the year of our Lord , at in the (district, county *or* united counties) aforesaid.

J. S. [L. S.]

N. B.—The use of this Form is best explained by referring to what is said *ante*, pp. 134 & 135. The Magistrate should carefully examine the statute upon which the proceedings are had, so that the defendant be regularly summoned to appear and make his defence before *such Justice* or *Justices* (if more than one be required to convict) as under the statute have jurisdiction to determine the case.

No. XII.

Deposition as to service of summons before issuing a warrant or proceeding ex-parte.

Province of Canada,
District of (*or* County *or* United Counties of)
} A. B., Informant (*or* Complainant,)
vs.
C. D., Defendant.

The Deposition of J. N., (*Constable*,) of the of in the of , taken upon oath before me, the undersigned, one of Her Majesty's Justices of the Peace in and for the said of , at the of , in the said , this day of one thousand eight hundred and , who saith as follows:

On the day of one thousand eight hundred and , at o'clock (*or* between the hours of and of the clock) in the noon, I served C. D., mentioned in the annexed summons, with a duplicate thereof, by leaving the same with the said C. D. personally, (*or* by leaving the same with *his wife*, *servant*, *or as the case may be*, for him, at his usual place of abode,) in the of , in the said of , and have signed.

Taken and sworn before m[illegible]
the day and year, and a[illegible]e
place above mentioned

J. N.

(*Justice's signature.*)

N. B.—Where the defendant appears, this Deposition is unnecessary. It is only when he makes default that the Justice must enquire into the circumstances of the service. The course to be adopted is to have the defendant's name called aloud, and if he should not appear then the Constable, or other person who made the service, should be called and sworn, and examined by the Justice touching the manner and time of service. All this should be noted and recorded in the minutes of proceedings kept by the Justice or his Clerk. If a sufficient service be established, and the Magistrate determines upon either proceeding *ex-parte*, or issuing a warrant against the defendant, then a Deposition in the above form should be annexed to the summons before any further proceedings are had. (See *ante*, pp. 146 & 148.)

No. XIII.

Deposition substantiating matter of Information or Complaint, before issuing a warrant against Defendant.

Province of Canada,
District of (*or* County *or* United Counties of)
} A. B., Informant (*or* Complainant,)
vs.
C. D., Defendant.

The Deposition of A. B., of in the of , (*laborer,*) taken upon oath before me, the undersigned, one of Her Majesty's Justices of the Peace in and for the said of , at the of , in the said of , this day of , one thousand eight hundred and , who saith as follows:

The Information (*or* Complaint) in this case having been read to me, I declare that the matter therein charged and complained of, against the said defendant, is true and well founded in fact, and have signed (*or*, "and I declare that I cannot sign my name.")

Taken and sworn before me, the day and year, and at the place above mentioned.
}

(*Justice's signature.*)

N. B.—This Deposition is unnecessary if the Information or Complaint was preferred upon oath. But where the Information was *exhibited*, or Complaint *made*, without oath, and the defendant makes default, should the Magistrate, instead of proceeding *ex-parte*, desire to issue a warrant, this Deposition is absolutely necessary, and should be placed of record, as his justification for issuing a warrant. The Justice or his Clerk should likewise record in the minute of the proceedings the taking of this Deposition.

No. XIV.

Warrant when a summons is disobeyed.

Province of Canada, District of (*or* County *or* United Counties of) } To all or any of the Constables or other peace officers in the (district, county *or* united counties,) of

Whereas, on last past, information was laid (*or* complaint was made) before , (one) of Her Majesty's Justices of the Peace in and for the said of , for that A. B. (&c., *as in the summons ;*) and whereas (I) the said Justice of the Peace then issued (my) summons unto the said A. B., commanding him, in Her Majesty's name, to be and appear on , at o'clock in the forenoon, at , before

If the summons was issued according to Form No. XI., *then make such alterations here as will conform to the summons issued.*

such Justices of the Peace as might then be there, to answer unto the said information (*or* complaint,) and to be further dealt with according to law; and whereas the said A. B. hath neglected to be and appear at the time and place so appointed in and by the said summons, although it hath now been proved to me upon oath that the said summons hath been duly served upon the said A. B.; these are therefore to command you, in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before

Here likewise conform to the summons issued.

some one or more of Her Majesty's Justices of the Peace in and for the said (district, county *or* united counties,) to answer to the said information (*or* complaint,) and to be further dealt with according to law.

Given under my hand and seal, this day of , in the year of our Lord , at , in the (district) aforesaid.

J. S. [L. S.]

N. B.—Whether the prosecution be by *Information* or *Complaint*, it is discretionary with the Magistrate to issue this warrant, although, in practice, it is more usual to proceed *ex-parte* against the defendant.

No. XV.

Warrant in the first instance.

Province of Canada,
District of (*or* County *or* United Counties of)
} To all or any of the Constables or other peace officers of the said (district, county, *or* united counties) of

Whereas information hath this day been laid before the undersigned, (one) of Her Majesty's Justices of the Peace in and for the said (district *or* county, &c.,) of , for that A. B. (*here state shortly the matter of information;*) and oath being now made before me substantiating the matter of such information, these are therefore to command you, in Her Majesty's name, forthwith to apprehend the said A. B., and bring him before

Note observations in Form No. XI, and here make similar alterations if necessary. See also remarks ante, pp. 134 & 135.]

some one or more of Her Majesty's Justices of the Peace in and for the said (district *or* county, &c.,) to answer the said information, and to be further dealt with according to law.

Given under my hand and seal, this day of in the year of our Lord , at in the (district) aforesaid.

J. S. [L. S.]

N. B.—This warrant can never be issued upon a *Complaint;* it is only in cases of *Informations for any offence,* that a Magistrate has authority to issue it. In what cases it is advisable to issue it, see *ante,* p. 152; and when more proper to issue a summons, see p. 151.

No. XVI.

Indorsement in backing a warrant.

Province of Canada, District of (*or* County *or* United Counties of) } Whereas proof upon oath hath this day been made before me, one of Her Majesty's Justices of the Peace for the said of , that the name of J. S., to the within warrant subscribed, is of the handwriting of the Justice of the Peace within mentioned; I do therefore hereby authorize W. T., who bringeth to me this warrant, and all other persons to whom this warrant was originally directed, or by whom it may be lawfully executed, and also all constables and other peace officers of the said of , to execute the same within the said last mentioned (county *or* district.)

Given under my hand, this day of 185 .

J. L.

N. B.—As to the backing of a warrant, and in what cases necessary, see *ante*, p. 154. This indorsement is to be written on the warrant, and signed by the Justice of the district or territorial division where the same is to be executed.

No. XVII.

Memorandum of execution of warrant.

In execution of this warrant I arrested the within named , on the day of one thousand eight hundred and , at the hour of (*or* between the hours of and) of the clock in the noon, at the (city, parish, &c.,) of

Signed,

FEES—Arrest,
Travel,

N. B.—For fees of Constable refer to p. 139.

No. XVIII.

Affidavit to obtain Summons for witness.

Province of Canada,
District of (*or* County *or* United Counties of)
} A. B., Informant (*or* Complainant,)
vs.
C. D., Defendant.

A. B. (*or* C. D.) of the of in the of (the said Informant, Complainant *or* Defendant,) personally appeared before me, the undersigned, one of Her Majesty's Justices of the Peace in and for the said of ; this day of one thousand eight hundred and , at the said of , who, being duly sworn, upon his oath saith, that (*name of witness or witnesses, abode and occupation,*) and now residing (*or* being) within the said of , is (*or* are) likely to give material evidence on behalf of the said , and that he, the Deponent, verily believes that he (*or* they) will not voluntarily appear for the purpose of being examined as a witness (*or* as witnesses) in this matter; and thereupon the said prayeth that the said may be summoned to be and appear on the day of next (*or* instant,) at the hour of o'clock in the noon, at , before such Justices of the Peace for the said of as may then be there, to testify upon oath what he (*or* they) shall know concerning the matter of the said information (*or* complaint.)

Taken and sworn before me, on the day and year, and at the place above mentioned.
} (*Deponent's signature.*)

(*Justice's signature.*)

N. B.—The propriety of not issuing a summons without an Affidavit of this kind, is established, *ante*, pp. 160, 161.

No. XIX.

Summons to a witness.

Province of Canada,
District of (*or* County of
United Counties of)
} To E. F., of
in the said (district) of

Whereas information was laid (*or* complaint was made) before (one) of Her Majesty's Justices of the Peace in and for the said of , for that, (&c., *as in the summons;*) and it hath been made to appear to me upon (oath) that you are likely to give material evidence on behalf of the (prosecutor *or* complainant *or* defendant) in this behalf; these are therefore to require you to be and appear on at o'clock in the (fore) noon, at , before such Justices of the Peace for the said (district) as may then be there, to testify what you shall know concerning the matter of the said information (*or* complaint.)

Given under my hand and seal, this day of in the year of our Lord one thousand eight hundred and , at , in the (district) aforesaid.

J. S. [L. S.]

No. XX.

Memorandum of service of Subpœna.

On the day of one thousand eight hundred and , at o'clock (*or* between the hours of and of the clock) in the noon, I served (each of) the within named with a duplicate of this subpœna by leaving the same with personally, (*or* by leaving the same with his *wife, servant, or as the case may be*, for him at his usual place of abode,) in the of , in the of , (*and if a tender be made, add*) and at the same time tendered (*or* paid) to the said the sum of for his expenses in that behalf.

Fees—Service,
Travel,

A. B.
Constable.

(For Fees see *ante*, p. 139.)

N. B.—The Subpœna so endorsed must be produced by the Constable at the hearing, and where he must attend to depose to the service upon oath,

(*see the next Form,*) in case the witness do not appear, and the issuing of a warrant should become necessary.

As to the manner of service, refer to p. 159; and as to what expenses should be tendered, and when made, see pp. 163, 164 & 165.

No. XXI.

Deposition as to service of Subpœna, before issuing Warrant against witness.

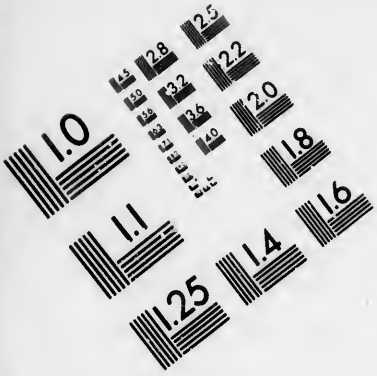
Province of Canada, District of (*or* County *or* United Counties of) } A. B., Informant (*or* Complainant,) vs. C. D., Defendant.

The Deposition of J. N., *Constable,* of the of in the of , taken upon oath before me, the undersigned, one of Her Majesty's Justices of the Peace in and for the said of , at the of, in the said , this day of one thousand eight hundred and , who saith as follows: On the day of one thousand eight hundred and , at o'clock (*or* between the hours of and of the clock) in the noon, I served E. F., &c., mentioned in the annexed subpœna, with a duplicate thereof, by leaving the same with the said personally, (*or* by leaving the same with *his wife, servant, or as the case may be,* for him at his usual place of abode,) in the of in the said of , (*and if a tender has been made, add*) and at the same time I tendered (*or* paid) to the said the sum of for his expenses in that behalf, and have signed.

Taken and sworn before me, on the day and year, and at the place above mentioned. } J. N.

(*Justice's signature.*)

N. B.—The necessity for this Deposition being made before issuing a warrant against a witness is shewn *ante,* p. 160; and it should be annexed to the Subpœna, sworn to, and placed of record, as the Magistrate's justification for issuing a warrant. The default of the witness to appear in obedience to the summons must first be established, and noted by the Justice or his Clerk in the minute of the proceedings. As to the necessity of a tender, see *ante,* pp. 161 *et seq.*



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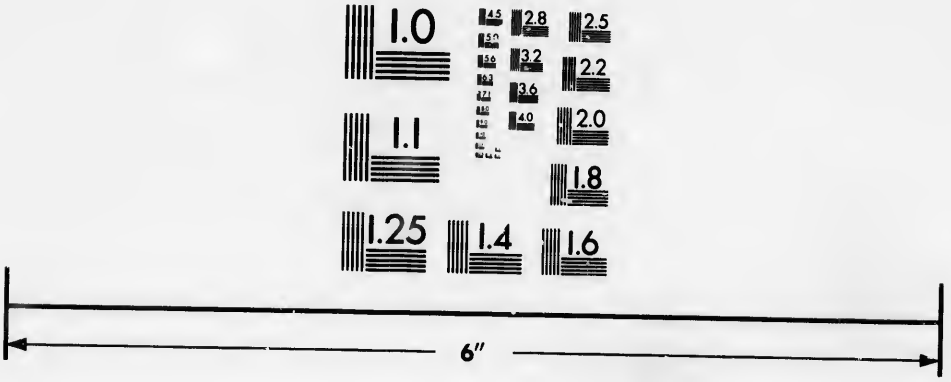

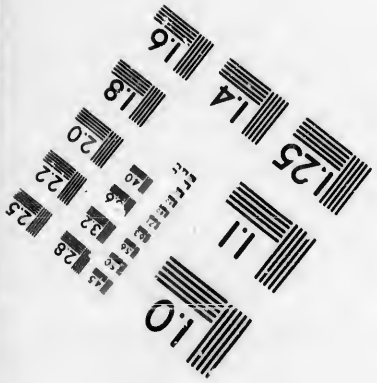

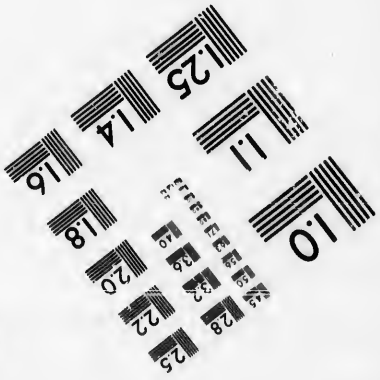

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No. XXII.

Warrant where a witness has not obeyed a summons.

Province of Canada, District of (*or* County *or* United Counties of) } To all or any of the Constables and other peace officers in the said (district) of

Whereas information was laid (*or* complaint was made) before (one) of Her Majesty's Justices of the Peace in and for the said of for that (&c., *as in the summons*,) and it having been made to appear to (me) upon oath, that E. F., of in the said , (laborer,) was likely to give material evidence on behalf of the (prosecutor,) (I) did duly issue (my) summons to the said E. F., requiring him to be and appear on , at o'clock in the (fore) noon of the same day, at , before such Justice or Justices of the Peace for the said as might then be there, to testify (what he should know concerning the said A. B.,) or the matter of the said information (*or* complaint;) and whereas proof hath this day been made before me, upon oath, of such summons having been duly served upon the said E. F.; and whereas the said E. F. hath neglected to appear at the time and place appointed by the said summons, and no just excuse hath been offered for such neglect; these are therefore to command you to take the said E. F., and to bring and have him on , at o'clock in the noon, at , before such Justice or Justices of the Peace for the said as may then be there, to testify what he shall know concerning the said information (*or* complaint.)

Given under my hand and seal, this day of in the year of our Lord , at , in the (district) aforesaid.

J. S. [L. S.]

N. B.—Some precaution is to be observed by the Magistrate before he issues this Warrant. Notice what has been said respecting this matter *ante*, p. 161.

No. XXIII.

Affidavit to obtain Warrant in the first instance against a witness.

Province of Canada,
District of (*or* County *or* United Counties of)
} A. B., Informant (*or* Complainant,)
vs.
C. D., Defendant.

A. B. (*or* C. D.) of the of in the of (the said Informant, Complainant *or* Defendant,) personally appeared before me, the undersigned, one of Her Majesty's Justices of the Peace in and for the said of , this day of one thousand eight hundred and , at the said of , who, being duly sworn, upon his oath saith, that (*name of witness or witnesses, abode and occupation,*) and now residing (*or* being) within the said of , is (*or* are) likely to give material evidence on behalf of the said , in this matter, and that it is probable that the said will not attend to give evidence without being compelled so to do; and thereupon the said prayeth that a warrant may issue to bring the said before me, on the day of next (*or* instant) at o'clock in the noon, at , or before such other Justices of the Peace for the said as may then be there, to testify what he (*or* they) shall know concerning the matter of the said information (*or* complaint.)

Taken and sworn before me, the day and year, and at the place above mentioned.
} (*Deponent's signature.*)

(*Justice's signature.*)

N. B.—The necessity for this Affidavit is shewn *ante*, p. 162.

No. XXIV.

Warrant for a witness in the first instance.

Province of Canada, District of (*or* County *or* United Counties of) } To all or any of the Constables or other peace officers in the said of

Whereas information was laid (*or* complaint was made) before the undersigned, (one) of Her Majesty's Justices of the Peace in and for the said of , for that (&c., *as in the summons,*) and it being made to appear before me upon oath, that E. F., of (laborer,) is likely to give material evidence on behalf of the (prosecutor) in this matter, and it is probable that the said E. F. will not attend to give evidence without being compelled so to do; these are therefore to command you to bring and have the said E. F. before me on , at o'clock in the (fore) noon, at , or before such other Justice or Justices of the Peace for the said district as may then be there, to testify what he shall know concerning the matter of the said information (*or* complaint.)

Given under my hand and seal this day of , in the year of our Lord one thousand eight hundred and , in the (district) aforesaid.

J. S. [L. S.]

N. B.—This Warrant should never be issued without an Affidavit having been previously made according to Form No. XXIII.

No. XXV.

Commitment of a witness for refusing to be sworn or to give evidence.

Province of Canada, District of (*or* County *or* United Counties of) } To all or any of the Constables or other peace officers in the said of , and to the Keeper of the (house of correction) at

Whereas information was laid (*or* complaint was made) before (me) (one) of Her Majesty's Justices of the Peace in and for the said of , for that (&c., *as in the summons*,) and E. F. now appearing before me, such Justice as aforesaid, on , at , and being required by me to make oath or affirmation as a witness in that behalf, hath now refused so to do, (*or* being now here duly sworn as a witness in the matter of the said information (*or* complaint,) doth refuse to answer a certain question concerning the premises, which is now here put to him, and more particularly the following question (*here insert the exact words of the question*,) without offering any just excuse for such his refusal;) these are therefore to command you, or any one of the said Constables or peace officers, to take the said E. F., and him safely to convey to the (house of correction) at aforesaid, and there deliver him to the said Keeper thereof, together with this Precept: and I do hereby command you, the said Keeper of the said (house of correction) to receive the said E. F. into your custody in the said (house of correction,) and there imprison him for such his contempt, for the space of days, unless he shall in the meantime consent to be examined and to answer concerning the premises,—and for so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of in the year of our Lord , at , in the (district) aforesaid.

J. S. [L. S.]

N. B.—In Upper Canada, the words "House of Correction" should be omitted, and "Common Gaol" inserted in their place. The Magistrate's Act of U. C., by section 6, requires that the Magistrate shall "commit the person so refusing to the common gaol for the territorial division where such person refusing shall then be;" whereas the 14 and 15 Vict., ch. 95, s. 6, makes use of the words "Common Gaol *or* House of Correction."

No. XXVI.

Complaint by the party threatened, for sureties for the peace.

Province of Canada, District of (*or* County *or* United Counties of) } The Complaint of A. B., of the of, in the of (*laborer,*) taken upon oath before me, the undersigned, one of Her Majesty's Justices of the Peace in and for the said of at the of , in the said of , this day of in the year of our Lord one thousand eight hundred and , who saith that C. D., of the of, in the said of , (*laborer,*) did, on the day of (instant *or* last past,) at the said of , threaten the said A. B. in the words or to the effect following, that is to say: (*set them out, with the circumstances under which they were used;*) and that from the above and other threats used by the said C. D., he, the said A. B., is afraid that the said C. D. will do him some bodily injury; and therefore prays that the said C. D. may be required to find sureties to keep the peace and be of good behaviour towards him, the said A. B.; and the said A. B. also saith that he doth not make this complaint against nor require such sureties from the said C. D. from any malice or ill will, but merely for the preservation of his person from injury, and he hath signed.

Taken and sworn before me, the day and year, and at the place above mentioned. } A. B.

(*Justice's signature.*)

N. B.—This Form is taken from the Magistrate's Act of U. C. 16 Vict., ch. 178, and may with advantage be followed in Lower Canada. The warrant to bring the party before the Justice upon the above Complaint may issue in the Form No. XXVII, following.

No. XXVII.

Warrant on complaint for sureties for the peace.

Province of Canada, District of (*or* County *or* United Counties of) } To all or any of the Constables or other peace officers in the said of

Whereas complaint hath this day been made upon oath before me, the undersigned, one of Her Majesty's Justices of the Peace in and for the said of , for that C. D., of, &c., on the day of *last*, at the of aforesaid, did threaten, (&c., *as in the complaint;*) these are therefore to command you, in Her Majesty's name, forthwith to apprehend the said C. D., and to bring him before me, or some one or more of Her Majesty's Justices of the Peace in and for the said of , to answer unto the said complaint, and to be further dealt with according to law.

Given under my hand and seal this day of , in the year of our Lord one thousand eight hundred and , at in the of aforesaid.

J. S. [L. S.]

N. B.—If the party is arrested, the complaint should be read to him, and he should be asked if he have any cause to shew why he should not give the required sureties. He cannot be allowed to controvert the facts stated in the complaint, (*Lord Vane's case*, 2 Str. 1202; *R.* v. *Doherty*, 13 East, 171); but he should be permitted, from the cross-examination of the complainant, or otherwise, to establish that the complaint is preferred from malice only, (*R.* v. *Parnell*, 2 Burr. 806); or to explain any parts of the complaint that may be ambiguous, (*R.* v. *Bringloe*, 13 East, 174, n.) Should he fail to do either, the Justice will order him to find sureties to become bound with himself in such sums as he may direct, to appear at the Quarter Sessions, and in the meantime to keep the peace and be of good behaviour, or to keep the peace, &c., for a certain limited period, and in default thereof to commit him. By 14 and 15 Vict., ch. 95, s. 17, all the costs incurred may be awarded by the Justice, recoverable by distress, and in default thereof imprisonment for one calendar month, unless sooner paid. In Stone's P. S. p. 303, we read: "If he finds sureties, the Justice should order the expenses incurred in the matter to be paid by him; upon doing which he may be discharged." But this authority, in so far as it implies the party's detention in custody until the costs are paid, appears very doubtful, when we consider that the statute enacts that costs awarded, where no penalty or sum of money is adjudged, shall be recoverable as stated above. In Upper Canada, this distinction must be made, that the 2nd section of 14 and 15 Vict., ch. 119, states that the costs of information, warrant, and warrant of commitment, in such case, shall be paid by the Complainant.

No. XXVIII.

Recognizance for the peace.

Province of Canada,
District of (*or* County *or* United Counties of)
} Be it remembered that on the day of in the year of our Lord one thousand eight hundred and , C. D., of (*laborer*), L. M., of , (*grocer*,) and N. O., of (*butcher*,) before me, the undersigned, one of Her Majesty's Justices of the Peace for the said of , and severally acknowledge themselves to owe to our Lady the Queen the several sums following, that is to say: the said C. D. the sum of , and the said L. M. and N. O. the sum of each, of good and lawful money of Canada, to be made and levied of their goods and chattels, lands and tenements respectively, to the use of our Lady the Queen, her heirs and successors, if the said C. D. fail in the condition endorsed.

Taken and acknowledged the day and year first above mentioned, at , before me.

(*Justice's signature.*)

The Condition of the within written Recognizance is such that if the within bounden C. D. (of, &c.,) [shall appear at the next Court of General or Quarter Sessions of the Peace, to be holden in and for the said of , to do and receive what shall then and there be enjoined him by the Court, and in the meantime] shall keep the peace and be of good behaviour towards Her Majesty and all her liege people, and especially towards A. B., (of, &c.,) for the term of now next ensuing; then the said Recognizance to be void, or else to stand in full force and virtue.

N. B.—This and the following Form are taken from 16 Vict., ch. 178. If intended to bind the party for a certain period only, the words within the brackets should be left out. The amount of security to be required is entirely within the discretion of the Justice, (*R.* v. *Holloway*, 2 Dowl. 525; 2 Arch., J. P. 527); and as to the *term* for which the party may be bound, whether for three, six, or twelve months, see what has been stated *ante*, pp. 77 & 78. Although, from the authorities there given, it would appear that a Justice has very extensive powers, still it is usual to limit the term to a period of one year or less. The Recognizance must be certified to the next Quarter Sessions, there to remain of record. (3 H. VII, ch. 1; 1 Hawk. ch. 60, s. 18.)

No. XXIX.

Commitment in default of sureties.

Province of Canada, District of (*or* County *or* United Counties of) } To the Constable of , in the of , and to the Keeper of the (common gaol) of the said

Whereas on the day of instant, complaint on oath was made before the undersigned (*or* J. S., Esquire,) one of Her Majesty's Justices of the Peace in and for the said of , by A. B., of (*laborer*,) that C. D., of, &c., on the day of at the of aforesaid, did threaten (&c., *as in the Complaint No.* ;) and whereas the said C. D. was this day brought and appeared before the said Justice (*or* J. S., Esquire, one of Her Majesty's Justices of the Peace in and for the said of , to answer unto the said complaint; and having been required by me to enter into his own recognizance in the sum of , with two sufficient sureties in the sum of each, [as well for his appearance at the next General Quarter Sessions of the Peace, to be held in and for the said of , to do what shall be then and there enjoined him by the Court, as also in the meantime] to keep the peace and be of good behaviour towards Her Majesty and all her liege people, and especially towards the said A. B.,* hath refused and neglected, and still refuses and neglects to find such sureties; these are therefore to command you, the said Constable, to take the said C. D., and him safely to convey to the (common gaol) at aforesaid, and there to deliver him to the Keeper thereof together with this Precept: and I do hereby command you, the said Keeper of the said (common gaol,) to receive the said C. D. into your custody, in the said (common gaol,) there to imprison him* [until the said next General Quarter Sessions of the Peace,] unless he in the meantime find sufficient sureties, [as well for his appearance at the said sessions, as in the meantime] to keep the peace as aforesaid.

Given under my hand and seal this day of in the year of our Lord one thousand eight hundred and at aforesaid.

J. S. [L. S.]

N. B.—If the party was ordered to find sureties for a limited period, leave out the words within the brackets, and insert at the places indicated by an Asterisk, the following: "for the space of now next ensuing." The

object of binding the party to appear at the sessions is that he may answer to such articles of the peace as may be exhibited against him. In England, it is done only in very extraordinary cases. (Stone's P. S. p. 304.) In Lower Canada, the invariable rule seems to be to bind the party for a limited time, and not for the sessions. This Warrant may be addressed according to the Form No. XXV., instead of being addressed as it is here; which is the form of address given in 16 Vict., ch. 178.

No. XXX.

Warrant of deliverance upon death of Complainant.

Province of Canada, District of (*or* County *or* United Counties of) } J. S., Esquire, one of Her Majesty's Justices of the Peace in and for the said of , to the Keeper of the (common gaol) at in the said

Whereas C. D., of in the said of (*laborer,*) was committed to your custody, at the instance of A. B., of, &c., for that he, the said C. D., did threaten, (&c., *describing the offence as in commitment,*) as in the commitment set forth, and for the purposes therein stated, and whereas the said A. B. hath since departed this life; these are therefore to command you, in Her Majesty's name, that if the said C. D. do remain in your said custody for the said cause, and for no other, you shall forbear to detain him any longer, and that you deliver him thence, and suffer him to go at large, and that upon the pain that will thereon ensue.

Given under my hand and seal at the of , the day of in the year of our Lord one thousand eight hundred and

J. S. [L. S.]

N. B.—If the Complainant die, and the party be in custody for not finding sureties, the Justice may issue a *liberate* to the gaolor, to discharge him. (Dalt. ch. 118; Arch., J. P., 528.) This may be done according to the above Form. But as it may be necessary to liberate a party upon his finding sureties, the following Form is given.

No. XXXI.

Warrant of deliverance upon sureties being found.

Province of Canada, District of (*or* County *or* United Counties of) } J. S., Esquire, one of Her Majesty's Justices of the Peace in and for the said of , to the Keeper of the (common gaol) at in the said

Whereas C. D., of in the said of (*laborer,*) was committed to your custody at the instance of A. B., of, &c., for that he, the said C. D., did threaten, (&c., *describing the offence as in commitment,*) as in the said commitment is set forth, and for the purposes therein stated; and whereas the said C. D. hath before me found sufficient sureties as required of him, and in default of which he was committed to your custody; these are therefore to command you, in Her Majesty's name, that if the said C. D. do remain in your said custody for the said cause and for no other, you shall forbear to detain him any longer, but that you deliver him thence, and suffer him to go at large, and that upon the pain that will thereon ensue.

Given under my hand and seal at the of , the d of in the year of our Lord one thousand eight hundred an

J. S. [L. S.

No. XXXII.

Commitment for insulting a Justice, or for any contempt committed in his presence while acting judicially.

Province of Canada, District of (*or* County *or* United Counties of) } To all or any of the Constables or other peace officers in the said of , and to the Keeper of the (common gaol) at in the said of

Whereas A. B., of, &c., being personally present this day at in the said , before me, J. S., Esquire, one of Her Majesty's Justices of the Peace in and for the said , *to answer and make his defence to a certain information* (or *complaint*) *for* (*state the*

offence or matter charged,) and being so personally present before me, hath this day been guilty of divers gross insults and contemptuous behaviour to me, the said Justice, then being in the actual execution of my office as such Justice of the Peace as aforesaid, by accusing me of partiality and injustice in the execution of my office (*or* by using abusive and opprobrious language, *or* by using violent and threatening gestures, &c., *according to the facts;*)* and whereas the said A. B., in consequence of such his insolent and contemptuous behaviour, is now here, by me the said Justice, required to find sureties for his good behaviour, that is to say, two sufficient sureties to become bound with him in a recognizance in the sum of £ each, conditioned for the personal appearance of the said A. B. at the next General Quarter Sessions of the Peace to be holden in and for the said of , and that in the meantime he should be of good behaviour; but that the said A. B. hath refused to find sureties and to become bound in such recognizance as aforesaid; these are therefore to command you, the said Constables, peace officers, or any one of you, to convey and deliver the said A. B. into the custody of the Keeper of the (common gaol) at in the said , together with this my Warrant: and I hereby command you, the said Keeper, to receive the said A. B. into your custody, in the said (common gaol,) and him there safely to keep until the next General Quarter Sessions of the Peace to be held for the said , unless he in the meantime find such sureties, and enter into such recognizance as aforesaid.

Given under my hand and seal at the day of in the year of our Lord one thousand eight hundred and

J. S. [L. S.]

N. B.—The above Form applies to the case of a Defendant offering insult to a Justice in the progress of a cause. Should the insult proceed from any other person, the words in Italics in the foregoing Form should be left out, and the following inserted in their place: "*during a certain sitting then and there held by me as such Justice of the Peace, while acting judicially and in open Court.*" This Form is taken from 3 Burns, J. P. 167, and applies to the method of dealing with a party for contempt, referred to *ante*, p. 77.

No. XXXIII.

Commitment for non-payment of a fine imposed for a contempt.

Province of Canada, District of (*or* County *or* United Counties of) } To all or any of the Constables or other peace officers in the said of , and to the Keeper of the (common gaol) at in the said of

After alleging the contempt as in Form No. XXXII, *down to the Asterisk, changing it if necessary according to the directions given in the Note to that Form, proceed as follows:* And whereas the said A. B., in consequence of such his insolent and contemptuous behaviour, is now here, by me the said Justice, adjudged and ordered forthwith to pay a fine of , and in default of immediate payment, that he be imprisoned in the (common gaol) at in the said , for the space of , unless the said fine be sooner paid; and whereas the said A. B. hath not paid the said fine, but neglects and refuses so to do; these are therefore to command you, or any one of the said Constables or peace officers, to take the said A. B., and him safely to convey to the (common gaol) at aforesaid, and there deliver him to the said Keeper thereof, together with this Precept: and I do hereby command you, the said Keeper of the said (common gaol,) to receive the said A. B. into your custody in the said (common gaol,) and there imprison him, for such his contempt, for the space of aforesaid, unless the said fine shall be sooner paid.

Given under our hand and seal at the day of in the year of our Lord one thousand eight hundred and

J. S. [L. S.]

N. B.—The fine imposed should not be larger than would be necessary to operate as a punishment, according to the circumstances and position in life of the party; it should not be such as to render it impossible for the party to pay it, but should be within his means, and a small fine would in most instances be quite sufficient. As to the power of Justices to punish for contempt in this way, see *ante*, p. 79.

No. XXXV.

Commitment for contempt by imprisonment.

Province of Canada, District of (*or* County *or* United Counties of) } To all or any of the Constables or other peace officers in the said of , and to the Keeper of the (common gaol) at in the said of

After alleging the contempt as in Form No. XXXII, *down to the Asterisk, changing it, if necessary, according to the directions given in the Note to that Form, proceed as follows:* And whereas the said A. B., in consequence of such his insolent and contemptuous behaviour, is now here, by me, the said Justice, adjudged and ordered to undergo an imprisonment in the (common gaol) at in the said of , for the space of (*hours, days or such other period as may be determined upon;*) these are therefore to command you, or any one of the said Constables or peace officers, to take the said A. B., and him safely to convey to the (common gaol) at aforesaid, and there deliver him to the said Keeper thereof, together with his Precept: and I do hereby command you, the said Keeper of the said (common gaol,) to receive the said A. B. into your custody in the said (common gaol,) and there imprison him, for such his contempt, for the space of , at the expiration of which period, if not detained for any other cause, you will release and discharge him from your custody, and for so doing this shall be your warrant.

Given under my hand and seal, at aforesaid, the day of in the year of our Lord one thousand eight hundred and

J. S. [L. S.]

N. B.—Refer to what is said *ante*, p. 76, as to this mode of punishment. The Justice must exercise his discretion as to the period of imprisonment, according to the nature of the offence committed and the circumstances of the case. It may, however, be remarked that as the object to be attained is the maintenance of order and proper respect for the authority of Justices, a short period of imprisonment will answer the desired effect.