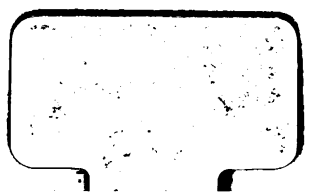

THE

LAW AND PRACTICE

OF

SUMMARY CONVICTIONS

ON

PENAL STATUTES

BY

Justices of the Peace.

INCLUDING THE

PROCEEDINGS PRELIMINARY AND SUBSEQUENT

TO

CONVICTIONS;

AND ON

APPEAL AND REMOVAL;

ALSO

THE RESPONSIBILITY AND INDEMNITY

OF

CONVICTING MAGISTRATES AND THEIR OFFICERS.

WITH

AN APPENDIX,

CONTAINING

PRACTICAL FORMS AND PRECEDENTS
OF CONVICTIONS.

By W. PALEY, Esquire,
BARRISTER AT LAW.

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TO

WILLIAM TIDD, Esquire,

BARRISTER AT LAW,

THIS SINCERE THOUGH IMPERFECT TRIBUTE

OF ESTEEM AND RESPECT

IS GRATEFULLY OFFERED BY

HIS FRIEND,

W. PALEY.

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ERRATA.

P. 29, note (x), line 3, from the end, *for* " witness" *read* " defendant."
33, line 7, from the bottom, *for* " Justices" *read* " Justice."
44, line 6, *for* " relative of" *read* " relative to."
47, line 8, insert the word " there" *before* " being."
86, line 19, *for* " seventh" *read* " fifth."
184, line 18, place the ; after " several."
214, line 16, *for* " repealed" *read* " repeated."
224, line 1, *dele* the words " returned with the *Certiorari*."
241, line 18, *dele* the words " the act for which."

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INTRODUCTION.

AN enquiry into the antiquity of that summary method of conviction, which forms the subject of the following Treatise, or into the causes which occasioned its substitution for that mode of popular trial, which distinguishes our jurisprudence, is rather prompted by curiosity, than by any relation to the law upon the present subject as it now subsists; since that is founded entirely upon the positive authority of Acts of Parliament, from which source alone the whole system derives its being. A few cursory remarks, however, upon the date and origin of a judicature, so remarkably contrasted with the spirit of our primitive institutions, may not, it is hoped, be altogether unacceptable or misplaced.

The office of a Justice of Peace has been so much enlarged by the duties annexed to it, in the execution of penal statutes, that there remains scarcely a resemblance between the present office and that of the ancient Conservators of the peace, out of which it has been gradually formed. The first great alteration that deserves to be remarked, is in the manner of appointment. Till the commencement of the reign of Edward the Third, those officers, like the sheriffs down to the preceding reign, and like the Coroners to this day, were chosen by the freeholders at large; agreeably

agreeably to that principle of popular election in the choice of Magistrates, which pervaded the Anglo-Saxon institutions, and seems from the earliest times to have characterised the policy of all those northern nations from whom they emanated *, The act of 1 Edw. III, at the same time that it removed the choice from the people, by ordaining, that thenceforth, in every county, certain persons should be *assigned*, i. e. by commission, to keep the peace, ensured also a more regular appointment of officers for that purpose throughout the kingdom. The persons so assigned under the authority of that law, acquired, about thirty-five years afterwards, the legal title of Justices of the Peace, by which appellation they were first styled in a statute of the thirty-sixth year of Edward the Third.

Their power and duty, however, at first, was simply that of guarding and taking security for the preservation of the peace; nor was it till a considerable time had elapsed from their first appointment, by Edward the Third, that they were invested with any judicial authority in relation to other statutory offences, nor until a much later period still, that a discretionary power of Conviction was vested in individual Justices, without the intervention of a Jury, or any popular form of trial.

For some time following the first of these periods, when any new statute was passed for the regulation of trade or police, which required particular provisions

* *Eliguntur* in conciliis et principes qui jura per pagos vicosque reddunt. Tacit. de Mor. Ger.

to be made for its administration, the method was, by the statute itself, either to assign the execution of it to the sheriffs of counties, and mayors, or other head-officers in boroughs, which was most usual in matters merely affecting the police, or in other cases to declare that Commissioners, sometimes also styled Justices, should be appointed for carrying the act into execution; this was more frequently the case in those penal statutes which affected peculiar trades, fisheries, and the like, and such Commissioners were either nominated by the act itself, or appointed by commission from the Crown, under the authority of the act. By degrees, however, the execution of such penal laws was by their respective provisions more frequently vested in the Justices of Peace by that denomination, who being in general the persons best qualified by discretion and knowledge in each district, might, without the trouble of a fresh selection, be most eligibly fixed upon for the performance of that duty: and the former method, at the same time, was gradually disused, so that towards the middle of the reign of Henry the Fourth, the practice of appointing Commissioners for particular acts had almost entirely given way to that of charging the Justices of Peace with the execution of them *.

Still, however, their power in regard to the manner of executing that duty, was restrained to the

* Some instances, however, of what had formerly been general exist in later times; such for example, is the statute 1 Will. & Mar. c. 32, relating to the export of wool, which specifies the Commissioners for carrying it into execution. And the Statute of Sewers, 23 Hen. VIII. c. 5, is still administered by special Commissioners, appointed according to the provisions of that act.

only mode of judicial enquiry known to the common law, and to which alone a general authority to *hear* and *determine* offences could refer. Neither the acts above alluded to, which were to be executed by special Justices, nor, at first, those which were referred to the Justices of Peace, by their name of office, contained any other direction as to the manner of their proceeding, than what was conveyed by the expressions authorizing them to *hear and determine*, or to *examine and punish* offences against the respective acts; which according to the general principles of law, implies only a power to proceed by the common law method of inquisition and verdict *.

The Justices, therefore, were under the necessity of holding Sessions, and assembling Jurors for the trial of these smaller offences. The trouble and expence of these meetings to the Justices themselves, when there were but few in each county, as in the thirty-fourth year of Edward III. not more than eight in the county of Kent †, was the occasion that they were not called sufficiently often for the number of offences which required to be disposed of; and therefore, it was, that the statute 36 Edw. III. st. 1. c. 12, commanded that they should be held at least four times in the year: for it is observable that neither this, nor the subsequent statutes, by which it is enforced, 12 Ric. II. c. 10, and 2 Hen. V. c. 4, restrain the times of holding the Sessions to that number, and the latter expressly adds, "and oftener if need be." However, as the Justices were not enjoined absolutely to hold them, except at those times, and as

* See 4 Co. 74, *b*, and the authorities there referred to.

† Lamb. 33.

the

the act 12 Ric. II. c. 10, which assigned them wages for defraying their expences at the Sessions, only made provision for the four principal or Quarter Sessions, the effect was to limit the actual times of holding the Sessions to those periods. As the offences, however, subjected by various statutes to the cognizance of Justices became more numerous, and particularly during the reign of Henry the Seventh, when their number was vastly increased, their assembling once in each quarter of a year was found insufficient to afford the dispatch which the nature of those offences required: to provide a remedy for which, without introducing any new and extraordinary jurisdiction, or departing from the ancient mode of conviction by verdict, the statute 33 Hen. VIII. c. 10 enacted, that at the Easter Sessions, in every year, the Justices should diligently peruse and study the statutes therein enumerated, (comprehending in fact all those in the execution of which they had authority,) and should then divide themselves according to hundreds, wapentakes, &c. assigning at least two to each division, who in their respective divisions should (six weeks before each of the general Quarter Sessions,) hold a special Sessions, expressly for executing those statutes, at which they should inquire of the offences specified, either upon presentment, *i. e.* by indictment, previously found by the Grand Jury, or upon information by a private person: but whether upon indictment or information, as the statute expressly takes notice, the party, previous to any punishment, was always supposed to be convicted by confession, or verdict of twelve men: and the same statute contains regula-

tions for impannelling the Jury upon those occasions *. The opposite inconvenience, however, resulting from this act, of calling the country together every six weeks for the special and general Sessions, was very soon felt to be greater than the advantage proposed from it in the disposal of offences; and, therefore, four years afterwards it was repealed by another act, 37 Hen. VIII. c. 7, for the reason expressly assigned, viz. "that the King's most loving subjects are much travailed, and otherwise encumbered in coming and keeping of the said six weeks Sessions, to their costs, charges, and unquietness;" and by this latter act, the articles enumerated in the former are referred to the general Quarter Sessions as before.

In order therefore to avoid the inconvenience of postponing the trial of small offences to the Quarter Sessions, and in very many cases of committing the party for the intermediate time; or on the other hand of making too frequent calls upon the country, in assembling a Jury at shorter intervals, there seems to have been no alternative, as those offences became more and more numerous, than that of entrusting to the Justices, out of Sessions, a power to hear and determine the matters themselves.

When this expedient was for the first time adopted by the Legislature, it is not easy, on account of the ambiguous wording of some of the older statutes, to determine with precision. In very early times such a power had been conferred upon them in two cases, which seemed in their nature to require a speedy interference; but even in these it was confined to their

* See the Preamble to 37 Hen. VIII. c. 7, in which the above mentioned statute is fully recited.

own

own view; these are the cases of Forcible Entries, 12 Ric. II. c. 2, and of Riots, 13 Hen. IV. c. 7, for, in the latter of which, it may be remarked, that this extraordinary jurisdiction is carefully limited by the urgency of the occasion, by which alone therefore it was probably thought to be justified; for it is there directed, that if the rioters had departed before the arrival of the Justices, so that the view could not be had, they are then to inquire of the matter not by themselves, but by means of a Jury which they are specially directed in that case to summon. One other instance also occurs of a power to convict without Jury, but that was on *confession* of the party; viz. by the act of 2 Hen. V. stat. 1. c. 4, relating to Labourers, which authorized them to examine labourers, &c. on their oath, and on *their confession* to punish them *as if they were convict by inquest*.

These two cases of *view* and *confession* seem to be the only clear instances in which Justices of Peace were empowered in those early times to inflict punishment upon their own inquiry and judgment. There are, indeed, two other statutes, in which such an authority may perhaps be doubtfully inferred. The first is that of 17 Edw. IV. c. 4, against frauds in the making of tiles, which empowers the Justices of Peace, "and every of them, *by their discretion*, as well by examination as otherwise, to inquire, hear, and determine the offences against that act;" from which large words Mr. Lambard classes this as one of the matters of which a single Justice might take cognizance out of Sessions, though not without stating a doubt whether the act would bear that construction. The other is, the statute 11 Hen. VII. c. 15. against frauds by sheriffs,

under-sheriffs,

under-sheriffs, &c. in entering plaints in the county courts, which empowers any Justice of the Peace, on complaint of the party grieved, to examine the person complained of, "and if on such examination he shall be found in default, he shall be convict and attaint of the offence, without further examination or inquiry," and forfeit 40*s*. which the Justice is directed to certify, together with the examinations, into the Exchequer. This also is enumerated by Lambard amongst the things that Justices may execute summarily out of Sessions. But what the mode of proceeding contemplated in framing these acts, or whether these words are sufficient to convey an authority then perfectly novel, and which we might therefore expect to find explicitly described, must remain a matter of doubt. The author already referred to seems to have been at a loss to define the method of proceeding intended by the expressions in those acts, and to have hesitated in pronouncing that a sole power of determining was vested in Justices without a Jury; for, he observes, "how far this discretion, and the word *otherwise*, may be extended, in this and such like cases, it cannot be foretold, for it is referred to the Justices, and they must take counsel *ex re* and *ex tempore* for it*."

This leads to another observation necessary to be kept in mind, in order to guard against a misconstruction of some of the older statutes, particularly those in the reign of Henry the Seventh, which are worded in a manner that may at first sight appear to imply a power of summary conviction, in contradistinction to the trial by the country, but which

* P. 525.

have

have in reality a totally different view. The statutes alluded to are those which make use of expressions of the following import; viz. that the Justices of the Peace may hear and determine the offences specified, "as well by Inquisition as by Information and Proofs," (as in the Game Act, 11 Hen. VII. c. 17.); or, "that the Justices, upon examination of two lawful witnesses, may award process in the same manner as upon presentment or inquisition of twelve men," (as in the statutes 5 Eliz. c. 12, 4 & 5 Phil. & Mary, c. 2, 5 Edw. VI. c. 14.). But it is to be observed, that when a power was given to Justices of Peace *to hear and determine*, &c. this conferred an authority only to proceed in the common law way by indictment found by the Grand Jury, or, as the statutes express it, upon inquisition and presentment of twelve men. Upon this proceeding the Justices had authority of course to award process, but they had no power to do so, or to inquire, upon the presentment or information of a private relator*; and therefore the informer had no means of recovering at the Sessions a share of the penalty, unless such a mode of recovery was expressly authorized by statute, which, according to Mr. Lambard, was the sole object of the provisions above alluded to. This purpose, though sometimes expressed with a conciseness that may give rise to some ambiguity, is in certain acts explained in a manner that serves to illustrate the meaning of those which are less explicit: of such it is sufficient to refer to those of 25 Hen. VIII. c. 13. s. 5, and 3 Jac. c. 13.

* Lamb. 501.

The

The forfeitures imposed by penal statutes, if not otherwise specially disposed of, belonged to the Crown; but experience proved, that the admission of the informer to a share was equally necessary to the purposes of police and of revenue. All the acts however prior to the reign of Henry the Seventh, which entitle the informer to a moiety of the penalty, direct the mode of recovery to be by action of debt, bill, or plaint. Nor before that time does there appear to be any instance of a power to proceed by information at the Sessions for penalties. In that reign it was that it became usual to insert in penal statutes the provisions authorizing the recovery of the penalties before the Justices in Sessions by Information, and empowering them to award process upon the information of any person, as they might upon indictment or presentment by the inquest. The policy of affording this encouragement to prosecutions which brought a share of the penalties to the Crown, is characteristic of the ruling disposition of the Sovereign; and in that light it may be worth remarking, that the last Session of his reign affords a striking proof of the influence of that spirit upon the character of the laws, by the iniquitous principle of making the Justices sharers in the penalties of their own inflicting. The stat. 19 Hen. VII. which imposes most unusually heavy penalties upon the use of various modes of taking deer, authorizes two Justices in Sessions arbitrarily to examine and commit persons whom they judge guilty, until payment of the fines to the King, and declares them entitled to one-tenth of all such fines, "for their labour in that behalf." This disgraceful pattern, as it had no precedent, has happily had no copy

copy in our law. The power however of inquiry on information by Justices in Sessions, which took its rise about the period we are speaking of, continued to prevail in penal statutes of the succeeding reigns, till the mode of recovery by summary examination before a single Justice or Justices out of Sessions, was more commonly substituted in its stead.

To return to our first enquiry concerning the period when that method came into use; it has been already remarked, as a settled maxim, that a naked authority to *hear and determine*, implied a proceeding conformable to the common law mode of determination only, *i. e.* by a Jury, and one instance only, that of 17 Edw. IV. c. 4, is noticed earlier than the reign of Henry the Seventh, which carries the appearance of a more arbitrary and discretionary jurisdiction. But in the eleventh year of that King's reign the Legislature was induced to break down all respect for the ancient common law mode of trial, by an Act, that in spite of the fair preamble, betrays its true source in the rapacious policy of the Monarch; viz. 11 Hen. VII. c. 3, which, pretending that many wholesome statutes were not executed by reason of the embracery and corruption of the inquests, ordained, that it should be lawful for the Justices of Assize, and the Justices of Peace in every county, upon information (for the King) *at their discretion* to hear and determine all offences short of felony against any statute then in being*. This discretionary authority fettered by no rules, and intentionally ab-

* 11 Hen. VII. c. 3. See the statutes printed by Powell, 1551, vol. I, and 4 Inst. 40, 41.

solved

solved from the observance of law and usage *, enabled the Justices to execute all penal statutes without any presentment or trial by Jury. The real intention of the statute, which was that of replenishing the Exchequer by the terror of arbitrary and vexatious prosecutions, under colour of penalties upon all the most obsolete penal statutes, however obscure or inconsistent with the times, was rigorously seconded by Empson and Dudley, whose activity was stimulated by a grant of the extraordinary office of Clerks of the Forfeitures: by their means the mischiefs of a power so liable in any hands to abuse, became an instrument of intolerable oppression the more galling from its pretensions to legal authority. Among the first acts therefore of the Parliament which commenced with the succeeding reign, were the abolition of that dangerous power by the repeal † of the Statute, and the attainder of the two obnoxious instruments of its abuse, whose atonement, according to the maxims of popular justice, was measured by the iniquity rather than the illegality of their acts.

After this short and unfavourable experiment, which Sir E. Coke adduces as an example of the danger of altering the common law, and which has never been imitated by a like *general* law of the same nature, the Legislature, for some time, seems to have been, not without reason, sparing in the sanction of a summary jurisdiction even in particular offences. And we have already had occasion to remark the means unsuccessfully tried in the thirty-

* Inst. 49. † 1 Hen. VIII. c. 6.

third

third year of Henry the Eighth, to provide for the accumulated execution of the penal statutes, without deviating from the common law rules of judicature.

The earliest statute upon which a summary conviction by a Justice is on record, or of which a precedent is found in the books, is that of 33 Hen. VIII. c. 6, against the practice of carrying daggs or short-guns. Mr. Lambard has given a precedent of a conviction upon this statute*; and there appears to have been one removed into the Court of King's Bench by *Certiorari*, as early as the forty-third year of Elizabeth, 1600: and this very case affords a proof of the objection, which, in the state of manners at that day, might well exist against relaxing the jealousy of the common law, by entrusting any thing like arbitrary authority in private hands. It appears that a sheriff's officer, going to execute a writ against a Justice of Peace for a debt, and taking with him a hand-gun, from the apprehension of a rescue, the Justice, instead of obeying the writ, apprehended, convicted, and imprisoned the officer till he paid a fine of £10, under colour of the Act of Parliament.

Dr. Burn, indeed, assuming the statute 43 Eliz. c. 7, (against hedge breaking and some other petty misdemeanors,) to be the first statute, which, in authorizing the special jurisdiction of a single Justice, requires the examination to be on *oath*, conjectures from that circumstance, that in all former Acts the Justices of Peace upon whom an authority was con-

* C. 7. p. 298.

ferred,

ferred, to enquire into and punish offences against those Acts, were considered as acting in their Sessions by a Jury, in like manner and form of proceeding as in other of the King's Courts *.

The peculiar manner indeed in which this statute is worded, in regard to the administration of the oath by a single Justice, distinguishes it from any former one, and proves, that an unusual authority at least was in the contemplation of the framers of it. But that this authority was altogether novel is contradicted both by the instance above remarked in 33 Hen. VIII. c. 3, and by a former statute at the commencement of the same reign, viz. 5 Eliz. c. 4, for regulating the conduct of servants, which confers a large portion of discretionary authority upon Justices of the Peace, and such as can scarcely be explained otherwise than as an authority to convict upon their own judgment out of Sessions, and without the verdict of a Jury; particularly the twenty-first section, which declares, that any offender, of the description there mentioned, being convicted before any two Justices by confession, or by the testimony, witness, and *oath* of two honest men, shall suffer imprisonment for one year; and what proves the proceeding intended to be of a summary kind and out of Sessions is, what follows, viz. that if the offence requires further punishment, the offender shall receive such as the Justices in their open Sessions shall think fit.

The few instances however in which a summary power of fine or imprisonment was committed to individual Justices, amounting, up to the end of the

* Burn's Justice, tit. Oaths.

reign

reign of Elizabeth to no more than four or five, attest the unwillingness of the Legislature to quit the safe and approved forms of criminal judicature. In the following reign, the multiplied statutes against a variety of petty disorders, such as those relating to alehouses, profane swearing, drunkenness, game, wages, embezzlements, and such like, occasioned a more frequent recourse to the summary interference of Justices of Peace, which was gradually extended to matters of greater importance, as the nation became more familiarized to its use; and after the restoration, by the first Excise Acts, and by several statutes affecting the regulations of trade, and lastly, by the Game Act, 22 and 23 Car. II, the practice was insensibly moulded into the jurisprudence of the country, of which it still continues to form an important branch.

We shall conclude these remarks with briefly noticing the changes which have been made in the system since its institution. The most material of which is the right of *Appeal.*

By the first statutes which gave a power to Justices of the Peace out of Sessions, to hear and determine the respective offences thereby created, that determination was final as to the facts; for a liberty of appeal, unless expressly annexed to the authority, was not like that of suing out a *Certiorari,* implied as a common law right.

The privilege of appealing to the Sessions against the *Conviction* of single Justices, by which that authority is now so generally and properly qualified, was not known till the reign of Charles the Second, though the model of an Appeal in other matters might be found

found in the acts relating to the poor, as far back as that of Elizabeth.—The earliest instance of an Appeal to the Sessions against a penal Conviction, is found in the hereditary Excise Act, as it is called, 12 Car. II. c. 23, which authorizes an Appeal, not indeed against the decision of Justices of Peace, if they choose to act, but against that of certain sub-commissioners, on whom, in case of the neglect or refusal of the Justices, the power of inflicting the penalties of the statute is devolved, but subject to the review and final determination of the Justices in Sessions. The first instance of an Appeal from the sentence of Justices of Peace, is in the statute 22 Car. II. c. 1. called the Conventicle Act, and it deserves to be remarked, that the idea of controuling the jurisdiction of individual Justices, seems originally to have been by allowing an Appeal to the verdict of a Jury: for that act, after authorizing a summary examination and recovery of penalties before any two Justices, gives to the party convicted the privilege of an Appeal in writing, to the judgment of the Justices of the Peace in their next Quarter Sessions, upon which "he may plead and make his defence, and have his trial by a Jury thereupon." * That precedent however has not been copied, and the notion of an Appeal to a Jury seems to have been speedily laid aside; for an Act of the following Sessions, the 22 and 23 Car. II. c. 25, (the Game Act), establishes the mode of an Appeal which has since been uniformly adopted, viz. to the Justices in Sessions, but without the privilege of a trial by Jury.

* Sec. 6.

The

The principal alteration introduced by more modern Acts of Parliament, have been by taking away the writ of *Certiorari* in numerous cases, and by the frequent adoption of compendious forms, which greatly abridge the task and care of the Magistrate in drawing up the Conviction.—The entire dispensation from any detail, either of the proceeding before the Magistrate, or of the proofs in support of the fact, which these forms allow, is undoubtedly calculated to secure the execution of penal statutes, by rendering it more easy: for the Conviction is thereby reduced to a mere memorandum of the judgment; and if this had been the sole purpose for which the record of the Magistrate was originally required, no objection could be raised to its being rendered as concise as possible. But that this was considered only as one object of it, and that the design of the Conviction was not merely to record the fact of the judgment, but to shew that the proceedings, required by justice, had been regularly observed, and the sentence legally supported by the evidence, is every where evinced by the language and sentiments of the ablest Judges, from the time of Lord C. J. Holt, who himself, on all occasions, seems to have regarded the obligation of recording the whole proceedings as a necessary counterpoise against the liability to error or misapplication, to which a private and discretionary tribunal is naturally exposed. Considering, indeed, the severity of many of the penalties subjected to this jurisdiction, without any opportunity of pleading to the Conviction, and that moreover, if the Conviction should be set aside upon appeal, yet as the law now stands, nothing short of express malice in the Magistrate entitles the party grieved to any

any redress for the inconvenience he may have been put to; it may be worthy of deliberation, whether the too prevalent use of these short forms of Conviction, particularly in regard to offences of which the evidence may involve some nicety, does not, by withdrawing the principal obligation to a regular, perfect, and cautious investigation, leave too little security against the possible effects of haste, mistake, or preconception, which, without the least mixture of bad motives, may produce as much injustice as malice itself.

PART

PART I.

CHAPTER I.

Of the summary Jurisdiction of Justices of the Peace.

1. THE examination and punishment of offences in a summary manner by justices of peace out of their sessions, and without the intervention of a jury or any open trial, is founded entirely upon a special authority conferred and regulated by statute. No new offence is cognizable in that manner, unless expressly made so by act of parliament *(a)*, and all the proceedings under an authority so created must be strictly conformable to the regulations prescribed by the special law in each instance, from which all their force is derived *(b)*.

This is the first requisite, the absence of which can by no means be cured. But besides this there are other rules applying generally to the system of summary convictions, which are not less necessary to be attended to in the exercise of this important jurisdiction. These I now propose to consider in the following order. 1st. As they relate to the duty of magistrates in the examination, hearing, and judgment of offences in a summary way; 2dly. To the form of recording the proceedings, or what is usually termed the conviction; 3dly, The steps subsequent to the judgment, including the various processes of execution, as well as those of appeal; and lastly, what

(a) Saville, 144. (b) Coles's case, Sir W. Jones, 139. 170. 1 Sh. 14.

relates to the protection and indemnity of magistrates, and their subordinate officers, in the exercise of this duty.

The uniform mode of proceeding is, by information, summons, and judgment; which will be examined separately. But it may be proper in the first place to state those rules which concern the jurisdiction of the magistrate.

Section 2. Of the Limits of the Jurisdiction.

The residence of the magistrate.

2. The authority of justices of peace appointed by commission from the crown is limited to the respective counties therein specified; and that of magistrates in separate jurisdictions is confined to their respective districts: it is in no case attached to the person, so as to be capable of being exerted elsewhere than within those limits. It is laid down by Dalton *(c)*, that a justice of peace, for the time that he shall make his abode, or be out of the county where he is in commission, cannot intermeddle to take any recognizance or any examination or otherwise, or otherwise to exercise his authority in any matter that shall happen within the county where he is in commission; neither can he cause one to be brought before him out of the county where he is in commission into the other county; " for, being out of the county where he is in commission, he is but a private man." A distinction however is remarked by Mr. Serjeant Hawkins *(d)*, between *coercive* and *ministerial* acts; the former of which cannot be performed by magistrates out of their own county, but the latter, it is said, may. And it is affirmed by the same authority, that recognizances and informations voluntarily taken by magistrates out of the county, &c. are good. This opinion is supported in some measure by the following case.—The question was as to an oath made by a person robbed, preparatory to an action against the

(c) Dalt. c. 6. (d) 2 Hawk. P. C. c. 8. s. 29.

hundred,

hundred, on the statute of Hue and Cry, 13 Edw. 1, before a justice of the county, as required by 27 Eliz. c. 13. The latter statute directs the oath of the robbery to be made before some justice of the county where the robbery was committed, and inhabiting within the hundred. The oath, in the present case, was made in London, before a magistrate of the county of *Berks*, (where the robbery was), whose usual residence was in the hundred, but who, at the time of receiving the oath, resided in London. The court of King's Bench, and afterwards all the judges upon conference, held this sufficient *(e)*. It was said to be the usual course for justices to take informations against offenders in any place out of the county, to prove offences in the county where they are committed. It must however be considered as doubtful, whether a magistrate can, out of the county, properly receive an information upon oath to found a subsequent proceeding before himself of a penal nature; and it is clear that any coercive or judicial act would be altogether void unless done within the county *(f)*.

With regard however to county magistrates, whose residence happens to be locally situated in cities or places which are distinct in point of jurisdiction from the county at large, it is provided by 9 Geo. 1. c. 7. s. 3. " for the greater ease of justices of the peace authorized to act for any county," that if any such justice of the peace shall happen to dwell in any city or other precinct that is a county of itself, situate in the county at large for which he shall be appointed a justice, although not within the same county, it shall be lawful for any such justice to grant warrants, take examinations, and make orders for any matters which one or more justices of the peace may act in, at his own dwelling-house, although such dwelling-house be out of the county where he is authorized to act as a justice, and in some city or other precinct adjoining,

9 Geo. 1. c. 7, justice residing in city, &c

(e) Helier v. Benhurst, Cro. Car. 211. Jones, 259.
(f) *Ib.* and Dalt. c. 25.

that is a county of itself, " and this provision is extended by 28 Geo. 3. c. 49. s. 4, to enable county justices to act as such at *any place* within *any* city, town, or other precinct being a county of itself, and situate within, surrounded by, or adjoining to, any such county at large." But these acts do not authorize such county justices to intermeddle in any matters arising within the separate jurisdictions there mentioned. Moreover, by the latter of those statutes, (s. 1,) any magistrate commissioned for two *adjoining* counties may act in either upon matters arising in the other, provided he be personally resident in one of the said counties at the time he so acts : and by the same clause, the warrants, &c. must be directed in the first instance to the constable or other officer of the county to which they more particularly relate.

Justice acting for two adjoining counties.

Section 3. Of the local Limits of the Jurisdiction, as to the Offence.

Offences within the county.

3. The jurisdiction is further limited to *offences* committed *within* the county, and though an act expressly directs the offence to be enquired of by justices residing near the place where it is committed, that does not give jurisdiction to any other than justices of the *county* within which the offence was committed *(g)*.

Some acts give jurisdiction to justices, as well of the county where the offence is committed, as of that in which the offender resides, or is apprehended. For offences against the *Excise* laws, jurisdiction is given by 18 Geo. 2. c. 26. s. 13, and 15 Geo. 3. c. 43. s. 26, to any two justices of the county where the offender is found; and the same provision is made with regard to the *Customs*, by 49 Geo. 3. c. 65. Many other acts relating to particular offences, contain the like power.

(g) Taylor v. Hubble, 2 Str. 1154. Rex v. Chandler, 14 East. 267.

By

By 47 Geo. 3. c. 66. s. 44, all penalties for offences against the Customs arising on the *seas*, are made cognizable by justices of the port into which the vessel is brought *(h)*.

But though the authority of county justices is confined to the limits of the county for which they are named, yet it does not necessarily extend to all places within the county, if there be any district therein which possesses a separate and *exclusive* jurisdiction *(i)*.

Exclusive liberties.

The words of the commission however, "as well within liberties as without" *(k)*, are held to give the justices for the county, jurisdiction in such boroughs and towns corporate, as are not counties of themselves *(l)*, though they have a magistracy of their own, unless the charter by which they are constituted imports an express exclusion of the county magistrates, by a clause of *ne intromittant (m)*. There is no doubt that the crown may grant commissions of the peace for any particular district in a county; nor that such subdivision may have justices of its own whose authority excludes the jurisdiction of the justices for the county at large *(n)*. But the exclusion of the county magistrates has always been jealously regarded, and nothing but express words are deemed capable of having that effect *(o)*. Therefore, where a borough had possessed an exclusive jurisdiction under two successive charters, containing *non intromittant* clauses, and a third charter vested

(*h*) The statute 11 Geo. 2. c. 19, against the fraudulent removal of goods by tenants, empowers the landlord, "if the goods removed be under 50*l.* to exhibit a complaint in writing before two justices of the county, riding, or division, residing near the place whence such goods were removed, or near the place where the same are found." Under these words it has been held, that if the goods be removed out of one county into another, the complaint may be exhibited before two justices of the latter county. Rex *v.* Morgan, Cald. 158.

(*i*) Plow. 37. Lamb. 48. Dalt. c. 6. s. 7.

(*k*) See the form of the commission, 3 Burn. tit. Justices of the Peace.

(*l*) Cromp. 8.

(*m*) *Id. Ib.*

(*n*) Rex *v.* Sainsbury, 4 T. R. 456. Blankley *v.* Winstanley, 3 T. R. 279. Talbot *v.* Hubble, 2 Str. 1154.

(*o*) 4 T. R. 456, 3 T. R. 287.

the

the authority of justices of the peace in the mayor, bailiffs, and burgesses, *in tam amplis modis et consimilibus modo et formâ prout præante in eodem burgo usitatum et consuetum fuit*, it was held, that notwithstanding such reference to the former charters, the county magistrates could not be excluded; inasmuch as their jurisdiction was not taken away by express terms *(p)*.

In such cases therefore the magistrates of the borough, and the county justices, possess concurrent jurisdiction *(q)*.

But where the jurisdiction of the county justices is taken away by express and adequate words in the charter for that purpose, any act of theirs within the franchise, is not only a contempt, but is wholly void *(r)*: and notwithstanding the doubt intimated by Lord Hale and Mr. Serjeant Hawkins (*s*), who make it a question whether the act of the county justices be void, or only such as subjects them to punishment as for a contempt of the King's prohibition, the law seems to be now settled by express authorities of a more recent date *(t)*.

Besides the separate jurisdictions of boroughs, towns corporate, and cities which are counties of themselves, there are also other districts or subdivisions of counties which have distinct magistrates, such as the divisions of Lincolnshire, the Ridings of Yorkshire, the district of the Isle of Ely, &c. It may be proper therefore to notice, that with regard to remedial statutes intended for the benefit of the kingdom at large, and which are appointed to be executed by "any justices of the *county, city,* or *town* corporate, where the offence may be committed" the effect of such a provision is held to be, to give jurisdiction to all persons acting as justices in the district or division where the offence is committed, though that

(*p*) 3 T. R. 279.
(*q*) 4 T. R. 456.
(*r*) Taylor *v.* Hubble, 2 Str. 1154.
(*s*) 2 Hawk. P. C. c. 8. s. 29, 2 H. H. 47.
(*t*) Taylor *v.* Hubble, 2 Str. 1154, which is recognized as established law in the subsequent cases of Blankley *v.* Winstanley, 3 T. R. 279, and Rex *v.* Sainsbury, 4 T. R. 456.

particular

particular kind of district or division be not among those enumerated (*u*).

Section 4. Of a qualified Jurisdiction, as to Number and Description of Justices.

Number necessary.

The number of justices requisite to the valid exercise of a summary authority out of sessions, depends entirely upon the particular acts of parliament, conferring the authority. An authority given by statute to *two* cannot be executed by *one* justice (*v*). But if the complaint be directed to be made to any justice, though the statute should require the final determination to be by two, it seems that the information is well lodged before one (*w*).

Wherever the concurrence of two is requisite for any judicial act, they must be together at the time of executing it (*x*).

It should be observed, that wherever authority is given to *one* justice, it may be executed by any greater number (*y*).

With regard to the power of the justices *in sessions* to originate convictions on penal statutes, the rule laid down by Lord C. J. Holt is, that if authority be given to two justices to do an act, and from that act there is no appeal, it may commence at the sessions; but if an appeal be given, it cannot begin there (*z*).

Particular description of justices.

Though the majority of penal statutes give authority generally to all justices of the peace, without distinction, which implies an equal power in all, within the limits of their respective commissions, yet, as some acts point out

(*u*) R. *v.* Stevens, Cald. 302.

(*v*) Dalt. c. 6. 4 Co. 46. It is said by Dalton, cap. 6, "That though a statute appoints a thing to be done by two or more, if the offence be *any misdemeanour or matter against the peace*, then, upon complaint made of the offence to any one of the justices, it seemeth that one of those justices may grant out his warrant to attach the offender, and bring him before the same, or any other justice, to find surety for his appearance at the sessions. But one justice alone may not in anywise meddle to hear and determine."

(*w*) Ware *v.* Stanstead, 2 Salk. 488.

(*x*) Billings *v.* Prinn, 2 Bl. Rep. 1017.

(*y*) Hatton's case, 2 Salk. 477. Dalt. c. 6. s. 8.

(*z*) R. *v.* Randale, 2 Salk. 470.

those

those of a particular description, it may be proper to take notice in what cases such selection is *imperative*, and excludes all others, and where it is construed to be merely *directory*.

Next justice. It seems consistent with principle, as the power vested in justices of the peace is of a special kind, that where any matter is referred to a particular description of justices, the authority of all others should be excluded by that express designation *(a)*. And therefore, where a statute refers the matter to the *next* justice, no other but the one answering that description has any authority *(b)*.

In or *near* the place where, &c. However, it has been held, in construing the acts which mention justices *in or near* the place where the offence was committed, that, notwithstanding that description, any justice of the county may take cognizance of the matter *(c)*.

Justice of the *division*. The same construction has been put upon the words justices of the *division*, which are held to be merely directory, and not restrictive or qualificatory *(d)*: and therefore the act may be executed by any justice of the county. It is the same, where the statute specifies justices *in or near* the parish or division *(e)*. And if any thing be directed to be done "*in the division* by *magistrates acting for the division*," any magistrate of the county present at a meeting in the division, is competent for that purpose *(f)*.

Many of the earlier penal statutes having required, that one of the justices empowered to act, should be of the *quorum*, to remove any difficulty on that account; in small liberties it is provided by 7 Geo. 3, c. 21, that all acts done by two or more justices qualified to act in cities, boroughs, towns corporate, franchises, and liberties which have only one justice of the *quorum*, shall be valid and effectual in law, to all intents and purposes, as if one of the said justices had been of the *quorum*.

(*a*) Dalt. c. 27. s. 8.
(*b*) Sanders's case, 1 Saund. 263. 2 Keb. 559.
(*c*) 2 Keb. 559. 3 Keb. 383. 1 Saund. 263. B. Ab. tit. Justices of the Peace, E. 5.
(*d*) Ashley's case, 2 Salk. 480. *ib.* 473. Anon. 12. Mod. 546.
(*e*) R. *v.* Price, Cald. 305. R. *v.* Loxdale, 1 Burr. 447.
(*f*) R. *v.* Price, Cald. 305, *per* Ashhurst, J.

Subject

Subject to the rules and restrictions above-mentioned, every justice of the peace is competent to exercise the summary authority committed by statute to justices of the peace generally: but that power is accompanied with this further qualification, that no magistrate, however duly authorized in all other respects, can act judicially in a case wherein he is himself a party. The plain principle of justice that no one can be a judge in his own cause, pervades every branch of the law, and is as ancient as the law itself *(g)*. This is so fundamental a maxim as not to be over-ruled by any prescription *(h)*. Lord Coke and Lord Holt, both go so far as to question whether even an act of parliament has power to ordain that the same person shall be both party and judge *(i)*. It is however certain, that every proceeding, which bears this objection upon the face of it, is absolutely void *(k)*. Disqualification by *interest.*

There are also instances upon record of magistrates being punished by attachment for acting as judges in matters in which they themselves were parties *(l)*. In a recent case a criminal information was moved for against a justice of peace who, upon a complaint preferred before him, in his magisterial capacity, by his own bailiff, convicted and sentenced to punishment a labourer employed on his own farm, for refusal to perform his work according to his contract. The court of King's Bench granted a rule to shew cause, and only declined making it absolute, from a consideration that

(*g*) Co. Lit. 141. a. 8 Co. 118. Dalt. c. 173.

(*h*) *Id. ib.* Hob. 87.

(*i*) 8 Co. 118. Bonham's case, Hob. 87. 12 Mod. 687. Mayor of London *v.* Wood.

(*k*) 12 Mod. 674, 687. Salk. 398. Hob. 87. See also Burr. Sett. Cas. 194, and Foxham Tything, 2 Salk. 607. It should be noted, that in the case of the Mayor of Norwich, 2 Roll. Ab. 93, in which a judgment in the Mayor's court was affirmed upon a writ of error, though the mayor himself was the plaintiff, the objection did not appear upon the record: and that this was the true reason of the judgment, and the only one upon which it can be supported, is sufficiently proved by Lord C. J. Holt, 12 Mod. 688, and by the opinion of the other judges in the same case, *id. ib.* 675, 675.

(*l*) The Mayor of Hereford's case, *per* Holt, C. J. 2 Lord Raymond, 766, 1 Salk. 201. 396. And 8 Hen. 6. c. 19, it is said, "auxi ad estre vu que justice de peace que ad execute ceo office en son case desmesne ad estre puni pur ceo in camerâ stellatâ."

under

under all the circumstances the steps taken appeared to proceed from an error in judgment, rather than any bad motive. But at the same time severely reprehended the conduct of the magistrate, in sitting in judgment upon a charge in which he himself was to be considered as the real complainant, though in form the complaint preferred by his bailiff: and declared that it was a most abusive intrepretation of the law, that a man should presume to erect himself into a criminal judge over the servants on his own farm, for an offence against himself. The court also ordered him to pay all the costs of the application *(m)*.

The legislature has in some cases expressly guarded against the danger of entrusting a summary power to persons interested. And it is observable, that the first statute which clearly and unequivocally gives the summary authority to justices to convict, upon examination without trial, viz. the 43 Eliz. c. 7, against robbing of orchards, &c. *(n)*, specially provides (sec. 3,) "that no justice, or other head officer, do execute this statute for any of the offences there mentioned, done to himself, unless he be associated with, and assisted by, one or more other justices of the peace whom the offence doth not concern." A similar exception is introduced in the act 11 Geo. 2, c. 19, s. 4, for preventing frauds by tenants. Upon this principle *brewers* are prohibited by 24 Geo. 2, c. 40, from acting in the laws relating to beer. The same prohibition is applied to *bakers* by 3 Geo. 3, c. 11, s. 12, and 32 Geo. 2. c. 29, s. 33, as to the acts relating to bread. A like provision is inserted in the acts relating to penalties in the woollen *(o)*, cotton *(p)*, and dying *(q)* trades, to the col-

(*m*) R. v. Hoseason, 14 East. 606.

(*n*) Dr. Burn, (See Burn's Justice, tit. Oaths) is of opinion that this is the first statute which authorizes a conviction in a summary way; and that the former statutes, which authorize the examination and trial of offences by justices of peace, refer to the common law mode of trial by jury, before the justices in sessions.

(*o*) 7 Ann. c. 13. s. 2. 7 Geo. 2. c. 25. 11 Geo. 2. c. 28. s. 10. 14 Geo. 2. c. 35. s. 4. 5 Geo. 3. c. 51. s. 4.

(*p*) 39 and 40 Geo. 3. c. 90. s. 10.

(*q*) 13 Geo. 1. c. 24. s. 5.

lection

lection of salt duties *(r)*, and embezzling ordnance and naval stores, &c. *(s)*.

Section 5. Priority of Jurisdiction.

Competition of authority.

All the justices of each district are equal in authority; but as it would be contrary to the public interest, as well as indecent, that there should be a contest between different justices, it is agreed, 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 *(t)*.

Section 6. As to the Offence.

Where property, &c. is in question.

There is seldom any difficulty in ascertaining the offences liable to summary conviction, since each must be the subject of a special law. It may be proper however to mention a rule applicable to this mode of trial in general, that where property or title is in question, the jurisdiction of justices of the peace to hear and determine in a summary manner is ousted, and their hands tied from interfering, though the facts be such as they have otherwise authority to take cognizance of *(u)*. It will be sufficient at present to notice this maxim cursorily, reserving its application to particular cases, till we have occasion to examine the matters of complaint and defence connected with our subject.

(r) 13 Will. 3. c. 1. s. 18.
(s) 39 and 40 Geo. 3. c. 89. s. 18.
(t) R. v. Sainsbury, 4 T. R. 456.
(u) R. v. Burnaby, 2 Lord Raymond, 900. 1 Salk. 181. R. v. Speed, 1 Lord Raymond, 583. Kinnersley v. Orpe, Doug. 499.

Section

Section 7. Of the Limitation of Authority as to Time.

Having explained the extent of the magistrates jurisdiction with a view to the place and nature of the offence, it remains to be enquired what limitations it is subject to in point of *time*. This is to be ascertained by the statutes themselves, which direct the proceeding in each case. The period is fixed either with reference to the time of commencing the prosecution, or to the time of conviction: and the following rules apply according as these different terms are made use of. Where the proviso, as to the time, runs "*that the offence be prosecuted,* or that *the party be prosecuted for the offence* within a stated time *(v)*," it is sufficient that the information be laid, though the conviction do not take place within that time *(w)*: the information being for that purpose, the commencement of the prosecution. But if a statute authorizes a conviction "provided such *conviction* be made within ——— months after the offence committed," (as the game acts, 22 and 23 Car. 2, c. 25, 5 Ann. c. 14, s. 1.) it is not enough that the information was within that period, but the conviction itself is void, if not made within the limited time. And it makes no difference that it was prevented from being so by an adjournment at the request of the defendant himself: for after the time has expired for making the conviction, there is no authority existing for that purpose *(x)*.

Time, how reckoned.

With regard to the mode of reckoning the time limited by penal statutes, these points have been determined. 1st, If the time be expressed by *the year*, or any aliquot part, as a half, a quarter, &c. of a year, the computation is by calendar months, of twelve to the year. But if *months* are mentioned, and not the *year*, they are always

(*w*) As 3 W. and M. c. 10. 29 Car. 2. c. 7, and various other statutes.

(*v*) R. *v.* Barrett, 1 Salk. 383.

(*x*) R. *v.* Tolley, 3 East. 467.

computed

computed by lunar months, of four weeks to the month(*y*) 2d, Where the time is dated from the offence committed, the *day* on which it was committed is to be reckoned as one(*z*); but otherwise, if it be from the day of doing the act in question.

(*y*) R. *v.* Peckham, Carth. 406. One apparent contradiction to this rule is found in the construction of the act, 13 H. 4. c. 7, for the punishment of riots, which requires the justices to enquire, hear, and determine within *a month* after the riot committed. Upon this statute it was determined, that an indictment may be within a calendar month: for, it was said, that statute is not a penal statute, but only directory of the punishment of an offence which was so at common law, and therefore that the common law calculation, viz. by calendar months, must prevail. R. *v.* Cussens, 1 Sid. 181.

(*z*) *Per* Parker, C. J. R. *v.* Green, 10 Mod. 212. Powys, J. indeed dissented, and Eyre, J. said, it was a point which had never been settled. However, the case of R. *v.* Adderley, Doug. 465, recognizes the rule, that where the time is limited from an act done, the day is inclusive, but where it is from the day of doing an act, it is exclusive.

CHAP.

CHAPTER II.

Of the Proceedings before the Justice, preliminary to Conviction.

WE shall in the next place take a short view of the proceedings before the justice, and of the steps preliminary to judgment and conviction; which we shall do the more succinctly, because, as the process must (except where it is dispensed with by statute) be fully and correctly set out in the conviction, a more minute investigation of it may be postponed till we come to describe the several parts of the conviction itself.

Information or complaint.

First, then, it is requisite in all summary proceedings of a penal nature, that there should be an information, or complaint, which is the basis of all the subsequent proceedings, and without which it seems that the justice is not authorized in intermeddling *(a)*. Except where he is authorized by statute to convict on view, as by 19 Geo. 2. c. 21. s. 2, against profane swearing, &c.

As it is the duty of justices to enforce those acts, the execution of which is referred to them, it seems that they cannot properly refuse to receive a complaint regularly brought: and it is probable that upon such refusal the court of King's Bench would issue a mandamus to compel the justice to receive the information *(b)*. The acts conferring the authority vary in the terms used for that purpose; by some, the justices are " authorized and em-

(a) 2 Lord Raym. 509. Brookshaw *v.* Hopkins, Lofft. 240.

(b) Str. 413. R. *v.* Newton, *ib.* 530. R. *v.* Benn, 6 T. R. 198; see also 4 H. 7. c. 12. The opinion stated in the text is however rather an inference from these cases, than warranted by any direct authority.

powered;"

powered;" by others, "authorized, empowered, and *required*," or, "enjoined *(c)*." Some statutes inflict a penalty upon the refusal, for which an action may be brought *(d)*.

Wherever the complaint is required by statute to be in *writing*, that form must be observed, but, unless expressly so directed, it does not seem necessary that it should be so. Nor is it requisite that the information be upon *oath*, if not enjoined by the letter of the statute *(e)*.

Complaint by the *owner*, when necessary.

In some cases of injury to private property, where the penalty is intended as a compensation to the owner, and in which the dissent of the owner is essential to the offence, as on 5 Geo. 3. c. 14, for the protection of private fisheries, it has been suggested as proper, in point of regularity, that either the complaint should be made on behalf of the owner, or some other proof of his dissent adduced, along with the charge; although the statute itself may not profess in terms to make that a condition. No authority however has gone so far as to decide that this is absolutely necessary; but the opinions intimated are of sufficient weight to render it adviseable for justices who are called upon to act in cases of this nature, to be satisfied as to the fact *(f)*, at least so far as regards the owner's dissent to the act, without which it does not amount to any offence. And even where the offence is complete as to that particular, it has been doubted whe-

(c) 19 Geo. 2. c. 22. 27 Geo. 2. c. 8. s. 5. 32 Geo. 2. c. 16. s. 18. 14 Geo. 3. c. 44. 49 Geo. 3, c. 65, in all cases relating to the Customs, 59 Geo. 3. c. 41. s. 21, the Hawkers and Pedlars act, and many others.

(d) Smith, q. t. v. Langham, 2 Sh. 224. was an action for a penalty of 100*l.* against a justice for having refused to administer an oath to an informer under 22 Car. 2. c. 1. s. 11, and see Skin. 61; such penalties are more common in older acts, but are also found in various modern acts, as 12 Geo. 2. c. 29. s. 9. 19 Geo. 2. c. 21. s. 6. 25 Geo. 3. c. 50. s. 22. 25 Geo. 3. c. 51. s. 58. 28 Geo. 3. c. 17. s. 4.

(e) R. v. Willis, Bosc. 16. This is most usually directed where power is given to apprehend the offender in the first instance, though not confined to cases of that description.

(f) R. v. Corden, 4 Burr. 2279. Bosc. 17. 1 East. 281.

ther

ther a conviction for it can be founded upon the complaint of a common informer *(g)*.

Justice bound to proceed.

The magistrate being possessed of the charge, it becomes his duty either to dismiss it upon hearing, or to proceed to the examination of it. Where the liberation or forfeiture of property seized under the acts relating to the Customs or Excise, depends upon the adjudication of the magistrates before whom the information is laid, they are bound either to proceed or to discharge the information altogether. Thus on an information exhibited by an officer of the Customs, under 6 Geo. 1. c. 1. upon a seizure of brandy, though the facts appeared not to warrant the seizure, yet the justices refused to dismiss the information so as to enable the party to reclaim his property: and upon motion stating these circumstances, a *mandamus* was issued to compel them to proceed to a determination *(h)*.

Section 2. Of issuing the Summons.

Where a summons is necessary.

2. If the information appears to justify the interference of the magistrate, the next step is to give the party accused notice of the accusation, and an opportunity to answer it, by issuing a summons, containing the substance of the charge. In some few instances the legislature itself points out the method of proceeding, and directs the offender to be summoned. But even where the statutes are silent, as to any particular mode of proceeding, the law declares, that the magistrates to whom the cognizance of offences is referred, are nevertheless bound to observe the rules of natural justice, one of which is, that the accused should have an opportunity of being heard

(*g*) Arg. 1 East. 281. (*h*) R. v. Todd, 1 Str. 530.

before

before he is condemned (*i*). This is indispensably required in all penal proceedings of a summary nature by justices of peace (*k*). It is declared by Lord Kenyon to be an invariable rule of law (*l*); and is stated by Mr. Serjeant Hawkins to be implied in the construction of all penal statutes (*m*). So jealous is the law to enforce this equitable rule, that the neglect of it by a justice in proceeding summarily without a previous summons to the party, has been treated as a misdemeanour, proper for the interference of the court of King's Bench by information (*n*); which has been granted upon affidavits of the fact. As this is a privilege of common right which requires no special provision to entitle the defendant to the advantage of it, so it cannot be taken away by any custom (*o*).

Upon a sufficient information properly laid, the magistrates are bound to issue a summons, and proceed to a hearing: and if they refuse to do so will be compelled by *mandamus* (*p*).

The summons (*q*) should be directed to the party against whom the charge is laid; and should in general be

Direction of summons.

(*i*) *Per* Parker, C. J. R. *v.* Simpson, 10 Mod. 379. R. *v.* Dyer, 1 Salk. 181. 6 Mod. 41. Dalt. c. 6. Str. 567. R. *v.* University of Cambridge. See also 11 Co. 99. Lord Coke adopts as a principle of law the passage of Seneca:

Qui aliquid statuerit parte inauditâ alterâ,
Æquum licet statuerit, haud æquus fuit.

(*k*) R. *v.* Dyer, 1 Salk. 181. 6 Mod. 41; and see the cases collected in 8 Mod. 154, note (*a*).

(*l*) R. *v.* Benn, 6 T. R. 198.

(*m*) 1 Hawk. 420.

(*n*) R. *v.* Venables, 2 Lord Raymond, 1407. *Per cur.* R. *v.* Simpson, 1 Str. 46. R. *v.* Allington, 1 Str. 678. It is said in the report of R. *v.* Heber, 2 Barnard. 101, that an information was granted against a magistrate for convicting a person without any previous notice, he happening to be present when another was convicted upon a similar charge. But when that report was cited in R. *v.* Stone, 1 East. 642, Lord Kenyon said, that Barnardiston was an inaccurate reporter, and that probably, if the conviction was looked into, it would appear either that the defendant was not called upon for his defence, or had not proper time given him upon request.

(*o*) *Dict.* R. *v.* University of Cambridge, 8 Mod. 163.

(*p*) R. *v.* Benn, 6 T. R. 195.

(*q*) See Appendix.

signed by the justice himself by whom it is issued *(r)*. Where a particular form of notice is prescribed by the act, that must be strictly pursued *(s)*.

The intention of the summons being to afford the person accused the means of making his defence, it should contain the substance of the charge, and fix a day and place for his appearance; allowing a sufficient time for the attendance of himself and his witnesses *(t)*, a summons to appear immediately upon the receipt thereof has been thought insufficient in one case *(u)*. In another, an objection made to the summons that it was to appear on the same day, was only removed by the fact of the defendant having actually appeared, and so waived any irregularity in the notice *(v)*. It is equally necessary that it should be to appear at a place certain, otherwise the party commits no default by not appearing; and the magistrate cannot proceed in the defendant's absence upon a summons defective in these particulars, without making himself liable to an information *(w)*.

Service of the summons.

It has been made a question whether the service of the summons must be *personal*. It seems in general necessary that it should be so, unless where personal service is expressly dispensed with by statute. Lord C. J. Parker was of that opinion *(x)*: and the provisions specially introduced into many acts of parliament to make a service at the dwelling-house sufficient, seem to justify the inference that the law in other cases is understood to require a service upon the person. By 32 Geo. 2. c. 17. s. 2, in all cases relating to the *Excise* (except where

(r) R. v. Steventon, 2 East. 365. It appeared that it had uniformly been the practice of the Commissioners of the Excise to issue summonses for the attendance of witnesses, with the name of the Solicitor of the Excise only, printed at the foot; and this was supported on the ground of invariable usage alone. But Lord Kenyon in that case, alluding to convictions by other magistrates, says, "as to justices, I will take for granted, that they always sign the summonses issued by them as they have been used to do". *Id. ib.*

(s) R. v. Croke, Cowp. 30.

(t) R. v. Johnson, 1 Str. 260.

(u) 2 Burr. 681.

(v) R. v. Johnson, 1 Str. 261.

(w) R. v. Simpson, 2 Str. 46.

(x) 10 Mod. 345.

particular

particular provisions are made) a summons directed to the party in his real or assumed name, left at his usual place of residence, shop, workhouse, &c. is to be deemed legal notice. And in all offences relating to the *Customs*, a summons may be left at the dwelling-house, by 49 Geo. 3. c. 65. s. 3. *(y)*. In these and the like cases, leaving a *copy* at the house is sufficient *(z)*, and the delivery may be to a person on the premises apparently residing there as a servant *(a)*.

The foregoing rules, however, it should be observed, apply only to those cases where the defendant does not in fact appear: for if he actually appears and pleads, there is no longer any question upon the sufficiency or regularity of the summons *(b)*.

Section 3. Of the Apprehension, Appearance, or Default.

Apprehension of offender to answer.

For offences merely arising by penal statutes, and not connected with any breach of the peace, a justice has no authority, as necessarily incident to the cognizance of the offence, to apprehend the accused in the first instance, or even after a summons and default, but can only summon him to attend, and in default of his appearance proceed *ex parte*. However, in a variety of cases where there may be reason to apprehend, from the nature of the offence, or the probable description of the offender, that the object

(y) Other acts which particularly authorize a service at the house, &c. are 35 Geo. 3. c. 113, s. 6, by which it is sufficient to leave a summons at the house, out-house, cellar, vault, &c. of any person selling ale without licence, and by the name under he which he entered the house. 25 Geo. 3. c. 65. s. 13, 14, relating to offences against the salt duties. 36 Geo. 3. c. 88. s. 26, against frauds in the sale of hay and straw. 36 Geo. 3. c. 111, and 39 Geo. 3. c. 81. s. 10, against unlawful combinations by workmen. 50 Geo. 3. c. 48, regulating stage coaches, which directs the summons for the coachman to be left with the book-keeper, &c.

(z) R. v. Chandler, 14 East. 268.

(a) *Id. ib.*

(b) 1 Str. 261.

of the prosecution would be defeated by giving him notice, the legislature has thought proper to arm the magistrate with authority to issue a warrant immediately upon the information *(c)*. In the majority of such instances, though not in all, the information is required to be upon *oath*. Some acts direct the magistrate to cause the defendant to be brought before him, which seems to imply an authority to use compulsory process *(d)*. But even where a statute authorizes the issuing a warrant upon complaint, yet if it be for the non-payment of money, (as on the 49 Geo. 3. c. 68. s. 3. which empowers a magistrate, on complaint and proof, by oath, of an order of maintenance and non-payment, to issue his warrant to apprehend) nevertheless it is proper to issue a summons in the first instance to the party charged, to attend and shew cause *(e)*.

Judgment by *default.*

If the defendant being duly summoned neglects or refuses to appear, still the magistrate cannot ordinarily, by his general authority, enforce his appearance by any compulsory means. That power is sometimes supplied by statute directing the magistrate first to summon the party, and upon default or non-appearance to issue a warrant for his apprehension *(f)*. But when no such power is given by statute, the magistrate can only proceed to examine and give judgment *ex parte*; which he is then at liberty and bound to do, in the absence of the defendant *(g)*. It was not without much doubt and hesitation that the court of King's Bench recognized the power of justices to proceed in the defendant's absence, even after summons. It seems however not to have been doubted since the determination of the *Queen* v. *Simpson*, Trin. 13 Ann. *(h)*, and to

(c) As 42 Geo. 3. c. 119. s. 4. 47 Geo. 3. sess. 2. c. 78. s. 146. 50 Geo. 3. c. 41. s. 25. and many others.

(d) As 19 Geo. 2. c. 21. s. 4.

(e) R. v. Martyr, 13 East. 55.

(f) As 5 Geo. 2. c. 20. s. 7. 6 Geo. 2. c. 29. s. 22. 15 Geo. 2. c. 33. s. 6. 20 Geo. 2. c. 39. 26 Geo. 2. c. 30. s. 17. 31 Geo. 2. c. 29. s. 34.

(g) R. v. Simpson, 10 Mod. 341. 378. 1 Str. 44.

(h) The case of the Queen v. Simpson, Trin. 13 Ann. 10 Mod. 348. 341. 379, in which the point was

to be now settled by undisputed practice, that a party who refuses to appear after regular notice, may be convicted in his absence. In several cases where the statutes themselves have pointed out the method of proceeding, and directed the magistrate to examine, &c. on default of the defendant's appearance, it is with the restriction that proof be made of the service of the notice *(i)*. It is presumed, however, that such proof is in all cases necessary to the regularity of the proceedings, where the judgment is without the appearance of the defendant.

The non-attendance however of the party does not authorize a judgment without a due examination of the facts upon oath, with the same formality as if he were present and made defence *(k)*.

Section 4. Proceedings after Appearance.

If the defendant appears, any irregularity in the summons, or even the want of a summons altogether, becomes immaterial *(l)*: except it be in a case where a special form of summons is required by the act, which has not been complied with *(m)*.

Upon the defendant's appearance, he either prays time, or confesses charge, or denies it and makes defence immediately. In the first case, if he pleads not guilty, and

was first decided, was three times argued; and upon the two former arguments the leaning of the court was strongly against the power to proceed *ex parte*. It may be noted, that in Ditton's case, where two justices had discharged an apprentice in the absence of the master, who had been bound over to appear, but made default, it was objected, that they had no such power, the act expressly directing the discharge to be on the master's appearance: but the court confirmed the order for the discharge, observing, that the act must have a reasonable construction, so as not to permit the master to take advantage of his own obstinacy. Ditton's case, 2 Salk. 490. Pasch. 13 W. 3.

(*i*) See 5 Geo. 2. c. 25. s. 7. 6 Geo. 2. c. 29. s. 22.

(*k*) *Semb.* 10 Mod. 381.

(*l*) R. *v.* Johnson, 1 Str. 261. R. *v.* Barret, 1 Salk. 383. 2 Salk. 428. R. *v.* Aiken, 3 Burr. 1735. R. *v.* Stone, 1 East. 649.

(*m*) R. *v.* Croke, Cowp. 30.

requires

Defendant requiring time.

requires time for his defence, and to produce his evidence, it is reasonable, and the law seems to require that the party should be allowed a proper interval for that purpose. Though no express adjudication has occurred to determine this point, it may be inferred from the language of the court of King's Bench in those cases where a question has occurred upon the effect of the defendant's appearance. Thus, in over-ruling the objection to the want of a previous summons, the court, in the case of the *King* v. *Aiken (n)*, laid great stress upon the fact, that the defendant on his appearance *did not desire further time* to prove his innocence or produce his witnesses. And upon a later occasion, in which Lord Kenyon pronounced a decision to the like effect, his words were "justice requires that a party should be duly summoned and fully heard; but if he be stated to be present at the time of the proceeding, and to have heard all the witnesses, and not to have *asked for any further time* to bring forward his defence if he had any, this has at all times been deemed sufficient *(o)*."

Adjournment.

The hearing may, either upon the application of the defendant, or for any other cause, be adjourned to a subsequent day; taking care not to exceed the time if any be limited by the act, for *making the conviction (p)*. But if the limitation refers only to the time within which the offence must be prosecuted, (as in 29 Car. 2. c. 7, and many other acts) and not, (as in the game acts, 22 and 23 Car. 2. c. 25. 5 Ann. c. 14,) to the time of making the conviction, then, provided the information has been laid in due time, the hearing and subsequent proceedings to judgment will be valid, though postponed to a term beyond the period mentioned in the act *(q)*.

Confession.

If the charge be *confessed*, nothing more remains for the magistrate but to pass judgment, and impose the

(n) 3 Burr. 1786.
(o) R. v. Stone, 1 East. 469.
(p) R. v. Tolley, 3 East. 467, *ante*, p. 12.
(q) R. v. Barrett, 1 Salk. 383.

penalty.

penalty. It has been determined, that though the act only empowers the justice to convict upon the oath of one or more witnesses, this implies a power to convict upon the confession of the party alone *(r)*. Even if that decision had not occurred to determine the law upon this point, it should seem scarcely to admit of much doubt, except what might arise from the express mention made in several acts of parliament of the voluntary confession of the parties, and the distinct provision sometimes introduced that the voluntary confession shall be sufficient to convict the party himself; as in the act 21 Jac. 1. c. 27,—a provision, which seems to argue a doubt whether the law would of itself supply that power.

As the confession supplies the want of evidence, so it cures any objection to the manner of taking the depositions; such, for instance, as that they were not made in the presence of the defendant *(s)*.

Denial of the charge.

If the defendant appears and denies the charge, or neglects to appear after being duly summoned, the next step is to substantiate the information by testimony. For that purpose the prosecutor or informer must produce his witnesses to prove the facts alledged.

Compelling attendance of witnesses.

The magistrate has in general no authority to compel the attendance of witnesses for the purpose of a summary trial; unless where it is specially given by act of parliament. This, in many cases, has been done; and in sundry acts the provision is accompanied with a penalty on refusal to attend for the purpose of being examined *(t)*.

It

(r) R. v. Gage, 1 Str. 546. In this case, however, which was upon 5 Ann. c. 14, for using a greyhound, Mr. J. Eyre dissented, because the statute 22 and 23 Car. 2. c. 26, gives power to convict upon confession for the same offence, and therefore he thought there existed no necessity for carrying the act 5 Ann. c. 14, so far. The practice seems to be now established agreeably to that decision, and to meet with no objection or controversy. See also Dalt. c. 7. s. 2.

(s) R. v. Hall, 1 T. R. 320.

(t) See Appendix.—The summons should be signed by the justice before whom the information is laid. By usage which has been sanctioned by the court of King's Bench, the summonses issued

Examination of witnesses.

It seems agreed that the examination of witnesses must be upon oath, and that no legal conviction can be founded upon any testimony not so taken. There is a difference in the manner in which the acts are worded, in regard to the mode of examination to be pursued. For, while some acts expressly mention the testimony of witnesses *on oath*, others in general terms authorize the magistrate *to hear and determine*, or to convict or give judgment *on the examination of witnesses*, without noticing the oath. But such general expressions seem in legal construction necessarily to refer to the only kind of testimony known to the law, viz. that upon oath. "For," says Dalton, "in all cases whersoever any man is authorized to examine witnesses, such examination shall be taken and construed to be as the law will, *i. e.* upon oath *(u)*." This was the opinion of Lord C. J. Broke, and Mr. Lambert; and the rather, adds the latter, because, in these cases of convictions by justices of the peace, the trial dependeth wholly upon these examinations *(v)*.

Oath.

The power of justices to administer an oath by virtue of that jurisdiction which is conveyed in the authority to hear, examine, and convict, without any express mention of a power to administer an oath, does not seem, from any thing now extant, to have been ever questioned, so as to be brought to a judicial decision. But, in order, as it should seem, to remove any scruples with regard to that point, the statute 15 Geo. 3. c. 39, was passed; which reciting, "that it is frequently necessary for justices of the peace to administer oaths or affirmations, where penalties are to be levied or distresses to be made in pursuance of acts of parliament, which they have no power to administer, unless authorized so to do by such acts respectively," enacts, "that where any penalty is directed to be levied or distress to be made, by any act of parliament

15 Geo. 3. c. 39.

issued by the Commissioners of Excise are not signed, but have the name of the Solicitor of the Excise printed at the bottom. 2 East. 362.

(u) Dalt. c. 6. s. 6.
(v) *Id.* c. 115. c. 164. Plow. 12. a. Lamb. 517.

NOW

now in force, or hereafter to be made, it shall and may be lawful for any justice or justices acting under the authority of such acts respectively, and he and they is and are hereby authorized and empowered to administer an oath or oaths, affirmation or affirmations, to any person or persons, for the levying of such penalties, or making such distresses respectively."

If, as Dr. Burn thinks *(w)*, the preamble of this act extends to all cases in which there is not an express power given to the justices to administer an oath, the effect of it is to declare illegal the greater part of the convictions which had taken place at any period before its enactment. But a more serious consideration which arises out of the act is, that though the preamble contains a general declaration of the want of any general authority to administer oaths in execution of penal statutes, yet does it fall short in supplying that authority in all cases where it may be wanted. For the remedial part is strictly confined to cases of pecuniary penalty, and no provision is made for those in which the punishment is merely *corporeal*. Cases of that description therefore *(x)*, as Dr. Burn has suggested *(y)*, are left exposed to great doubt and uncertainty, if any weight is to be given to the law as legislatively propounded by that act. No such doubt however appears to have been stirred, and no attempt has been made to invalidate the authority constantly exercised by magistrates in such cases: though the question might have arisen in a prosecution for perjury, alledged to be committed in a deposition so taken, relating to an offence against an act which does not specially authorize the administering an oath, and for which the punishment is only corporeal.

(w) Burn's Justice, tit. Oaths.

(x) For instance, on 1 Geo. 1. st. 2. c. 48, for destroying trees, where the punishment (which is extended to several subsequent acts, 6 Geo. 1. c. 16. s. 2, and 29 Geo. 2. c. 86. s. 8.) is three months imprisonment and whipping, without any pecuniary penalty: none of those statutes make mention of an oath, but only empower justices to hear and finally determine and adjudge.

(y) Burn's Justice, tit. Oaths.

Section

Section 5. Of the Competency of Witnesses.

What witnesses admissible.

From the term generally used in penal statutes, directing the conviction to be upon the testimony of *credible* witnesses, it might be doubted whether the magistrate should not be at liberty to examine any witness to whom he might think proper to give credit. But according to the interpretation put upon the same term in the construction of the statute of frauds, 29 Car. 2. c. 3. s. 5. *credible* is equivalent to *competent:* and therefore such witnesses only can be properly received on a summary conviction, as are capable of being examined in a court of justice *(z)*. On this account it is now clearly settled, that the informer himself cannot be a witness wherever he is entitled to any share of the penalty on conviction: and so many convictions have been quashed upon that ground, that the rule cannot now be questioned *(a)*. The law is indeed recognized by the legislature in the statute 32 Geo. 3. c. 56, which in the case there provided for (that of fraudulently giving false characters to servants) expressly enables the informer to be a witness, notwithstanding that he is entitled to part of the penalty. A special provision to the like effect is also made by the statute regulating hackney coaches, 33 Geo. 3. c. 75. s. 17. The same thing seems to be im-

Informer.

(z) 7 Bac. Ab. tit. Wills, D. p. 328.

(a) R. v. Tilley, 1 Str. 316. R. v. Stone, 2 Lord Raymond, 1545. R. v. Blaney, Andr. 240, R. v. Piercy, *id.* 18. R. v. Robotham, 3 Burr. 1473. If the case of Jennings v. Hankey, 3 Mod. 114, 115, be correctly reported, the court of King's Bench had at one time sanctioned the contrary doctrine. According to that report it was decided, that the informer, under a penal statute giving him half the penalty, was a competent witness. But besides that the contrary is established by numerous and more recent decisions, the loose manner in which the case is reported may warrant a suspicion of inaccuracy. The same judgment was given in another case against the opinion of Herbert, C. J. by the majority of the judges of the court of King's Bench, who admitted the informer, though entitled to half the penalty, to be a good witness; upon the ground that the justices are the sole judges of the credibility of the witnesses. R. v. Drake, 2 Sh. 489, 4th point.

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pliedly authorized by those statutes which award part of the penalty to the person upon whose oath the offender is convicted, as 7 Geo. 1. st. 1. c. 12. s. 1, 2. *(b)*.

Parishioners, when admissible.

Upon this ground, rated parishioners, before the act of 27 Geo. 3. c. 29, were deemed incompetent witnesses in all those cases, which are very numerous, wherein any part of the penalty is given by statute to the poor of the parish *(c)*; unless a particular provision in the act rendered them competent. The statute 27 Geo. c. 29. was therefore passed for the express purpose of removing that difficulty where the penalty does not exceed £20, by enacting, that thenceforth "the inhabitants of every parish, township, or place, shall be deemed competent witnesses for the purpose of proving the commission of any offence within the limits of such parish, township, or place, notwithstanding the penalty incurred by such offence, or any part thereof, may be given or applicable to the poor of such parish, township, or place, or otherwise for the benefit or use, or in aid or exoneration of such parish, township, or place: provided that the act shall not extend to any proceeding for the recovery of a penalty exceeding £20." In regard to penalties exceeding that sum therefore, the law remains as before the statute *(d)*.

But the disqualification arises from the witness being actually rated, and not from a liability to be rated; for an inhabitant not in fact rated has been held a competent witness, notwithstanding he was liable to be so *(e)*.

(*b*) See Precedents, Appendix, tit. Manufactures (Buttons).

(*c*) It is said, indeed, in one case, that a distinction was made between the penalty being given to the *poor* of the parish, as by 3 & 4 Will. 3. c. 10, and to the *overseers* of the poor; and that in the first case a person described to be of the parish might be a witness but not in the latter, because in that case all the inhabitants would have the benefit of it. R. v. Miller, 2 Barnard. 383.

(*d*) R. v. Davis, 6 T. R. 178.

(*e*) R. v. Cottrel, Cald. 551.

Section

Section 6. Of the Mode of Examination.

Witness examined in *presence of* the party.

Although no mode of examination be pointed out by the statutes giving jurisdiction over the offence; yet, as justice requires that the accused should be confronted with the witnesses against him, and have an opportunity of cross-examination, it is required by law in the summary mode of trial now under consideration, that the evidence and depositions should be taken in the presence of the defendant, where he appears. For though the legislature, by a summary mode of enquiry, intended to substitute a more expeditious process for the common law method of trial, it could not design to dispense with the rules of justice, as far as they are compatible with the method adopted. Indeed, it may be useful upon this occasion to notice the general maxim which has been laid down as a guide to the conduct of magistrates in regulating all their summary proceedings, viz. that "acts of parliament in what they are silent, are best expounded according to the use and reason of the common law (*f*)". Unless therefore the defendant forfeits this advantage by his wilful absence, he ought to be called upon to plead before any evidence is given (*g*): and the witnesses must be sworn and examined in his presence (*h*); or if the evidence has been taken down in his absence, and is read over to him afterwards, the witness must at the same time (unless the defendant upon hearing the evidence should confess the fact (*i*)), be re-sworn in his presence, and not merely called upon to assert the truth of his former testimony (*k*); for the intent of the rule is, that the witness should be subjected to the examination of the defendant upon his oath (*l*).

(*f*) *Verb.* Parker, C. J. R. *v.* Simpson, 1 Str. 45.
(*g*) 1 T. R. 320.
(*h*) R. *v.* Vipont, 2 Burr. 1163.
(*i*) R. *v.* Hall, 1 T. R. 320.
(*k*) R. *v.* Crowther, T. R. 125.
(*l*) 2 Burr. 1163.

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This rule is confirmed, rather than contradicted, by those cases referred to under a subsequent head, wherein convictions have been sustained without expressly alledging the evidence to have been taken in the presence of the defendant (*m*): for it will be found, that in all those cases the judgment proceeded upon a presumption collected from the whole conviction, that the defendant was in fact present, and did hear the evidence given, which was always admitted to be necessary to the regularity of the magistrates proceedings (*n*).

Section 7. Of the Proofs necessary to support the Charge.

Where the facts constituting an offence are all of a positive nature, there can be no doubt that they must be established in proof, by the prosecutor, before any judgment of conviction can be pronounced. But with regard to such offences as are made penal only by the want of certain qualifications in the offender, or by the absence of certain exculpatory circumstances, a difficulty will sometimes occur in determining the degree of *negative* proof, which ought to be required by the magistrate. This is exemplified most frequently in summary prosecutions on

Evidence, to *negative* exemptions, how far necessary.

(*m*) R. v. Baker, 2 Str. 1240. R. v. Aiken, 3 Burr. 1786. R. v. Kempson, Cowp. 241.

(*n*) *Per* Dennison, J. R. v. Vipont, 2 Burr. 1163. That learned judge, in commenting upon the case of R. v. Baker, 2 Str. 1240, explains it in the manner mentioned in the text. It must however be confessed, that the latter is not easily distinguishable from the case of R. v. Vipont, and it is said by Sir J. Burrow in a note to his report, 2 Burr. 1163, that one of the judges in R. v. Baker, declared he knew no law requiring the presence of the witness face to face. Such a declaration however is inconsistent with the reason given by Sir J. Strange, 2 Str. 1240, according to whose report the ground of the decision was, that the court supposed the whole to have passed at the same time, This supposition, though not very obviously arising upon the statement in the conviction, sufficiently shews that the law was understood to require the presence in fact of the witness. See also R. v. Lovat, 7 T. R. 152. R. v. Thompson, 7 T. R. 18. R. v. Swallow, 3 T. R. 284.

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the game laws; since they attach only upon persons destitute of certain qualifications enumerated in 22 and 23 Car. 2. c. 26, the absence of which is necessary to the jurisdiction of the convicting magistrate. The general rule of law dispenses with proof of a negative, and casts the burthen of establishing the exception in the affirmative, upon the party seeking to protect himself under it; and that rule is fortified in the case under consideration, by the difficulty of ascertaining or proving the want of every qualification introduced into the game laws. However, as far as it may be proper to state any conclusion upon a point still in suspense, the duty of magistrates in this particular seems by the effect of decided authorities to be governed by a different rule from that which prevails in trials at common law, and to require the production of some evidence to negative the existence of such exemptions as are incorporated with the offence, or at least to authorize a conclusion of their non-existence. For if it be necessary, as the preponderance of authorities seems to declare (*o*), that the evidence recorded in the conviction should go that length, it seems to follow, that the magistrate, to be able to make that statement with truth, should have some evidence of it before him. It was considered by Lord Mansfield (*p*), as a point fully settled, that it must be made out before the justice that the party had no such qualification as the law requires; and this, says his lordship, upon good reasons, independent of the authorities (*q*). In that opinion the judges Dennison and Foster fully concurred. To the

(*o*) *Post*, part ii.

(*p*) R. *v.* Jervis, 1 Burr. 153. See also R. *v.* Marriott, 1 Str. 66. Bluet, q. t. *v.* Heeds, Com. Rep. 525.

(*q*) *Id. ib.* and see the report of the same case, 1 East. 646, note. The case of R. *v.* Jervis, (1 Burr. 153,) can scarcely be considered as less than a direct authority upon this point; for though it be true as stated in R. *v.* Stone, 1 East. 653, that the conviction was defective by the want of the negative allegations in the *information* as well as in the *evidence*, yet it is plain from the two reports of that case in Burrow, and in the note, 1 East. 653, that the opinion of the court was expressed as much with reference to the evidence as to the information.

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weight of these authorities is to be added, that of the opinion declared by Lord Kenyon and Mr. J. Grose upon the latest case in which the attention of the court has been drawn to the question. And it may be useful to attend to what the former points out as the course which the magistrate ought to follow in requiring negative evidence of the want of qualification, because it is applicable to all cases where exemptions are introduced into the enacting clause of a penal statute. His words are, "It is said to be impossible for the prosecutor's witnesses to give negative evidence of the want of qualification in defendant, but I do not see why it may not be done. A witness may give general evidence of it from his belief: he may know the defendant, and know that to all appearance he may not be a man of substance: evidence may be given of his condition in life to raise a reasonable presumption against his having any of the necessary qualifications (*r*)". On the other hand, however, two of the learned judges of the court of King's Bench in the same case (*s*), were of opinion, that the general rule of law as acted upon in courts of justice, ought to govern the proceedings of justices, and therefore that no evidence of the want of qualification ought to be required from the prosecutor. That opinion is founded upon the practice in penal actions on the same statutes, and upon the inconvenience of requiring positive testimony in support of a negative, which in many instances is of a nature that it is almost impossible for a witness to swear to, and that must lie almost wholly in the knowledge of the party accused. According to the view of those learned judges, if the affirmative fact, viz. the killing the game, be proved, and the defendant does not prove his qualification, or desire further time to do so, there is enough to warrant the justice in drawing the conclusion of the want of qualification, and in convicting the defendant of the offence

(*r*) 1 East. 650. Le Blanc, R. v. Stone, 1 East.
(*s*) Mr. J. Lawrence and Mr. J. 653.

charged.

charged (*t*). Upon the whole therefore, the safest course and the most agreeable to precedent seems to be for the magistrate to require some *general* evidence, (for that is admitted to be sufficient) arising from the condition, or probable and apparent circumstances of the party, and tending to afford a reasonable presumption that he does not come within the exemptions of the statute.

The defendant's own representations or admissions afford a legitimate and strong ground for the conclusion: and it has been decided that justices, before whom an information was exhibited on the game laws, were justified in founding the want of the defendant's qualification upon the fact of his having sworn before them acting in another capacity, as commissioners of the income tax to an estate under £100 a year (*u*).

It must be observed however, that the doubt to which the foregoing remarks apply, arises only where the exemptions are either introduced or embodied by reference into the clause of the statute which describes the offence. For if those exceptions come by way of proviso in a separate clause or act, and without reference in the enacting clause, incorporating them therewith, it is a known and acknowledged distinction that the defendant in such cases must bring himself by proof within the proviso by which he seeks to protect himself (*v*).

Section 8. *Of the Defence.*

When the witnesses in support of the charge have been heard, the defendant should be called upon for his defence: and the magistrate is bound to hear the evidence tendered by him (*w*); that he may afterwards, as it is

(*t*) *Per* Lawrence, J. 1 East. 653.
(*u*) R. v. Clark, 8 T. R. 220.
(*v*) Dennison, J. R. v. Jarvis, 1 East 647, note, and Lord Kenyon, 1 East. 650; and R. v. Bryan, 2 Str. 1101, *post*.
(*w*) *Ante*, p. 17.

proper

proper to do, state it in the record of conviction, if he should notwithstanding give judgment against him (*x*).

Exemptions, Proof of.

Besides a denial of the charge, the accused may defend himself by proving that he is within some proviso or exception which excuses or qualifies the fact charged; or, that the act complained of was done under an asserted authority, or pursuant to a claim of right or property.

Claim of right or authority.

It has always been held as a maxim, that where *property* is in question, the exercise of a summary jurisdiction by justices of the peace is ousted (*y*). This principle is not founded upon any legislative provision, but is a qualification which the law itself raises in the execution of penal statutes (*z*): and is always implied in their construction.

The following cases illustrate the extent and application of this rule.

The first case arose on an objection made to a conviction for deer stealing, viz. that it was only stated that the defendant unlawfully killed, &c. for, it was urged, every unlawful killing is not within the act. Upon which Lord C. J. Holt said, "without doubt, if the defendant has but a colour of title the justices have no jurisdiction. If there is a pretence of right, we ought to suppose that the justices would do right and acquit the defendant, because he is entrusted with the execution of the law. Thus, if there was a dispute about the limits of a walk in a forest, and one claims as part of his walk, what is in fact a part of the division of another, and accordingly kills deer there, the case is out of the intent of the act, though plainly within the words. The intent is, to

(*x*) R. *v.* Lovet, 7 T. R. 153, post.

(*y*) R. *v.* Burnaby, 1 Salk. 181. 3 Salk. 217. 2 Lord Raym. 900.

(*z*) It is sometimes also the subject of special enactment, as in the statute 22 and 23 Car. 2. c. 25. s. 9. (the first act which gives an appeal,) the appeal clause makes the determination of the justices final, with this proviso, "if no title to any land, royalty, or fishery be therein concerned."

punish rogues and vagabonds, and not persons who by mistake exceed what the law warrants (*a*)."

Colour of title.

As the same rule applies in this particular to actions for penalties, the principles adopted in cases of that description may be referred to as apposite to the present subject. And though these decisions arise chiefly upon one description of offences, viz. that which is founded on the game laws, it may be useful to collect them in this place under one view; since the principle is equally applicable in other instances, to the case of persons charged with penalties for acts done under a visible authority or alledged title.

From these it will be seen, that without entering into the substantial merits of the title set up, it is sufficient to stop the summary interference of a magistrate by conviction, that even a colour of title appears to be in question, and that the act was really done under an assertion of that supposed title, however weak the claim may appear to be. Thus it has been held, that the act of killing fish in a private fishery, after notice given to the owner that it was done with intention to try the right to the place in question, did not subject the party to penalties under 5 Geo. 3. c. 14. s. 4, although the same title had before been tried and determined by a verdict against the party now claiming it; the act of parliament having expressly excepted persons who have a just right *or claim* (*b*).

Again, in an action for a penalty for destroying game, the plaintiff was nonsuited by the direction of Mr. J. Buller, upon its being proved that the defendant was game keeper to Sir R. Hoare, of his manor of B. and had as such been in the habit of shooting over the place where the game was killed, and no evidence was given of the place where the act was committed, being out of that manor. The learned judge said he would not put

(*a*) R. v. Speed, 2 Lord Raym. 583.

(*b*) Kinnersley v. Orpe, Doug. 509.

it

it upon the defendant to prove the place within the manor; for that he would not, in such an action, try the boundaries of a manor (*c*). The same learned judge, upon another occasion, refused to let the boundaries of a manor be tried in an action for penalties for killing game; and declared, that if only a colourable title in the person under whom the defendant acted were made out, with the exercise in fact of manorial rights, it would be a sufficient defence against the penalties of the statute (*d*).

Fictitious pretence of title not available.

The rule however ought not to be so extended as to enable an offender to arrest the summary jurisdiction of the justice by a mere fictitious pretence of title. An assertion of right therefore is not to be regarded, where it evidently appears that no colour or pretext for it exists; as where the parties own shewing or other manifest circumstances prove the claim to be wholly groundless. Thus, in an action for penalties for killing game, the defence set up was, that the defendant was game keeper to a person named *Roebuck*, who was merely proved to have been promised a deputation by the plaintiff as lord of the manor, but who had since been warned by him to desist from shooting there. Upon the first trial the jury were directed to consider only, whether the defendant really acted as game keeper to *Roebuck*, which was ruled to be sufficient, however groundless *Roebuck*'s claim might be. A verdict was found accordingly for the defendant; which the court of King's Bench afterwards set aside, on account of the mis-direction; and upon that occasion Lord Kenyon said, "the court have before declared as they now do again, that where a party has even a colourable title only to a manor, a penal action is not a mode of proceeding by which they will investigate it. But here nothing of the sort is pretended, for it is admitted on the part of the defendant that the plaintiff was

(*c*) Hawkins v. Bailey, 4 T. R. 681, note (*a*).

(*d*) Blunt v. Grimes, 4 T. R. 682, note.

lord of the manor; but it is insisted that he promised the deputation of the manor to Mr. *Roebuck*. This decides the question; for a man cannot convey to another the power of appointing a game keeper without a conveyance also of the manor itself. But it has been said that the servant acted *bonâ fide*, and is therefore not within the act. He indeed chose to trust to what his master told him, but as the master had no right or even colour of title, it is no justification to the servant (*e*)."

In this case it was apparent from the defendant's own shewing, that the ground of his excuse, viz. as game keeper to a person who was not the lord of the manor, and who only set up an *agreement* for a deputation to *himself*, wholly failed. But as questions of right can still less properly be examined by magistrates in a summary way, than even in a penal action by a court and jury, it may be prudent for magistrates, when questions of this kind occur, to abstain from any other enquiry, than whether the act was really done under an idea of authority entertained at the time, and not fabricated afterwards for the mere purpose of evading the penalties; and if it appears to have been done under such real impression, to dismiss the complaint without investigating the legal grounds of the claim at all. For a matter which would not be any defence in an action of trespass, may nevertheless form a good ground of protection against a summary conviction; as appears from the instance put by Lord C. J. Holt, in a case already referred to (*f*), where he lays it down, with reference to a summary conviction, that if the keeper of a walk in a forest gives leave to a third person to kill a deer, though this licence does not give sufficient authority to the third person to kill it, yet it will not be an unlawful killing within the statute (3 & 4 Will. & Mary, c. 10,) because there is a colour of right.

(*e*) Calcraft *v.* Gibbs, 5 T. R. 19.

(*f*) R. *v.* Speed, 1 Lord Raymond, 585.

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Upon this subject it may be proper to notice a question which has been raised, without being decided, whether the penalty of keeping an alehouse without licence be incurred by a person acting under a licence, which is void from an irregularity in the jurisdiction of the magistrates who granted it. The prevailing opinion seems to be in the affirmative; but owing to a difference of opinion existing in the court, the point was not determined in the case in which it arose (*g*).

It is said (*h*), that upon a suggestion of title, the court of King's Bench, at any time while the conviction remains below, and has not been removed by *certiorari*, will grant a prohibition after conviction to stay the justice from proceeding upon it.

Section 9. Of giving Judgment, and fixing the Penalty.

When the case and evidence have been heard on both sides, it remains for the magistrate to convict the party, or to dismiss the complaint according to his judgment upon the circumstances. The degree of credit due to the evidence on either side is entirely for his consideration. For justices, upon these summary proceedings, are placed in the situation of a jury, and their judgment is conclusive as to the facts brought before them (*i*). It is sufficient therefore to authorize a conviction that there is such evidence before the magistrate as might in an action be left to a jury; and the court of King's Bench, when the conviction is brought before it, will not examine further, to see whether the conclusion drawn by the magistrate be or be not the inevitable conclusion from the evidence (*k*).

(*g*) Cald. 305, 6, note (10). R. *v.* Bryan, Andr. 81.

(*h*) *Per* Holt, C. J. 2 Lord Raymond, 901.

(*i*) R. *v.* Reason, 6 T. R. 375. R. *v.* Smith, 8 T. R. 590.

(*k*) R. *v.* Davis, 6 T. R. 178.

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And if the magistrates think fit to dismiss the charge, although there appears *primâ facie* ground for a conviction, their acquittal cannot be questioned; since no other court can judge of the credit due to witnesses which it did not hear examined (*l*).

Fixing penalty.

The magistrate is not obliged to fix the penalty at the instant of conviction, but may take time either for the purpose of informing himself of the legal penalty, or of considering the amount proper to be imposed. Therefore, though the forfeiture must necessarily appear as a part of the judgment in the conviction when formally drawn up (*m*), (which will otherwise be irregular), yet, if it be ascertained and imposed at any time before the conviction is so drawn up, and appears in the record returned to the court of King's Bench on a writ of *certiorari*, that court will not hear any objection on the ground that it was not in fact imposed by the magistrate at the time when he convicted the offender (*n*).

Section 10. *Of making out the Conviction, and giving Copy, &c.*

Conviction, record.

The proceedings of justices of peace by summary conviction are matter of record (*o*). It becomes therefore a part of the magistrate's duty upon every conviction, to record the proceedings in a formal shape; for the purpose of having it returned and filed at the sessions, which in point of strictness ought to be done of course upon

(*l*) R. *v.* Reason, 6 T. R. 376.

(*m*) *Post*, *Judgment*.

(*n*) 2 Lord Raymond, 1514. 1 Salk. 352.

(*o*) 12 Dalt. c. 2. s. 4. According to Lord C. J. Holt, in the case of the College of Physicians, 1 Salk. 200, wherever there is a jurisdiction erected with power to fine and imprison, that is a court of record, and what is there done is matter of record: and so is 8 Co. 60, 38. Lord C. J. De Grey, however, 2 Bl. Rep. 1146, observes, that this position cannot be generally and universally true. However, the reasons assigned by Dalton, c. 2. s. 4, for considering the acts of justices of peace on penal statutes as matters of record seem to justify the describing them as such. See *post*, part ii. c. 1. s. 1.

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all convictions; but more particularly in those cases where any part of the penalty goes to the crown, in order that such fines may be estreated into the Exchequer (*p*).

The summary jurisdiction of justices, though their proceedings be matter of record, is not however comprehended under the general denomination of the *King's courts;* and therefore it has been resolved, that the provisions of acts of parliament, which speak of proceedings by bill, plaint, or information, in any of his Majesty's courts, do not extend to proceedings of a summary nature before justices of peace (*q*).

Copy of conviction, defendant's right to.

The defendant seems also entitled to have a copy of the conviction, if it be necessary to his defence against an action for the same offence. And where a magistrate refused to grant a copy which was required for that purpose, he was compelled to pay his own costs of returning the conviction into the King's Bench, on a *certiorari* which the defendant was under the necessity of suing out as the only means of procuring a copy (*r*).

Practice as to drawing up conviction.

In point of fact however, the constant practice is, for the justices, at the time of their judgment, merely to take minutes of the charge, examination, and other proceedings, without attention to precise form, to serve as *memoranda* for drawing up a more formal statement, if it should be required to file the conviction at the sessions, or to return it to a writ of *certiorari*. Nor is there, provided the statement be warranted by the facts, any legal objection to this method; which the court of King's Bench has been in the habit of recognizing (*s*). Indeed it is allowed, that the formal conviction may be drawn up at any time, before the return to the *certiorari* or

(*p*) R. *v.* Eaton, 2 T. R. 285. R. *v.* Back, 1 Str. 127, held, that there must be a formal conviction upon the statute of Hawkers and Pedlars (8 and 9 Will. 3. c. 25,) though the statute mentions nothing of it.

(*q*) R. *v.* Steventon, 2 East. 374.

(*r*) 3 Burr. 1721.

(*s*) *Per* Lord Kenyon, 1 East. 188, 189. 10 Mod. 382.

sessions,

sessions, though after a commitment (*t*), or after the penalty has been levied by distress (*u*).

The conviction returned to the sessions, or to the court of King's Bench, is the only one of which those courts respectively can take notice; even after the magistrate has delivered to the defendant a copy of a conviction, as that upon which the subsequent proceedings have been founded, he is not thereby precluded from drawing up and returning a conviction in a formal shape, which is to be taken as the only authentic record of the proceedings.

Copy delivered not binding.

Thus, after a distress and a warrant of commitment issued, the party having applied for a copy of the proceedings, a copy of the original minutes was furnished to him by the justices clerk: and the justice afterwards drew up and returned to a *certiorari* another and more formal conviction, dated as of the day when the original proceedings were had. The latter conviction was warranted by the facts, but was more regular, and in that respect differed from the copy furnished to the defendant, which was in some respects informal. A criminal information was moved for against the justice, on the ground, that though magistrates ought to be indulged with a reasonable time for drawing up their convictions, yet, when issued by their authority to the parties, and acted upon by levying execution, they ought not to be altered; and it was urged that the parties, by such alteration being permitted, were liable to be drawn into unnecessary expence; as in that very instance, the defendant having received from the magistrate a copy of a conviction which was clearly bad, had been induced to apply for a *certiorari* to relieve himself from it. The court however not only refused to grant an information, but said, that if the magistrate had done no more than return the conviction in a more formal shape, instead of sending it up in the informal, one in

(*t*) Massey v. Johnson, 12 East. 83. (*u*) R. v. Barker, 1 East. 82.

which

which it was first drawn, and supposing the facts warranted the return actually made, it was not only legal, but laudable in him to do as he had done; and he would have done wrong if he had acted otherwise (*v*). And in answer to the argument of the defendant being drawn into the expence of litigating the conviction, the court observed, that a mere informalty in the manner of drawing up the conviction ought not to be the inducement for removing it into the King's Bench, but some substantial defect in the justice and legality of the proceeding before the magistrate.

Thus also in one case, where the copy delivered to the defendant contained a mistake in the name of the informer (*w*); and in another, where the warrant of commitment mis-stated the name of the person on whose oath the conviction was founded, it was held, that these errors might and ought to be corrected in the conviction formally returned: and the court will not allow the defendant to avail himself of the variance as any ground of objection (*x*).

In all these cases however, it is understood, that the corrected statement must be conformable to the truth of the facts as they really took place. And as the court gives credit to the magistrate for the truth of the facts recorded in the conviction, it will hold them punishable for making a false statement (*y*).

(*v*) R. *v.* Barker, 1 East. 188.
(*w*) R. *v.* Allen, 15 East. 333.
(*x*) 12 East. 67, *post*, Appeal.
(*y*) 15 East. 346, and by Lord C. J. Parker. R. *v.* Simpson, 10 Mod. 382, "as we ought to credit the justices in the execution of that power the law has entrusted them with, if the justices should make a false return, whereby the party as well as justice is abused, they may be punished."

PART

PART II.

CHAPTER I.

Of the general Form, and requisite Qualities of a Conviction.

WE proceed in the next place to explain the form and requisites of the conviction itself; which has been already described as a record containing a memorial of all the proceedings that have taken place up to and including the judgment or sentence *(a)*. It must therefore regularly be certified under the hand and seal of the convicting magistrate; for that is the only regular mode of authenticating it as his record *(b)*.

The particular rules applicable to the distinct parts of a conviction will be more fully explained under their

(a) 1 Salk. 377. That penal convictions have always been considered as records appears as well from their being always so styled in writs of *certiorari*, as from the uniform, and as it should seem indispensable, practice, before the act of 4 Geo. 2. c. 26, which required them when filed to be in Latin; as all records then necessarily were by the statute of Edward 3. In the case of R. v. Cheveney (an. 11 Geo. 1.) 2 Lord Raymond, 1368, a conviction for swearing was quashed because it was in English. Lord Holt indeed, in another case (R. v. Lomas, Comb. 289. Skin. 562.) said, that he saw no necessity why a conviction for keeping a private still should be in Latin any more than an order of bastardy. The practice however was taken for granted in the case of R. v. Lloyd, 2 Str. 999, and referred to as a criterion to distinguish orders from convictions. It is further confirmed by 6 Geo. 1. c. 21. s. 3, and by the form used in writs of *certiorari* applicable to such proceedings, by which they are styled "records."

(b) 1 Burn's Justice, 576, last ed. Bosc. 11.

proper

proper heads; but it may be expedient to notice in this place certain rules relating generally to its form and qualities.

1. A conviction ought to be in words and figures at length *(c)*.

2. In analogy to common law proceedings of record, in which each step in the cause is supposed to be entered upon the record at the time it takes place, it was formerly held, with great strictness, that a conviction must regularly state all the judicial proceedings before the magistrate in the *present* tense; and many convictions have been quashed for not conforming to that rule *(d)*. But modern decisions have relaxed this rule, and it is now admitted, that those judicial acts which took place prior to the date of the judgment, and conviction, may and ought to be stated as of the time *past*. Thus a conviction stated, "that on the *second* day of March, R. B. (the informer) *came*, &c. and now on this *sixth* day of March *came* the said S. H. (the defendant), &c. and the said S. H. now here being required to answer, &c. *confesseth* the offence:" dated the 6th day of March. The objection, that the information and appearance should have been in the present tense, was overruled *(e)*. May be in the *past* tense.

The judgment itself, however, is properly to be recorded in the present; agreeably to what is laid down by Lord C. J. Hale, as a rule in stating the proceedings of all inferior courts, viz. that the acts of the court (by which is probably understood the judgment) ought to be in the present tense, but the acts of the parties may be in the past, as *venit et protulit hîc in curiâ quandam querelam suam (f)*. Judgment in present tense.

(c) 2 H. H. 170.
(d) In R. v. Roberts, 2 Lord Raymond, 1376. 1 Str. 638, *præstitit sacramentum*, instead of *præstat*, was held bad. So in R. v. Landem, 1 Str. 443, a conviction for a forcible entry on view was quashed, because it set forth the view in the past tense, *accessimus et vidimus*.
(e) R. v. Hall, 1 T. R. 320.
(f) Hall v. Clarke, 1 Mod. 81.

The

General qualities.

The general qualities of a conviction in substance are, first, that it be full and correct; and, secondly, as the whole jurisdiction in summary proceedings is founded upon and solely derived from special acts of parliament, it is fundamentally required, in a conviction for any offence, that the directions of the particular statutes relative of that offence should appear upon the face of it to have been substantially complied with; both as to what regards the subject matter of the offence being clearly brought within the meaning of the acts, and also the method of proceeding and final judgment *(g)*. And if the charge falls short of the necessary legal decription of the offence, the omission is not cured by any allegations of its being done *unlawfully*, or *fraudulently*, or the like; or by stating that it was *against the form of the statute (h)*: for the last allegation is no more than a legal inference which must be supported by the premises *(i)*.

Certainty.

Another indispensable property of a conviction is *certainty*. But as there will be occasion to illustrate this more particularly afterwards, it may suffice at present to observe, that the same rule holds true with equal strictness in convictions, as in indictments, viz. that the charge should be positive and certain, in order that the defendant may both be apprized how to direct his defence, and protected from a second accusation for the same fact *(k)*: and in order also that the evidence may be seen to support the charge, and the judgment may appear appropriate to the offence *(l)*. An offence therefore cannot be charged *disjunctively*, or in the alternative in a conviction, though it may be so in an order *(m)*.

(*g*) Jones, 139. 170. Cole's case, Jenkins, 174. Sho. 48. R. *v.* Llewellyn, Comb. 439, *post*.

(*h*) R. *v.* Jukes, 8 T. R. 536. R. *v.* Jarvis, 1 Burr. 148.

(*i*) Dy. 363. 1 Str. 493.

(*k*) 2 Str. 900.

(*l*) *Vide* Hawk. P. C. B. ii. c. 25. s. 59.

(*m*) R. *v.* Middlehurst, 1 Burr. 399. 1 Salk. 372. 2 Hawk. c. 25. s. 59.

Though

Though in general it may be sufficient to state the fact in the words of the act of parliament *(n)*; yet it is not always safe merely to convey the description of the offence in those words. For where the statute describes an offence in such general terms as will embrace a variety of circumstances, a general description, though pursuant to the words of the act, is insufficient *(o)*; unless the circumstances be set out with time, place, number, &c. Also if the offence be such only *sub modo*, the offender must appear to be within the penal conditions specified; and consequently all those modifying or exempting circumstances which are enacted in the same clause with the offence itself, and the absence of which is a constituent part of the crime, must be expressly noticed *(p)*. Indeed, in the opinion of Mr. Serjeant Hawkins, that rule should extend even to the provisoes introduced by distinct clauses *(q)*: but the more numerous authorities only carry it to those which exist in the enacting clause. Pursuing the words of the statute.

Another maxim is, that all the facts necessary to support the proceeding be expressly alledged, and not left to be gathered by inference or intendment. For example, in a conviction for having concealed brewing vessels, the deposition, which appeared to be taken on a day subsequent to the information, only made the witness state, that the defendant *now has* two concealed vessels, &c.; and the conviction was quashed, because it should have appeared that he had them at the time of the information; for, though the words might be made to imply as much, yet Lord C. J. Holt said, a conviction must be certain, and not taken by collection *(r)*. Intendment.

But though equal certainty, and in some cases even more particularity, be required in convictions than in indict- Technical words unnecessary.

(n) R. v. Speed, 1 Lord Raymond, 583, *per* Holt, C. J.
(o) R. v. Jarvis, 1 Burr. 152. 1 Str. 494, 495. 2 Hawk. c. 25. s. 11.
(p) 1 Lord Raymond, 120. Str. 1101. 1 T. R. 144.
(q) 2 Hawk. c. 25. s. 113.
(r) 1 Lord Raymond, 509.

ments,

ments, with regard to the statement of the facts which constitute the offence; yet the same legal nicety and formality of expression which is indispensible in indictments, is not necessary in summary proceedings. Lord C. J. Holt, though he seems to have leaned towards a strict examination of summary proceedings, says, that "in convictions by justices of peace in a summary way, where the ancient course by indictment, &c. is dispensed with, the court may more easily dispense with *forms;* and it is sufficient for justices in the description of the offence to pursue the words of the statute, and they are not confined to the legal forms requisite in indictments for offences by common law: all that is necessary is to shew such a fact as is within the description of the statute, and to describe it as the statute wills *(s)*." It is evident, however, from the context, that this language refers only to those *technical* phrases or forms of pleading to which indictments are tied down. And this appears to be Mr. J. Buller's view of it, when he says, that "the court, in considering convictions, is always strict in two or three points; first, that a jurisdiction is shewn by the person convicting; secondly, that the party has been summoned; thirdly, that the case is duly made out in evidence: but the court has not been strict in the technical words of them, and I know of no case," he observes, "which says that summary convictions shall be drawn in any precise form *(t)*."

Contra pacem.

Therefore the fact need not be charged with the words *against the peace* of the King *(u)*. This indeed seems to be unnecessary, for the reason suggested by the Attorney-General (Sir E. Northey) *(v)*, viz. that these prosecutions are not by the King, and he can have no fine upon them for the breach of his peace.

(s) 1 Lord Raymond, 581. 583. 1 Salk. 378.
(t) R. v. Green, Cald. 391.
(u) R. v. Chandler, 1 Lord Raymond, 581.
(v) 1 Salk. 378.

Neither

Neither is the omission of the word *unlawfully* any objection *(w)*, unless it be distinctly used in the act as part of the description of the offence *(x)*.

Statutory forms.

In order to simplify the task of drawing up convictions, many of the modern penal acts provide certain compendious forms, which, though given as models, are for the most part directory only, and intended to assist the magistrate's duty, being usually some such words as, "that the justice be authorized or empowered to draw up the conviction *in the form or to the effect* following, that is to say, &c." In some cases, however, the form is peremptorily prescribed, and must be exactly followed.

In the use of these forms it will be expedient to attend to the following points, which will be more fully illustrated in the sequel: first, that where a blank is left for inserting the offence, the same accuracy is required in the description of it as in other cases *(y)*: secondly, that although, as is often the case, the act directs "that no conviction under that act shall be set aside for want of form, or through the mistake of any fact, circumstance, or other matter, provided the material facts alledged be proved," yet notwithstanding these or the like words, every material fact must be alledged, and the omission, if any, is not aided by reference to such clause *(z)*. It deserves to be remarked that Lord Kenyon, in allusion to a provision in the terms just mentioned, says, "with regard to the section in the act, that no conviction shall be quashed for want of form, I confess I am not able to understand it as applied to proceedings removed into this court. It enacts that no conviction on this act (36 Geo. 3. c. 60. s. 11.) shall be set aside by any court for want of form, or through the mistake of any fact, circumstance, or other matter whatsoever, provided the material facts alledged in such conviction,

Provision for want of form.

(w) R. v. Chipp, Str. 711.
(x) R. v. Speed, 1 Lord Raymond, 583.
(y) R. v. Hayell, 13 East. 139.
(z) R. v. Jukes, 8 T. R. 536.

and

and upon which the same shall be grounded, be proved to the satisfaction of the court. I can understand it as far as it respects the proceedings before the sessions by way of appeal. On an appeal the whole case is gone into, evidence is to be given to support the conviction, and then it may be known whether or no the material facts alledged in such conviction, and upon which the same shall be grounded, be proved to the *satisfaction of the court*. But when the conviction is removed here by *certiorari*, I do not understand how we can inquire into those facts *(a)*." 3dly, If any particular form be prescribed as indispensibly necessary, that must be strictly complied with *(b)*; but if the act only declares that the magistrate may draw up the conviction *in the form or to the effect* there exemplified, then, provided the conviction contains every thing required by the form given, it will not be vitiated by unnecessarily stating more than is required. Thus, on 31 Geo. 3. c. 21, which, by sect. 4, directs the conviction to be drawn up according to a form there specified, *or to the effect thereof*, the magistrate having, besides all the requisite particulars, unnecessarily inserted what was not required by the specified form, viz. the information, summons, appearance, and names of the witnesses, but not the evidence; it was objected, that the conviction was neither good at common law for want of setting out the evidence, nor by the statute, as it did not strictly follow the form there directed, but the objection was over-ruled, because it was held, that as the conviction contained all that the form required, it was not invalidated by stating what was unnecessary *(c)*.

Superfluous facts.

This last observation leads us to take notice of a general maxim applicable to convictions in common with all other legal forms, viz. that any defect in the manner of stating that which is in itself surplusage, and might be omitted al-

Surplusage in general.

(a) 8 T. R. 540.
(b) R. v. Jefferies, 4 T. R. 769, 768. *per* Lord Kenyon.
(c) R. v. Jefferies, 4 T. R.

together,

together, does not vitiate the rest which is sound. An example of this maxim is found in the case last cited, and is confirmed by what was ruled in the case of a conviction on the Conventicle Act, 22 Car. 2. c. 1, in which some of the exceptions introduced by a later act, and not necessary to have been noticed at all, were defectively negatived, notwithstanding which the conviction was held to be good, the unnecessary reference to those exceptions being rejected altogether as surplusage *(d)*. Thus also, where a conviction and penalty was stated to be for breaking and entering a park, and chasing a deer, founded upon a statute which mentions only chasing deer, without any reference to the offence of breaking and entering the park, it was adjudged that the conviction was good for that offence which was contained in the act, though it also embraced another fact which was not punishable *(e)*.

Impossible date.

Under this article may also be noticed, that an impossible or incongruous date, if the conviction be complete without it, may be rejected as surplusage and will not hurt *(f)*.

Lastly, It is a general rule, that a conviction being an entire judgment must be good throughout. For if any material part be faulty, it vitiates the whole *(g)*.

Section 2. On the Construction of Convictions.

It may be proper in this place to offer a few remarks on the principles adopted by the courts in the construction of penal convictions, more especially as expressions are occasionally found in the cases which have come under their

(*d*) R. v. Hall, 1. T. R. 320.
(*e*) R. v. Drake, 2 Sh. 489.
(*f*) R. v. Picton, 2 East. 196.
(*g*) R. v. Catherall, 2 Str. 900. 1 T. R. 2491. By consent, however, it seems, that a conviction may be set aside as to part of the judgment, Cowp. 728.

adjudication, tending to a notion of greater strictness being exercised in the examination of these than of any other criminal proceedings; and calculated to represent the summary jurisdiction from which they originate as deserving the peculiar vigilance and jealousy of the superior courts. It is an unquestionable principle of the common law in the construction of penal statutes, however executed, that they shall be taken favourably for them upon whom the penalty is inflicted *(h)*: and the judges at different periods may seem to have thought the application of this maxim more particularly requisite in proceedings of a summary kind. Lord C. J. Holt is represented upon one occasion as expressing himself thus in the case of a conviction on a penal statute, "Every body," says he, "knows that this being a penal law ought by equity and reason to be construed according to the letter, and no further. That it is penal is plain from the penalty, and what is highly so, the defendant is put to a summary trial different from *magna charta*, for it is a fundamental privilege of an Englishman to be tried by a jury. Then, where a penalty is inflicted, and a different manner of trial from *magna charta* instituted, and the party offending, instead of being tried by his neighbours in a court of justice, shall be convicted by a single justice in a private chamber upon testimony of one witness, I fain would know if on the consideration of such a law we ought not to adhere to the letter without carrying the words farther than the natural sense *(i)*." Similar observations upon the nature of summary proceedings, as taking away the right of being tried *per pares*, are found in the mouth of the same judge on another occasion *(k)*. These sentiments agree with the opinion occasionally delivered from the bench, intimating, that the court ought to hold a tight hand over these convictions *(l)*. Mr. Serjeant

(*h*) Plow. 17. *Id.* 206.
(*i*) R. *v.* Whistler, Holt, 215.
(*k*) R. *v.* Chandler, 2 Salk. 378. R. *v.* Peckham, Comb. 439.
(*l*) R. *v.* Corden, 4 Burr. 2281, *per curiam.*

Hawkins

Hawkins likewise assigns as a reason for requiring greater certainty in them than in indictments, that the defendant has no opportunity of pleading to these summary forms(*m*). This reason is adopted by Lord Kenyon(*n*); and by Lord Mansfield(*o*), who says, "convictions must be taken strictly, and it is reasonable they should be so, because they must be taken to be true against the defendant, and therefore ought to be construed with strictness." It is also affirmed by Mr. J. Ashhurst(*p*), "that the construction ought to be more strict upon convictions than upon indictments, and the reason is, because the jurisdiction is summary."

On the other hand, however, there are not wanting examples of a less rigid construction, supported by opinions which almost intimate a disapprobation of that strictness inculcated in those we have already noticed. Among these may be remarked what is said on another occasion by the same learned judge whose opinion has just been quoted, Mr. J. Ashhurst. "As to the principle drawn from the old cases, that the court will be *astute* in discovering defects in convictions before summary jurisdictions, there seems to be no reason for it. Whether it was expedient that these jurisdictions should have been erected, was a matter for the consideration of the legislature, but as long as they exist, we ought to go all reasonable lengths to support the determinations. Therefore, in whatever light they may have formerly been viewed, the country is now convinced that it derives considerable advantage from the exercise of the powers delegated to justices of peace; and in modern times they have received every support from courts of law(*q*)." Many examples likewise occur in the following pages, of favourable intendments made in support of convictions, which afford proofs that the rigid

(*m*) 2 Hawk. c. 25. s. 13.
(*n*) R. *v.* Jukes, 8 T. R. 544.
(*o*) R. *v.* Little, 1 Burr. 613.
(*p*) R. *v.* Green, Cald. 391.
(*q*) 2 T. R. 18.

maxims expressed on other occasions are not to be taken literally.

In order to reconcile opinions and cases which upon first view seem to be at variance with each other, a distinction has been suggested by a very judicious writer, which appears to be warranted by closer examination of the authorities. A conviction, it must be recollected, contains a memorial both of the charge and of the judicial steps taken by the convicting magistrate. The question of the magistrate's *authority*, as collected from the record, is distinct from that of the *regularity* of his proceedings: and though nothing can be intended to aid or extend an extraordinary and circumscribed jurisdiction, yet something may reasonably be presumed for the regularity of proceedings legally commenced. Therefore, says Mr. Boscawen, though the court will not admit a summary, and (if one may still use the expression) an unconstitutional jurisdiction, unless the case in which it is exercised be literally the same as described by the statute, yet the magistrate once appearing to be duly authorized, they will not presume against the regularity and justice of his proceedings, if he has stated them with but a reasonable degree of accuracy (*r*). Agreeably to this idea, the cases which carry the doctrine of strictness the farthest will be found to relate to points affecting the jurisdiction: such are the style and title of the magistrate (*s*); the date (*t*), and locality (*u*) of the fact alledged; and more especially the description of the offence (*v*), in the essential parts of which no omission or defect can be supplied by implication. On the other hand, those cases which allow of a favourable intendment are mostly such as regard only the form of proceeding. Lord Holt himself, though he describes this summary jurisdiction as newly set up and not known to the law before,

(*r*) Bosc. 10.
(*s*) Str. 261.
(*t*) 1 Lord Raymond, 509, 510.
(*u*) 13 East. 141.
(*v*) 1 Burr. 613. 4 Burr. 2282. 1 T. R. 24. 1 East. 649, &c.

and

and gives that as a reason why the statute in each case must appear to be strictly pursued, allows "that the magistrates need not set forth every step of their proceedings, but so much that it may appear to be done *debito modo* in point of time, &c. (*w*)." And to the same purport is the declaration of the court in one case (*x*), "that where the legislature has given a power, the court will presume the justices to have followed that power." This consideration will serve to explain many of those instances that will be subsequently noticed, where the courts have apparently allowed considerable latitude of presumption to support convictions (*y*).

It is however to be remarked, as a proper caution in drawing any general conclusion from opinions or *dicta* which seem to admit of licence in the wording of convictions, that those expressions, when examined with the context, will be found to apply, not to the substance or contents of the conviction, but only to the use of certain technical forms which may be dispensed with consistently with the utmost precision in the statement of facts (*z*).

The safest rule perhaps that can be laid down upon this subject, is in the words of Lord Ellenborough, "that the court can intend nothing in favour of convictions, and will intend nothing against them (*a*)."

We shall conclude this discussion with one further observation, which is, that the court will not presume injustice or partiality in magistrates (*b*): but gives them credit for the truth of the facts stated, subject to the peril attending the wilful abuse of that credit by a false statement (*c*).

(*w*) R. *v.* Peckham, Comb. 439.
(*x*) 1 Str. 46.
(*y*) 2 Lord Raymond, 1375. 2 Str. 1240. 2 T. R. 23. 3 Burr. 1786.
(*z*) *Ante*, p. 46.
(*a*) R. *v.* Hazell, 13 East. 141.
(*b*) Skin. 123.
(*c*) 10 Mod. 382.

PART

PART II.

CHAPTER II.

Of the several Parts of a Conviction.

A REGULAR conviction, except where a statutory form is provided, consists of the following parts. I. The information. II. The summons and appearance, or default of the defendant; with his confession or denial, and defence. III. The evidence. IV. The adjudication, comprizing the judgment of forfeiture or corporal punishment, and the disposition of the penalty if pecuniary. The examination of these several parts, which forms the subject of the present chapter, will be assisted by the following general form, viz.

Information.

——— to wit, Be it remembered, that on the ——— day of ———, in the ——— year of the reign of ———, by the grace of God of the united kingdom of Great Britain and Ireland, King, defender of the faith, at ———, in the county of ———, one A. B. of ———, gentleman, cometh [*if on a day prior to the date of the conviction,* came] before me I. S. Esq. one of the justices of our said lord the king, assigned to keep the peace of our said lord the king, in and for the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, [*and where the statute so requires,* residing nearest to the place where the offence hereinafter mentioned was committed] and [by his complaint in writing, *or* upon oath, *as the statute may require*] giveth [or gave] me the said justice to understand and be informed, that one C. D. late of ———,

in

in the said county, yeoman, on the ——— day of ——— now last past, at ———, in the said county, did [here set forth the fact] against the form of the statute in such case made and provided [*or, if it be a private or local act,* against the form of a certain act of parliament made and passed on ———, in the ——— year of the reign of our said lord the king] and afterwards, upon the ——— day of ———, in the year aforesaid, at ——— aforesaid, in the county aforesaid, he the said C. D. having been duly summoned before me, in order to make his defence against the charge contained in the said information, appeareth and is present [*or, if on a day prior to that of the conviction,* appeared and was present] for that purpose, and having heard and fully understood the said charge contained in the said information, he the said C. D. is now here [*or was there*] asked by me the said justice, if he can [*or could*] say any thing for himself why he the said C. D. should not be convicted of the premises above charged upon him in form aforesaid, who pleadeth [*or* pleaded] that he is [*or* was] not guilty of the said offence so charged upon him. Nevertheless, on the ——— day of ——— aforesaid, in the year aforesaid, at ——— aforesaid, one credible witness [*if one only is required, or more, as the case may be*] to wit, E. F. of ———, yeoman, cometh [*or* came] before me the said justice, and before me, upon his oath, on the holy gospels of God, to him then and there, and in the presence of the said E. F. duly administered, deposeth, sweareth, and in the presence of the said C. D. upon his oath aforesaid affirmeth and saith, that the said C. D. on the ——— day of ——— aforesaid, in the year aforesaid, at ——— aforesaid, in the county aforesaid, [here set out fully and particularly the evidence of the fact] and the said C. D. doth not produce or prove to me the said justice any sufficient evidence to answer or contradict the

Appearance.

Plea.

Evidence.

the said charge, and the said evidence so given as aforesaid, and thereupon all and singular the premises being duly considered by me the said justice, it manifestly appears to me, that the said C. D. is guilty of the premises above in the said information laid to his charge, in manner and form aforesaid, whereupon he the said C. D. now on this ——— day of ———, in the year aforesaid, by and before me the said justice, by the oath of one credible witness aforesaid, according to the form of the statute aforesaid, is convicted,

Judgment.

and I do hereby adjudge that the said C. D. for his offence aforesaid, hath forfeited, and do pay the sum of £———, to be distributed as follows, that is to say, [pursue the distribution directed by the statute]. In witness whereof I the said justice have hereunto set my hand and seal, at ——— aforesaid, in the county aforesaid, the day and year above written.

If the defendant confesses, then after the appearance, say, and because the said C. D. hath nothing to say, nor can say any thing in his own defence, touching and concerning the premises aforesaid, but doth of his own accord, freely and voluntarily confess and acknowledge all and singular the said premises to be true, in manner and form as the same are charged upon him in the said information, and thereupon the said C. D. now on this ——— day of ———, at ——— aforesaid, by me the said justice, upon his own confession aforesaid, is convicted of the said offence in the said information charged, &c. [*as before*].

If the party has been summoned and has not appeared, and afterwards, on the ——— day of ———, in the year aforesaid, at ——— aforesaid, at which day and place the said C. D. was duly summoned to appear before me the said justice, to answer and make defence to the said charge in the said information, the said C. D. doth not appear, but makes default, whereupon one ———, a credible witness, upon his corporal

ral oath, to him in that behalf, administered by me the said justice, having deposed and sworn, that he did on the ——— day of ———, at ———, in the county aforesaid, personally serve the said C. D. with the summons aforesaid, [*or* serve the said C. D. with the summons aforesaid, by leaving the same at the dwelling-house of the said C. D. with a servant of the said C. D.] I the said justice do [or *did*] proceed to examine into the truth of the said complaint so charged as aforesaid, and E. F. of ———, one credible witness in that behalf thereupon, then and there cometh before me the said justice, and before me upon his oath, &c. (as above).

If the punishment be corporeal only, then in the judgment after the words, " is convicted, *say,* and I do hereby adjudge, that the said C. D. for his offence aforesaid, be committed to the common gaol of the said county of ———, at ———, [*or* to the house of correction of the said county of ———, at ———,] for the space of ———, there to be kept to hard labour for the said space of time, [if any further punishment, by whipping, that must also be adjudged.] In witness, &c. [as above.]

The mention of the county in the margin only denotes in what county the conviction was made, but does not of itself indicate where the offence was committed, so as to supply the want of that allegation in the body of the conviction *(d)*.

Section 2. Of the Information.

I. The information or complaint is the foundation of all the subsequent proceedings *(e)*; and must distinctly

(*d*) R. *v.* Austin, 8 Mod. 309. (*e*) *Ante*, p. 14.

set

set forth, 1st. The day and year on which, 2dly. the place where, 3dly. the name and style of the justice or justices before whom it is exhibited; and lastly, the *charge.*

Date of exhibiting.

1st. The day and year of exhibiting the information must be specified, as well that it may appear to be subsequent to the offence, and prior to all the other proceedings *(f)*, as in order to ascertain that the prosecution is within the time limited by statute *(g)*. And as some statutes appoint an interval which must elapse, *before* any prosecution *(h)*, the time in such cases is material to shew that the prosecution is not premature.

Place.

The mention of the place where the information is stated to be received is necessary, in order to shew that the magistrate, at the time, was acting within his jurisdiction *(i)*.

Name and style of justice.

2d. The name and style of the magistrate before whom the complaint is lodged must next be set forth, from which it must appear that he is a magistrate of the county where the offence is afterwards stated to have happened, in order that his jurisdiction may be shewn on the face of the proceedings *(k)*. It is not sufficient therefore to describe him as a justice *in* the county, without saying *of* and *for* the county *(l)*. It is however no objection, that he is described as *being* a justice, &c. without the word *there* being, &c. for that is implied *(m)*.

So much nicety has been thought necessary in the description of the justice's title and office, that a conviction was quashed, because the information was said to be before two justices of our lord the king, to keep his peace in the county of, &c. but omitting the word *assigned (n)*. It may be questionable however, whether the omission would now be deemed a fatal objection; and it is said to have been since over-ruled *(o)*. Where the

(*f*) 2 Lord Raymond, 1546.
(*g*) *Ante*, p. 12.
(*h*) As 19 Geo. 3. c. 50. s. 2.
(*i*) Bosc. 24.
(*k*) R. *v.* Johnson, 1 Str. 261.
(*l*) R. *v.* Dobbyn, 2 Salk. 473.
(*m*) R. *v.* Chipp, 1 Str. 711.
(*n*) Sanders's case, 1 Saund. 263.
(*o*) 2 Barnard. 383.

statute

statute gives cognizance of the offence to the *next* justice of the county, the convicting magistrate should be so described, for no other but the next has any jurisdiction *(p)*. But if the act only mention justices *in or near* the place, it is but directory, and they need not be so described in the conviction *(q)*: nor, if the statute speaks of justices *acting for the division*, need they be so alledged, for any justice of the county comes within that condition *(r)*.

Formerly, if one of the convicting justices, as was usual, was required by the statute to be of the *quorum*, a conviction could not be good without it was so expressed in the style of the justices, but that objection is now removed by the statute 26 Geo. 2. c. 27, which enacts, that no order or adjudication of justices shall be set aside for that defect.

3. The name of the informer should also regularly be stated in all cases. But it is indispensable in those cases where any part of the penalty is given by the statute to the informer; in order that the conviction may appear to be founded upon other evidence than that of the informer himself, who, as we have before noticed, is in such cases incompetent to give evidence *(s)*. And in cases where the penalty is given to the owner of property injured, by way of compensation, as his dissent, it has been held *(t)*, ought to appear by some means on the face of the conviction, it is advisable in cases of that description, to mention the name of the owner, as joining in the complaint by himself, or by some one on his behalf *(u)*. Informer's name, &c.

Though in *actions* on penal statutes, which give part of the penalty only to the informer, he must be alledged to

(p) Sanders's case, 1 Saund. 263. Dalton, c. 6.

(q) 2 Keb. 559.

(r) R. *v.* Price, Cald. 305. 3 Bac. Ab. 798. tit. Justices of Peace.

(s) 2 Ld. Raymond, 1545; *ante*, p. 26. Where no part of the penalty goes to the informer, there seems no decisive reason or authority, unless usage and precedent may be deemed such, for requiring the name of the informer to be mentioned.

(t) R. *v.* Corden, 2 Burr. 2279; *ante*, p. 15.

(u) *Id. ib.*

sue

sue *as well* for himself, as for the other parties, that allegation is held to be unnecessary in a conviction (*v*).

Where the statute directs the complaint to be upon *oath*, it should be so stated (*w*). Some acts also require the complaint to be in *writing*; and where that is the case, it must be so expressed.

Charge, offender's name.

4. The information then proceeds to state the charge: beginning with the *name* of the offender. If there be several offenders, each must be named. The court refused to entertain a conviction in which the persons charged were described as *Messrs. Harrison and Company;* and treated it as a nullity, even against the party named. For though neither the defendant Harrison nor the others did object to the conviction on that ground, Lord Kenyon said, that the court were 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 (*x*).

It is no objection that the offender appears to be a *fême covert;* for a *fême covert*, it has been decided, may be convicted on a penal statute, without joining her husband. This was so decided in the case of a conviction on 9 Geo. 2, c. 23, for selling gin, to which exception was taken, that the defendant appeared to be a *fême covert*, and therefore could make no contract for the sale; or, that if she could be convicted of the offence, that the husband ought to have been joined for uniformity. But it was held that the conviction was right, for it was an offence which the woman might commit alone (*y*).

(*v*) R. *v.* Lovett, 7 T. R. 152.
(*w*) R. *v.* Willis, 19 Geo. 3. B. R. Bosc. 16.
(*x*) R. *v.* Harrison and Comp. 8 T. R. 508.
(*y*) R. *v.* Crofts, 2 Str. 1120; a married woman may be convicted of recusancy, Hob. 96. 11 Co. 61. Foster's case. See *post*, Distress.

5. The

5. The information should likewise specify the *time* and *place* of committing the fact complained of. The cases indeed which speak of the necessity of mentioning the time in the conviction do not insist upon it in terms applying particularly to the *information*, and it is by inference only that they are so construed. In one case (*z*) it is reported generally to have been agreed that the time of the conviction, and also of the offence, must appear; the reason of which, it is added by the reporter, seems to be, because it must be on a prosecution within a limited time after the offence committed. And in a subsequent case, for not accounting for sums received under a turnpike act, it is merely said, that the conviction was quashed, because no particular sums were mentioned, nor the *times* when the money was charged to be received, so as to enable the party to defend himself on a second charge (*a*). So that these cases, as they are reported, leave it doubtful whether it was there decided, that the mention of the time is necessary in the *information*, or only that it must appear upon the whole conviction, which it may do by being stated in the evidence only. There seems, however, good reason for ascertaining the date of the offence in the information, in order that the magistrate may appear to have proceeded upon a legal charge, which cannot be, unless it be brought within a certain time from the commitment of the offence, or, according to some statutes, till after a certain number of days have elapsed after the offence committed (*b*). Time of offence.

It is settled however, that in convictions the precise day need not be named either in the information or the evidence; but that it is sufficiently certain if the fact be alledged to have happened *between* such a day, and such a day; provided the first of the days specified be within the limited time. It may not be easy to assign a reason for the difference in this respect between convictions and indictments; Time, how charged.

(*z*) R. v. Pullen, 1 Salk. 369. (*b*) 14 East. 272.
(*a*) R. v. Catheral, 2 Str. 900.

in

in the latter of which such a mode of pleading is held to be insufficient *(c)*. The authorities however are explicit; and the point is noticed by Mr. Serjeant Hawkins, as solemnly decided in regard to convictions, though the contrary is stated by him to be the law in indictments *(d)*. The question first arose in a case which came before the court on the Deer Stealing act, 3 & 4 Will. 3. c. 10. That case is reported in several books *(e)*, none of which give the conviction itself, but only the resolution of the court, upon the several points excepted to. The report of *Salkeld*, with which the others agree without any material variation, is as follows:—It was agreed, that "*inter* such a day and such a day defendant killed three deer" is good, for if a day certain were alledged the informer is not tied up to that. Now in these cases he is confined to give evidence of a killing within these days, so that it is more certain and better for the defendant. Otherwise it is in informations at common law, because every distinct offence creates a new penalty, but 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.—It was further said by the court, and supported by reference to many precedents, that all the informations in the Exchequer are in this form. And as to the argument derived from the hardship of driving the defendant to give an account of every day during the time specified, it was answered, that the omission of the particular days is not any inconvenience, because if he can shew an authority for killing so many as are charged upon him in the same time, it will drive the prosecutor to prove more: and if he be charged at another time he may aver that those for which he has been convicted are the same *(f)*.

(*c*) 2 Hawk. c. 25. s. 82.
(*d*) *Id. ib.*
(*e*) R. v. Chandler, 11 Will. 3. 1 Salk. 378. 1 Ld. Raymond, 581. Carth. 502. 5 Mod. 446.
(*f*) 1 Lord Raymond, 582.

Again,

Again, the very same objection was discussed afterwards upon a conviction under the same act (*g*). The information, as appears by the record filed of Hilary term, 12 Ann. alledged that the defendant committed the fact *between the last day of July and the sixth day of August, and within twelve months before the information.*—The evidence was the same. The exception, as we learn from the report (*h*), was, that no certain time was laid for the commission of the crime. The authority of the last cited case, the *King* v. *Chandler*, was referred to, and considered as a conclusive answer to the objection: and what had been there insisted on, was repeated, that it was the constant course of informations in the Exchequer, to set forth the time in the same manner.

Notwithstanding, however, that these convictions were supported, it is more regular to fix the charge to a certain day, where it can be done.

With reference to the manner of stating it, it may be noted, that an information appearing to be exhibited on the 29th of May, 1805, charging the fact *within three months*, to wit, on the 12th of May *now last past*, it was held, that these words "now last past" might, by reason of the accompanying words, "within three months," refer to the day and not to the month, so as to obviate the objection of the information being out of time by supposing it to refer to May 1804 (*i*).

On the same ground, that the magistrate's jurisdiction is limited in local extent, as well as in time, the *place* where the offence was committed should be charged in the information, as well as proved by the evidence, in order that the complaint may appear to be one over which the magistrate's cognizance extends. The reports of cases applicable to this point are mostly defective in not setting out the convictions, and in not discriminating whether the Place.

(*g*) R. v. Simpson, 13 Ann. 10 Mod. 248.

(*h*) 10 Mod. 248.

(*i*) R. v. Crisp, 7 East. 389.

objections

objections pointed to the information, or the evidence; they only establish as a general position, 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. We shall refer the particular notice of those cases to the head of Evidence, where they must necessarily be brought under consideration *(k)*. But as 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 *(l)*, 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.

County. The mention of the county in the margin does not supply the want of an allegation, either expressly or by reference, of the fact being committed in the county; for the insertion of it in the margin, is only to shew in what county the conviction was made *(m)*. But where the place has once been mentioned, as at B. in the county of H. it is enough afterwards to say at *B. aforesaid,* without saying in the *county aforesaid,* for it will not be presumed to lie in two counties *(n)*.

The court will take notice of the known divisions of the kingdom. For which reason, where an act imposed a £100 penalty upon the offence, if committed within the Bills of Mortality, and £50 if without, it was held to be sufficient, in a conviction for the smaller sum, to alledge the fact at Reading, in the county of *Berks,* without averring it to be without the Bills of Mortality *(o)*. But it seemed to be the opinion of Mr. Justice Buller, that if the conviction had been for the higher penalty, it might have been necessary to expressly alledge the fact to have been committed within the Bills of Mortality.

(*k*) *Post. Evidence.*
(*l*) *Post. Description of Offence.*
(*m*) R. *v.* Austin, 8 Mod. 309.
(*n*) R. *v.* Burnaby, 2 Lord Raymond, 901, 902.
(*o*) R. *v.* Vasey, Bosc. 130. See Conv. App. Prec. tit. Auctioneer.

We

We are in the next place to explain the manner of describing the *body* or substance of the charge itself. The general qualities required in that description, have been already adverted to; but it will now be proper to enter into the illustration of those rules by more particular examples. Of describing the offence.

1. The information, it must be remembered, being the substratum of the magistrate's jurisdiction, and in the nature of an indictment, must contain a complete statement of the offence, with all its legal qualities; for the evidence subsequently stated, can only support the charge, but can by no means extend or supply what is wanting in it.

The following case relates to another kind of summary proceeding by justices, which however is so much in the nature of those convictions we are considering that the case affords a satisfactory illustration of the principle just mentioned. Charge not extended by evidence.

By 1 W. and M. sess. 1. c. 21. s. 4, if any clerk of the peace misdemean himself *in his office*, and thereupon a complaint and charge in writing of *such* misdemeanour be exhibited against him to the sessions, the sessions shall discharge him. An order was removed by *certiorari*, which had been made at the sessions in these terms; "Whereas, by complaint in writing exhibited to this court against R. B. clerk of the peace, the said R. B. was charged with divers misdemeanours in his office, viz. that he exacted of one A. the sum of 5*s.* for a *subpœna*, and did compel one B. to pay him 9*s.* more than his due fee; and it doth appear upon evidence that the said R. B. misdemeaned himself *in his office by extorting* of the said A. *by colour thereof*, 5*s.* more than was due, and of the said B. 9*s.* more than was due; this court doth discharge and remove him from the said office of clerk of the peace." By the opinion of seven of the judges, including Holt, C. J. and Powell, this order was quashed for the insufficiency of the charge; for they held, that what goes before the *videlicet* being only matter of recital, the charge begins at the

videlicet, and then it does not appear that these misdemeanours relate to his office. And they held also, that what followed upon the evidence before the justices did not help because it is no part of the charge *(p)*.

There is one case however in which two of the judges of the court of King's Bench seem to have been inclined to allow the charge and the evidence to be taken together, where the charge was upon oath, and the informer not interested in the penalty; deeming it sufficient that upon the whole conviction, a complete offence appeared to be established upon oath *(q)*. It is unnecessary to recite at length, or to comment upon this case, which, as well from the peculiarity of its circumstances as the want of any decision, can hardly be considered as establishing any point of general importance, or as overturning a principle founded upon more positive authorities.

Allegations necessary.

The most essential requisite in the description of the offence is, that it contain, in express terms, every ingredient which is required by the statute. And if one of those be the *knowledge* of the party, nothing short of a direct averment to that effect is sufficient.

Scienter.

Thus, in a conviction on 36 Geo. 3. c. 60. s. 2, which prohibits persons from putting the word *gilt* upon metal buttons, *knowing the same not to be gilt*; the information charged, that the defendant, on the day and place therein mentioned, did *unlawfully and fraudulently* put and place for sale a certain number of metal buttons having stamped thereon the word *gilt*, the said metal buttons not being *gilt*, &c. contrary to the statute. The conviction was quashed, on the ground that the defendant was not charged with having exposed to sale the buttons marked *gilt*,

(p) R. *v.* Baines, 2 Salk. 680. A very full report of this case, as argued before the twelve judges, is to be found in 2 Ld. Raymond, 1268. The above is taken from Salkeld, and though much shorter, appears by a comparison with the report in Ld. Raymond, to be a correct summary of the case.

(q) R. *v.* Green, Cald. 391.

knowing

knowing that they were not gilt. The court considered the fact of knowledge as an essential constituent of the offence, and not supplied by the words *unlawfully, fraudulently, and against the form of the statute,* which were not deemed equivalent to "knowingly." It seems indeed to have been the opinion of Mr. J. Lawrence, that if the words used had been so equivalent, the conviction might have been supported *(r)*.

Pursuing statute.

So, a conviction on 3 W. and M. c. 10. s. 2 for killing deer was quashed, for alledging the deer to be killed *in quodam loco* where they had been usually kept, without describing it as *inclosed,* pursuant to the terms of the statute *(s)*.

Thus also, convictions on the game laws for keeping and using *a dog* to destroy game *(t)*, or for using a *hound (u)*, have been set aside, for neither of these denominations are contained in the statutes. But *a dog called a grey-hound* is sufficient *(v)*.

No intendment admitted.

No intendment is admitted to help out a description defective by the want of an essential component.

In a conviction on the lottery act, 22 Geo. 3. c. 47, the information stated, that the defendant received of one S. T. the sum of 5*s*. on promise to pay £1 : 6*s* : 3*s*. on the event that *the ticket* No. 37,107 should be drawn fortunate on the 37th day of the drawing of the lottery authorized and established by an act of parliament made in the twenty-fifth year &c. entitled, &c. contrary to the form of the statute. The general act, 22 Geo. 3. c. 47, (under which the penalty is given by section 13, referring to

(r) R. v. Jukes, 8 T. R. 536.

(s) R. v. Moore, 2 Lord Raymond, 791. In the report of the case of R. v. Ford, 12 Mod. 453, an objection is said to have been made to a conviction for deer stealing that it was not alledged that deer had usually been kept in the place for ten years before, (see stat. 3 & 4 Will. & Mary, c. 10, since repealed) but that it was answered, if that be notoriously known it need not be averred. *Quære tamen.*

(t) Reason v. Lisle, Com. 567. Burn. tit. Game.

(u) Hooke v. Wilts, 2 Str. 1126.

(v) R. v. Hartley, Cald. 175.

section 2,) prohibits all adventuring with *lottery tickets in any lottery* which may at any time be authorized by act of parliament; and inasmuch as it was not expressly averred that the ticket upon which the insurance was made, was *a ticket in any lottery authorized by act of parliament,* (the only mention of such lottery being with reference to the time of drawing), the offence was held to be incompletely described and the conviction quashed *(w)*.

Offender brought within the description of the stat.

Upon the like principle it has been held, that to justify a conviction for offering goods to sale without a licence, the charge must bring the defendant within the description of persons requiring a licence, and that it is not enough to alledge that he sold *as* a hawker and pedlar.

Cases.

A conviction for this offence set forth "that one T. P. came before the justice, and gave him information that T. Little the defendant (at a place and time specified) was found offering to sale silk handkerchiefs, and trading as a hawker, pedlar, or petty chapman; and that the said T. Little did then and there offer to sell a parcel of silk handkerchiefs; and that the said T. Little did not, although required so to do, produce any licence as the law in that case made and provided directs to qualify him for his said trading." It afterwards stated, that the defendant, upon his appearance, was asked if he had any thing to say why he should not be convicted of the *said* offence so charged upon him in form aforesaid. Whereupon he *confessed* that he did offer to sale silk handkerchiefs to the said T. P. in such manner as is mentioned in the aforesaid information, and that he hath no licence for selling thereof. It then proceeded, "and the said T. Little is now here required to produce a licence granted to him to empower or qualify him to travel or trade pursuant to the statute; and he doth not produce any such licence, or any licence in that behalf, and doth not alledge any matter in his defence."—Whereupon it was stated, "that it manifestly appears to

(w) R. v. Trelawny, 1 T. R. 122.

the

the justice that the defendant is guilty of the offence in the information above laid to his charge in manner and form as by the same is above alledged." He was accordingly "convicted of the said *premises* in the said information specified, according to the form of the statute in such case made and provided."

The Act (9 and 10 Will. 3. c. 27), "requires a duty to be paid, and a licence taken out by every hawker, pedlar, petty chapman, or any other trading person *going from town to town, or to other men's houses, and travelling either on foot or with horse, carrying to sell or exposing to sale any goods*," &c.—The objection on behalf of the defendant was, that the charge did not bring him within the description of the Act, as going from town to town, &c. and travelling, &c. but only described him generally to be a person that traded *as* a hawker and pedlar and offered to sell a parcel of silk handkerchiefs to the informer.

The conviction was quashed, and Lord Mansfield said, "A single act of selling a parcel of silk handkerchiefs to a particular person is not a proof that he was *such* a hawker, pedlar, or petty chapman, as ought to take out a licence by the act. Now it is certainly of the essence of the crime of not producing a licence, that he be such a person as ought to take out a licence. It may not be necessary to define exactly what a hawker, pedlar, or petty chapman is, but it is necessary to alledge and shew, that he sold the goods, and traded as one (*x*)."—The defect, it was also agreed, was not

(*x*) R. v. Little, 1 Burr. 613. I have been favoured with an exact copy of the conviction in this case from the MSS. of a gentleman at the bar, which, as it is not set out at length in the report, and serves to illustrate more fully the effect of the decision, it may be useful to subjoin.

City and County of the City of Litchfield. } Be it remembered, &c. at &c. one T. Preston, gentleman, cometh in his proper person before me W. B. &c. and giveth me the said justice to understand, &c. that one Thomas Little, on the 24th day of October, A. D. 1757, in the parish, &c. was found offering

not helped by the confession, which went only to the offence charged.

The true objection to the conviction in the foregoing case, seems to be this. It is first stated(*y*) merely that the defendant was found trading as a hawker, pedlar, and petty chapman: but that is a conclusion of law, and, unless

offering to sale silk handkerchiefs, and trading as an hawker, pedlar, or petty chapman, and that the said T. Little did then and there offer to sell to him the said T. Preston, a parcel of silk handkerchiefs, and that the said T. Little did not, although required so to do, produce any licence, as the law in that case made and provided directs, to qualify him for his said trading; and the said T. Preston thereupon then and there prayed that the said T. Little might be convicted, &c. Whereupon the said T. Little being brought before me, and being then and there present, and having heard the said information read, and being charged therewith, he the said T. Little is then and there asked by me the said W. B. if he hath any thing to say why he the said T. Little should not be convicted of the said offence so charged upon him in form aforesaid, according to the form of the statute, &c. Whereupon he the said T. Little doth now here freely and voluntarily confess, before me the said W. B. that he did offer to sell silk handkerchiefs to the said T. Preston, in such manner as is mentioned in the said information, and that he hath no licence for selling thereof; and the said T. Little is now here required by me the said W. B. the justice aforesaid, to produce a licence granted to him to empower or qualify him to travel or trade, pursuant to the statute in that behalf made and provided; and he the said T. Little doth not produce before me any such licence, or any licence granted to him in that behalf; and the said T. Little doth not pretend or alledge, that he is real worker or maker of the said goods, or the child, apprentice, agent, or servant, of or to any such worker or maker, nor doth he alledge any other matter in his defence. Whereupon, &c. I do adjudge, that the said T. Little is an hawker within the true intent and meaning of the statute in such case made and provided, and it manifestly appeareth to me the said justice, that he the said T. Little is guilty of the said offence in the said information above laid to his charge, in manner and form as by the said information is above alledged. Therefore it is considered, &c. that the said T. Little be and is convicted of the said premises in the said information specified above laid to his charge, according to the form of the statute, &c.; and that he do forfeit for his said offence, the sum of, &c. to be levied and paid according to the form of the statute, &c. In witness whereof, &c.

From a note of the judgment, annexed to the above, it appears, that the court declared the going about from place to place to be of the essence of the offence, in order to make the defendant a person who ought to take out a licence; and the being described as a hawker and pedlar, without any allegation of the fact of his going from town to town, was a conclusion unsupported by the premises.

(*y*) See the conviction, *ante*, note (*x*).

the

the mode of his trading be shewn so as to bring him within that character, is too general, the act having described the person designated as travelling from town to town, and to other men's houses, &c.; then to shew what his dealing was, it is only stated, that he offered for sale a parcel of silk handkerchiefs to T. P., which might be in a totally different manner from that alluded to by the Act, for every sale does not make a man a hawker and pedlar. The objection therefore is not, as has been sometimes supposed, that *one act* of trading is *not* sufficient to constitute the offence specified; for, it is conceived, that several acts stated in the same way as this would not have amounted to the offence; but it is, that no overt act is laid of trading as a hawker and pedlar according to the intention and description of the Act.

That this was the foundation of the judgment may be collected from a comparison with the following Case on a Conviction for selling by auction without a licence; wherein it was held sufficient to alledge in the information, "that the defendant did, in the capacity of an auctioneer, put up to public sale *by way of auction*, and did vend by public sale by way of auction, divers goods &c. without first taking out a licence (*z*)." The words of the act 17 Geo. 3. c. 50, upon which the Conviction was founded, requires a licence to be taken out by every person "who shall exercise the calling or occupation of an auctioneer, *at any sale*, by out-cry, &c. or any other *mode of sale by auction*, or who shall act in such capacity." It was objected, that though the information charges the defendant with having sold goods in the capacity of an auctioneer, yet neither that nor the evidence alledge him to be one: and the case of The King *v.* Little was cited, in which, it was argued, the court held that a single act of trading did not prove a man to be such a hawker and

(*z*) See the conviction, Appendix, Precedents, tit. Auctioneer.

pedlar

pedlar as ought to take out a licence. But Lord Mansfield said, "this case is very different from that of a hawker and pedlar: going about and selling is necessary to make a man a hawker and pedlar; but here a single act was enough to bring a man within the statute:" and Mr. J. Buller said, "a sale by auction is a known and certain term; but the witness goes further, and states it in such a manner as clearly shews it to be within the act." The conviction was therefore confirmed *(a)*. In this case it will be observed, the information stated not merely an act of selling, as in R. *v.* Little, but of selling in the capacity of an auctioneer by public sale by way of auction, which fulfils the description requiring a licence; and therefore one act *thus described* was a sufficient overt act of trading as an auctioneer.

Description more particular than statute.

It is sometimes also necessary, in pursuance of the intent of a statute, to adopt a narrower description than what is conveyed in the literal terms of the act. This appears from the construction which has been put upon the game-act 5 Ann. c. 14. It has been held, that a conviction on that statute for *keeping* a gun alledged to be "an engine for destroying game" cannot be supported: for, though the words of the act prohibit the keeping or using "*any engine to kill and destroy game*," it is so construed as to confine the offence of *keeping* to those things which can only be used for the purposes prohibited by the act, whereas a gun may be kept without any unlawful design *(b)*.

So, in an action of debt on the game laws, an objection in arrest of judgment was taken to the declaration, because it stated only that the defendant used a gun, "being an engine to kill and destroy game," without averring that he used it for the destruction of the game. Though the

(*a*) Boscawen, 130.
(*b*) R. *v.* Gardner, 2 Str. 1098. Wingfield *v.* Stafford, 1 Wils. 315.
See also for the same point,

omission

omission in that case was held to be cured by the verdict, it was distinctly admitted that it would have been bad in a conviction; and the authority of the last-mentioned case was not attempted to be questioned *(c)*.

Thus also, on a conviction for keeping a hand-gun contrary to the 33d Hen. 8. c. 6. The conviction was for having a gun in his house: the words of the statute are, "use to keep in his house," and perhaps it might be lent him. The words of the statute ought to be pursued. Conviction quashed *(d)*.

But under the same statute of 5 Ann. c. 14, *keeping a lurcher* is sufficient in a conviction; for the statute expressly mentions *lurchers*, and the prohibition is to keep *or* use disjunctively *(e)*.

2. Another rule in describing the offence is, that it is not sufficient to state as the offence that which is only the legal result of certain facts; but the facts themselves must be specified, that the court may judge whether they amount in law to the offence. Charging what is matter of law.

A conviction for profane cursing and swearing set forth the charge, viz. that the defendant did profanely swear fifty-four oaths, and profanely curse one hundred and sixty curses, *contra formam statuti;* and the deposition of the witness was worded in the same manner. Besides, a valid objection in describing the quality of the offender, the court held the conviction bad by reason of the oaths and curses not being set forth. They said, "what is a profane oath or curse is a matter of law, and ought not to be left to the judgment of the witness. The witness here takes upon himself to swear the law, and it is a matter of great dispute among the learned what are oaths and what curses." They referred to the case of Colborne *v.* Stockdale *(f)*, as fresh in every one's memory, where it was held (on a plea Cases.

(*c*) Avery *v.* Hoole, Cowp. 825.
(*d*) R. *v.* Llewellyn, 1 Sho. 48.
(*e*) R. *v.* Filer, 1 Str. 496.
(*f*) 1 Str. 493.

of

of the statute of gaming), that the particular game ought to be set out, because what is gaming is a matter of law *(g)*.

Many similar convictions have since been quashed for the same reason, viz. that the particular oaths and curses were not set forth *(h)*. But it is sufficient if it be for swearing one hundred and fifty oaths in these words, viz. (specifying the words once), without repeating each one hundred and fifty times *(i)*.

Upon this point also, of the necessity of stating not merely the legal effect in the terms of the statute but the particular acts upon which the court can judge of the result, may be mentioned the case referred to by Mr. J. Denison in the case of The King *v.* Jarvis, in these terms: "It was said, that in a conviction it is sufficient to pursue the words of the statute; but I think that is not so, and there are many cases where it has been ruled otherwise. Among other instances it was so determined in the case of Rex *v.* Chapman, Easter term 28 Geo. 2, upon a conviction of a person *for robbing an orchard;* which the court held not sufficient, but it ought to have appeared of what, and how the orchard was robbed, that they might judge whether it were a robbery within the meaning of the 43 Eliz. c. 7. *(k)*."

The

(*g*) R. *v.* Sparling, 1 Str. 497.

(*h*) R. *v.* Popplewell, 1 Str. 686. R. *v.* Chaveney, 2 Lord Raymond, 1368. And a conviction for this offence being pleaded to an action for false imprisonment, it was declared by Eyre, C. J. that if the nature of the oaths had not been specified in the conviction, so that they might appear to the court, it would have been void. Moult *v.* Jennings, cited Cowp. 642.

(*i*) R. *v.* Roberts, 1 Str. 608.

(*k*) 1 Burr. 148. And see the report of S. C. 1 East. 647, *note.* I have thought it proper to subjoin the material parts of the conviction itself in R. *v.* Chapman, from the record filed in the Crown Office, as necessary to illustrate the objection mentioned by Mr. J Denison. It is as follows. (Filed Hil. 28 Geo. 2. No. 22.)

Cambridgeshire, to wit.—Be it remembered, that on, &c. at, &c. T. W. of, &c. cometh in his proper person before me T. S. one of his majesty's justices, &c. and giveth information to me the said justice, that Martha Chapman, of C. in the said county, widow, on the 20th day of July then

The following is an example of the like rule to that which governs the preceding cases, viz. that where the act characterizes the class of offences prohibited by a general description, the particular overt acts must appear in the conviction, in order to ascertain their legal effect. This was upon the statute 39 & 40 Geo. 3. c. 106, prohibiting under a penalty *all agreements* by any journeymen manufacturers *for controlling* any person carrying on any manufacture, &c. and giving a summary form of conviction in which *the offence* is required to be stated. The defendants were convicted of having been unlawfully concerned in the *making and entering into a certain agreement* for the purpose of controlling W. B. a manufacturer, contrary to the form of the statute. It was urged against the conviction, that the agreement itself ought to have been set forth, in order that the court might judge whether it were an illegal agreement for the purpose of controlling the master manufacturers within the meaning of the act of parliament. The court of King's Bench concurred in that argument, and quashed the conviction. It is not enough, to use Lord Ellenborough's words, that the agreement should be for the purpose of controlling, that is, with the intent to control; but it must be entered into *for* controlling, that is, for effecting that object, and the court cannot say that this was such an agreement without seeing what it was *(l)*.

General description in words of statute insufficient.

It

then last past, did *rob a certain orchard* of the said T. W. at, &c. in the county aforesaid (the same robbery not being felony by the laws of this realm), contrary to the form of the statute in such case made and provided. The evidence is stated as follows, viz. the witness S. T. deposes, "that on the said 20th day of July, in the said year 1754, the said Martha Chapman, in the said information named, did *rob a certain orchard* of the said T. W. at, &c. aforesaid, in the said county (the said robbery so sworn to by the said S. T. not being felony by the laws of this realm), contrary to the form of the statute," &c. The judgment is, that the said Martha Chapman is convicted of the premises in and by the said information charged upon her in manner and form, &c.

(*l*) R. v. Neild, 6 East. 417. Two cases were much relied on in support of the conviction. The first was that of *Rex* v. *Fuller*, upon

It has been observed, that the description of the offence must at least be as particular as that used by the statute. But it has also been seen, from the instances just noticed, that in many cases it must be more so, and several examples have been given that it is not enough to follow merely the words of the statute. It may indeed be collected as a general rule from the foregoing and following cases, that 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 doctrine is exemplified in the following case.—The conviction was on the general Act 22 Geo. 3. c. 47. s. 13 against the insurance of lottery tickets, which makes it unlawful "to insure for or against the drawing of any tickets (there referred to), or to receive any money or goods in consideration of any agreement to repay any sum or to deliver goods if any such ticket shall prove fortunate or unfortunate, or on any *other chance or event* relative to the drawing of any such ticket whether as to its being drawn fortunate or unfortunate or the time of its being drawn or otherwise howsoever, or under any pretence, device, form, denomination, or description whatever, to promise or

Must specify particular facts.

upon an indictment founded on 37 Geo. 3. c. 70, which makes it an offence to *endeavour* to seduce soldiers from their duty. In that case it was held not to be necessary in an indictment for such offence upon that statute, to set out the means by which the endeavour was effected. 1 Bos. & Pull. 180. The other was that of *Rex v. Moors and others*, 6 East. 419, note (*b*), where in an indictment on 37 Geo. 3. c. 123, against administering unlawful oaths, it was holden not to be necessary to set out the oath itself. The latter of these cases at first occasioned some doubt in the minds of the judges, when called upon to decide in R. v. Neild; but after deliberation they remained satisfied that it turned upon the particular wording of the act of the 37 Geo. 3. c. 123, and did not affect the question then before them. With regard to the former case, *Rex v. Fuller*, if it be not allowed to consider it as anomalous, yet after the case of Rex v. Neild, and as explained by Lord Ellenborough on that occasion, it cannot be deemed a safe precedent beyond the particular act to which it applies.

agree

agree to pay any sum, or deliver any goods, or to do or forbear any thing for the benefit of any person, with or without consideration, *on any event or contingency* relative or applicable to the drawing of any such ticket," under a penalty of £50.

The *Information* stated, " that J. James, the defendant, did *under a certain pretence or device* promise and agree to pay a sum of money on the event or contingency relative and applicable to the drawing of a certain number or ticket, No. 27, on the fifteenth day of drawing the lottery authorized by an act referred to, contrary to the form of the statute." The conviction then, after setting out the summons, (which was " to appear to answer the matter of the complaint aforesaid, contained in the said information,") and the defendant's non-appearance, stated the evidence of two witnesses S. C. and W. R. viz. " that the said S. C. on the 2d of December instant at the place named insured with the said J. James a certain ticket, No. 27, as to such number not being drawn on the fifteenth day of drawing the said lottery, in consideration of which the said S. C. paid to the said J. James the sum of £—, and for which the said J. James promised to pay to the said S. C. the sum of £1 : 1*s.* provided the said number was drawn on the said fifteenth day, &c." The other witness deposed to his having been present at the transaction. The adjudication then followed in the regular form. —It was objected, that the *Information* was too general in not properly specifying the fact, or setting out any of its particulars, as the sum received, the pretence, the person with whom the insurance was made, &c. This was allowed to be a valid objection, and the reasons assigned by the court comprise the principles applicable to this class of cases.—Willes, J.: " 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.*

Charge. You should have alledged 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 says, " 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. The offence here is promising under certain circumstances to pay so much money. Some circumstance then must be shewn: it must be stated for what the money is so promised to be paid *(m)*."

Where sufficient to use the words of the statute.

But in all cases where the quality of the offence is not of a complicated nature but consists of a simple fact, it is sufficient to use the words of the statute: Thus,

One objection to the manner of stating the offence in the case of Rex *v.* Speed for killing deer on 3 & 4 Will. & Mary, c. 10, was, that it was too generally laid in the circumstance of killing; for it was only said *unam damam, Anglicé*, one *fallow deer*, without saying whether buck, doe, or fawn; and *quod illicité occidit*, without shewing how, whether by gun, bow, net, &c. *(n)*. The objection however was over-ruled. The manner of killing, it was held, need not be shewn specially; because, according to Holt C. J., the killing or not is the material part *(o)*.

(m) R. v. James, Cald. 458.
(n) Carth. 502.
(o) 1 Lord Raymond, 584. The rest of the case is taken from the report in Carthew, which is more full as to the point in question.

3. But

3. But sometimes a circumstance plainly implied, though not expressly contained in the act, forms a necessary ingredient in the offence. Thus, the Act 5 Geo. 3. c. 14. s. 3 for the preservation of fish, prohibits generally the taking of fish in private fisheries, without any express reservation as to the owner's consent; but the statute has been so construed as to require that the want of such consent must appear in the conviction. The case in which this was decided arose on a conviction under that Act, setting forth the information of *Martha Buxton*, viz. that the defendant did fish with a net in a certain specified part of a brook or stream called the Schoo Brook, and did take and kill several fish against the form of the statute; negativing the defendant's having any right, and negativing also the provisoes in the act, viz. that the stream was in any park &c. but in other inclosed ground being private property: and further, the information of one *J. Chatterton* was set forth, stating, "that *Richard Hayne* Esq. is the true owner of the fishery in question:" and thereupon the said *Martha Buxton* prays that the defendant may be convicted according to the form of the statute. The Conviction then stated the appearance of the defendant and his confession "of the truth of *the premises in manner and form as charged;*" and then adjudged the said defendant to be *guilty* of the *aforesaid offence*, and to be convicted of the premises according to the form of the statute; and awarded the forfeiture of £5 to "be paid as the statute aforesaid doth direct." This Conviction was objected to, because it did not appear to be made on the complaint of the owner, or by his authority, or that the fishing was without the consent of the owner. In answer to this objection it was urged, that the statute (s. 3, upon which the conviction proceeded) contains no expressions referring to the consent of the owner, or to a complaint by him. The court however all concurred in holding the conviction a bad one for want of such an allegation. After adverting to the propriety

Circumstances implied by statute, where necessary to be stated.

priety of keeping a strict hand over summary proceedings in general, they observed, that in the present case the justice did not appear to have jurisdiction. They said, "Here is no complaint from the owner, nor does it even appear to have been without his consent. This is plainly in the act of parliament: the giving the penalty to the owner shews it. All that is here stated might, for ought that appears, have been done with the consent of the owner. The fact ought to appear so that the court may be able to judge whether the conviction be agreeable to law. If the owner had been the complainer, that would have shewn his dissent. But this is upon the complaint of *Martha Buxton*, and it does not appear that the defendant has been guilty of fishing in any water being private property without the consent of the owner *(p)*." It should be observed, that another objection, in which the court concurred, was, that the fact of *ownership* was no where made out; for the witness who informed that *R. Hayne* was the owner was not upon oath.

The question, however, whether the complaint must necessarily be made by the owner or on his behalf, is not here settled: all that the court expressed upon that point was, that if the fact had been so it would have betokened his dissent, which there was nothing to intimate as the conviction then stood. We may take occasion here to repeat an observation which has occurred in other cases, viz. that the defendant's confession was not considered as supplying the defect in the description of the offence, for, it was said, if the facts alledged did not constitute a legal charge, his acknowledgment of those facts could not make him subject to punishment *(q)*.

A similar principle is recognized in the following:

This was a conviction upon the 22 & 23 Car. 2. c. 25. s. 7, which inflicts a penalty upon any one who "shall take any fish in any river, stew, pond, moat, or other water,

(p) R. v. Corden, 4 Burr. 2279. (q) *Id. ib.*

without

without the licence or consent of the lord or owner of the said water." This Conviction stated in the *Information* that T. Mallison the defendant, not having any lands, &c. (negativing *unnecessarily* the qualifications in sect. 3, which apply only to game), *nor in anywise whatsoever empowered, authorized, or qualified,* by the laws of this 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, unlawfully take and kill ten fish, contrary to the form of the statute. The Evidence was precisely to the same effect.—Several objections were made to the Conviction; but that upon which the judgment proceeded was the omission to alledge that the defendant "had not the licence or consent of the owner," and that it might, for any thing that appeared, be his own fish in his own pond that he killed. Lord Mansfield said, "this Conviction is clearly bad. The offence provided for by the act of 22 & 23 Car. 2. c. 25, is stealing fish; taking it without the licence 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, or in another person's pond."—And the Conviction was quashed upon that ground *(r)*.

However, it would perhaps be going too far to lay it down that the act must be stated to be done *feloniously* or with *intent to steal,* if the statute makes no express mention of it. For an exception to a Conviction for killing deer, that it was not laid *furtivé* or *cum animo furandi,* but only *illicité occidit,* was over-ruled: though it was admitted that the intent of the act was to prevent killing in a clandestine manner by stealth; but it was said to be enough in that case to lay the words in the Act of Parliament *(s)*. In that case, the fact was alledged to be with-

(r) R. v. Mallison, 2 Burr. 679.

(s) R. v. Speed, 1 Lord Raymond, 583.

out the consent of the owner *(t)*; so that the objection was only to the want of a positive averment of the intent to steal, and not, as in the preceding case, that nothing appeared to indicate an invasion of another's property.

Specifying particular sums, quantities, &c.

4. Another consideration to be attended to in describing the offence, is, that where any thing turns upon particular sums or quantities, they must be specified, for an obvious reason, which is explained by the following case.

The defendant was convicted on the Kensington Turnpike Act, for refusing to account and pay over the money received by him as collector. The conviction was quashed, because no particular sum was specified, nor the times when the money was charged to be received, so as to enable him to defend himself upon a second charge. And though the counsel for the trustees pressed to have the commitment stand good as to the not accounting, yet the court said it was one entire non-feasance charged both in the conviction and the commitment, and they would not sever them *(u)*.

Quantum of damages.

An additional reason for enumerating particular quantities, &c. exists in those cases where the magistrate is directed to award compensation according to the injury, or to assess a penalty by way of damages. Thus, where a Conviction was upon the stat. 43 Eliz. c. 7. s. 1, against robbing of orchards, cutting of trees, &c. it set forth the complaint by R. B. that the defendant cut down *divers* lime trees of the said R. B. upon which, after being duly convicted, he was awarded to pay so much as damages to the complainant. Upon an exception 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, "in trespass the nature and number of things ought to be mentioned; and much more in a Conviction, where all

(*t*) This appears by the report of the same case, Carth. 502.

(*u*) R. v. Catherall, Str. 900.

imaginable

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 reason that holds in trespasses holds here, viz. the ascertaining 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." And therefore, for this reason, *per totam curiam*, the Conviction was quashed *(v)*.

Certainty.

As to the manner of alledging the *quantity* of the article in question; a Conviction for buying a certain quantity of wheat, to wit, fifteen bushels of wheat (contrary to 22 and 23 Car. 2. c. 12.), has been held sufficiently certain *(w)*.

Negativing exemptions.

5. One of the most essential points to be carefully attended to in describing the Offence charged, is, that every Exemption, Excuse, or Qualification, which accompanies the description of the offence in the enacting clause, be distinctly and positively negatived. Mr. Serjeant Hawkins, without vouching any decided authority, delivers it as his opinion, after remarking the contrary determination in regard to indictments, that a Conviction on a penal Statute ought expressly to shew that the defendant is not within *any* of its provisoes; for, he says, since no plea can be admitted to such a Conviction, and the defendant can have no remedy against it but from an exception to some defect appearing upon the face of it, and all the proceedings are in a summary manner, it is but reasonable that such a Conviction should have the highest certainty, and satisfy the court that the defendant had no such matter in his favour as the statute itself allows him to plead *(x)*.

(v) R. *v.* Burnaby, 2 Lord Raymond, 900. 1 Salk. 181. In *Rex* v. *Gibbs*, 1 Str. 497, an indictment for selling in unlawful measures *divers quantities* of ale, was held to be too general, and bad on demurrer.

(w) R. *v.* Arnold, 5 T. R. 353.

(x) 2 Hawk. P. C. c. 25. s. 113.

What exemptions necessary to be negatived.

This consideration would lead to a conclusion, that it is necessary to negative all the provisoes annexed to the offence, either by the same or any other clause or statute, as well as those in the enacting clause *(y)*. The rule however seems, as established in practice, to be restricted to those of the latter description only *(z)*. To this extent the opinion of Mr. Serjeant Hawkins is adopted by Lord Kenyon in the following case:

Conviction on the stat. 36 Geo. 3. c. 60. s. 3 and 4. *(a)*, stating the information, "that J. Jukes, on, &c. did unlawfully and fraudulently put and place for sale in and upon certain cards and papers, divers metal buttons, to wit, &c. having marked or stamped on the under side thereof certain words indicating the quality thereof, to wit, the words "double gilt," the said buttons so marked "double gilt," or any of them, not being double gilt within the true intent and meaning of the statute in such case made and provided, contrary to the form of the statute, &c." When the case was called on, Lord Kenyon, C. J. observed, that the conviction could not be supported, because the information did not negative the exception in the clause enacting the offence, viz. that the buttons were exposed upon *the pattern cards (a)*. That the only cases where it was not necessary to negative the qualifications, were where the exception was introduced in a subsequent clause; and there it must come by way of defence on the part of the defendant."

(*y*) 8 T. R. 542. *Vide infra.*

(*z*) For a full discussion and explanation of the general doctrine here alluded to, *vide* R. Bell. Fost. Cr. L. 430. Spieres *v.* Parker, 1 T. R. 141. Gill *v.* Simeon, 7 T. R. 27. And see the note of Mr. Serjeant Williams, 1 Saund. 262, a.

(*a*) By s. 3, no person shall place or pack, or cause, &c. for sale in or upon any card *(except the pattern card or pattern cards)*, or paper, &c. or expose to sale any metal buttons indicating the quality thereof other than and except the words "gilt," or "plated," respectively, under a penalty of 5*l.* a dozen. Sect. 4. provides that the act shall not extend to inflict any penalty upon a person who shall pack or place for sale upon any card (except the pattern card), any buttons having the words "double gilt," provided such buttons were covered with gold in the proportion there specified.

fendant." And again,—"This is not an objection of form, but of substance: the reason is well given by *Hawkins* why a Conviction should negative all the exceptions in the enacting clause, because the party cannot plead to such conviction, and can have no remedy against it but from an exception to some defect appearing upon the face of it, and all the proceedings are in a summary manner. Therefore the Conviction itself should shew that the party accused had not the defence which the act gives him, if true. The good sense of the thing is in support of what is said by *Hawkins;* for, being a summary proceeding, and conclusive on the defendant, it ought to have the greatest certainty on the face of it *(b)*."

Offence *sub modo.*

It may be here added, that where any thing is declared to be an offence *sub modo* only, the fact must be averred with the necessary modifications: Thus,

The defendant was convicted as a rogue and vagabond, under 17 Geo. 2. c. 5. s. 2, for playing at a certain *unlawful game with bowls.* The act of 33 Hen. 8. c. 9. s. 16, makes the playing at bowls *out of the person's own orchard or garden* unlawful: and the Conviction, not alledging that to be the fact could not be supported: for the 17 Geo. 2. does not specify *bowls,* but mentions only playing at any *unlawful* game, as constituting a rogue and vagabond *(c)*.

General rule.

The rule therefore and distinction resulting from these, and confirmed by the cases mentioned in the sequel, seem to be clear, viz. that all circumstances of Exemption and modification, whether applying to the *offence* or to the *person,* that are either originally introduced or incorporated by reference with the enacting clause, must be distinctly enumerated and negatived; *but* that such matters of excuse as are given by other distinct clauses or provisoes need not be specifically set out or negatived.

(*b*) R. *v.* Jukes, 8 T. R. 542. (*c*) R. *v.* Clarke, Cowp. 35.

It

It must be here particularly noticed, that it is immaterial whether the Exception be in another section or in another Act of Parliament, if distinctly referred to and engrafted into the enacting clause. This is apparent from the following cases, the first of which is an example of Exemptions introduced by a preceding Clause, and the others by a preceding Act of Parliament:

Exemptions in *preceding* Clause.

By the *fifth* section of 1 Jac. 1. c. 22, it is enacted, that no person shall carry on the trade of a tanner, except under certain qualifications therein mentioned: the *seventh* section enacts, that no person shall 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. In a conviction upon this section, it was held not to be sufficient to set forth, in the words of it, that the defendant was not such a person as *by virtue of that Act* might lawfully use the trade of a tanner, but the Conviction must particularly negative his being within any of the enumerated exceptions mentioned in the seventh section *(d)*.

In preceding statute.

The rule as applied to Exemptions adopted from a preceding Act of Parliament, is abundantly exemplified by the instances of cases on the game laws.—By the statute 22 & 23 Car. 2. c. 25. s. 3, all persons not having lands, &c. are thereby declared to be persons by the law of this realm not allowed to have or keep dogs, nets, &c.; and a subsequent statute, 5 Ann. c. 14. s. 4, inflicts a penalty upon any person *not qualified by the laws of this realm so to do*, who shall do certain acts there mentioned. It is now established, that in convictions on the latter statute it is not sufficient to describe the defendant generally as a person not qualified by the laws of this realm, but that all the qualifications enumerated in 22 & 23 Car. 2. c. 25. must be distinctly and specifically negatived *(e)*.

(*d*) R. *v.* Pratten, 6 T. R. 559. (*e*) *Vide infra.*
1 Saund. William's, 262, *a*, note.

In

In one of the older cases indeed, upon the act 5 Ann. c. 14. *(f)*, in which a Conviction was quashed for omitting one qualification, the others being enumerated, it is alledged to have been thrown out by the Court, that if it had been laid generally that the defendant "not being a person qualified according to law, &c" it had been enough, but that the qualifications being distinctly set forth the omission of one was fatal. That opinion however is not supported; and is over-ruled by the series of later and uniform authorities which are here shortly enumerated:

General negative not sufficient.

Thus, in a Conviction on 5 Ann. c. 14, the information charged the defendant with keeping a greyhound, "being a person not qualified to keep a greyhound." It was stated that the defendant appeared and offered nothing in his defence, wherefore he was adjudged to be guilty, and convicted accordingly. Upon an objection taken to the Conviction for want of enumerating the qualifications, it was defended as strictly conformable to the statute 5 Ann. c. 14. Parker, C. J. at first inclined to support it on that ground; but finally the Conviction was quashed, because, in the words of the Court, the witness had taken upon himself to judge of the qualifications *(g)*. The same point had been already decided in a case of *R.* v. *Heywood*, Pasch. 12 Anne, where a Conviction alledging the Defendant not to be "qualified, licensed, or authorized, to use any engine, &c." was quashed *(h)*.

Though the ground of objection stated by the court in the Case just referred to, was that the negative allegation appeared to be the judgment of the witness only and not of the justices, the ensuing cases demonstrate that the want of a specific enumeration would not be helped by an adjudication in these general terms.

The very point was again determined, in a case where the defendant was convicted of keeping a lurcher and gun

(*f*) The Queen v. Matthews, 10 Mod. 27.

(*g*) R. v. Marriot, 1 Str. 66.

(*h*) Cited 1 Str. 66.

to

to destroy game, " not being qualified by the laws of the realm to do so, contrary to the form of the statute in such case made." The Conviction was quashed, because, as the report states, it was only averred generally that the defendant was not qualified, and it did not aver that he had not the particular qualifications mentioned in the statute (22 & 23 Car. 2. c. 25.) as to degree, estate, &c. *(i)*.

Lastly, all the former authorities were reviewed, and the point finally determined by the following case:

This was a Conviction on 5 Ann. c. 14, setting forth, first, the Information of I. W. that one *Maurice Jarvis* did unlawfully keep and use a setting dog and net for the destruction of game, and rode with and hunted the said setting dog with intent to destroy game, " he the said M. Jarvis, at the time and place when he so kept and used the said setting dog, &c. not being qualified by any laws or statutes of this realm to kill game, or keep or use any nets, dogs, or other engines for the destruction of the game, contrary to the form of the statutes in such case made." The Evidence was afterwards set out, which (after fully proving the fact) went on to negative the defendant's qualification in the same general manner as the Information. It was further stated that the defendant appeared and denied the fact, but shewed no sufficient cause why he should not be convicted of the offence charged upon him in the said information. The Conviction concluded, " It manifestly appears to us the said justices that the said *Maurice Jarvis* was not then anywise qualified, empowered, licensed, or authorized, by or according to the laws of this realm to kill game; and that the said M. Jarvis is guilty of the premises: therefore, &c." The Forfeiture was adjudged in the usual form.—Several exceptions were taken to this Conviction; the first was, that it did not sufficiently shew the defendant's want of the qualifications specified in 22 & 23 Car. 2. c. 25, which it was insisted ought to have

(i) R. v. Hill, 2 Lord Raymond, 1415.

been

been particularized, with an allegation that he had not any of them. In answer it was urged, that the Conviction followed the very words of the act of 5 Ann. c. 14, upon which it was founded, which does not enumerate the Qualifications. Lord Mansfield, without hearing the other objections, 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. The *obiter* saying *(k)*, in 10 Mod. (if it was a book of better authority than it is), would signify nothing when the determinations are the other way. There is a great difference between the purview of an Act, and a Proviso in it. In the case of Rex *v.* Hill *(l)*, it is the very point established and settled, that the general averment is not sufficient, and that it must be averred, that the defendant had not the qualifications mentioned in the statute. In the case of *Bluet q. t.* v. *Needs*, the general averment of the defendant's not being qualified was holden sufficient in an Action, though insufficient in a Conviction *(m)*. The distinction is obvious between an Action and a Conviction; and there it was agreed, and is given as the reason why it is not good upon a Conviction, that it must be made out before the Justice, and he must return, that the defendant had no manner of qualification. I take the point to be settled by the constant tenor of all the authorities; and I think upon very good reasons *(n)*." Mr. J. Denison added, that it was not always sufficient to lay the offence in the words of the Act of Parliament.—The Conviction was quashed.

(*k*) *Ante*, p. 87, R. *v.* Matthews.

(*l*) *Ante*, p. 88.

(*m*) Com. 525. But Mr. Justice Foster, in the case of R. *v.* Jarvis (see the note of that case, 1 East. 647, note), declared himself of opinion that the case of Bluet *v.* Needs could not be supported.

(*n*) R. *v.* Jarvis, 1 Burr. 148. And see a full report of the case from a MS. note of Lord Ashburton, 1 East. 643.

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Want of negative allegations in *information* not helped by evidence.

In the foregoing cases, the defect in omitting to negative the exceptions occurred both in the *Information*, and in the *Evidence*. Whether this be necessary in the Evidence, we shall inquire in its proper place; but that it is indispensable in the Information, and that the omission of it *there* is not cured by any statement in the Evidence, follows from what has been before laid down as to the necessity of setting forth there every circumstance material to the jurisdiction. Indeed this might be conclusively inferred from what is thrown out in some of the preceding decisions; but is rendered still more indisputable by an authority expressly in point, as follows:—On a rule to shew cause why a Conviction for using a gun should not be quashed; the objection was, that the *Information*, as set forth, did not alledge specifically that the defendant was not owner or keeper of any forest, chase, park, or warren. It was argued to be sufficient if the want of those qualifications appear in any part of the record, and it did appear by the *Evidence* as set forth, that the defendant had none of them. Lord Mansfield:—This will not do; the defendant can be convicted *only of the charge in the information;* and that must be sufficient to support the Conviction. The evidence, Mr. J. Ashhurst said, must *prove*, but cannot *supply*, any defects in the information *(o)*.

Want of qualification must appear *at the time* of offence committed.

It is obvious that the Defendant's want of the necessary qualifications should appear to have existed *at the time* of committing the offence, and should be alledged in such a manner as to apply to that time. Accordingly, in one of the earliest cases upon this point, a Conviction on 33 Hen. 8. c. 6, for keeping a gun was quashed, because it was only alledged that the defendant *non habuisset* £100 *per annum*, but did not say when, and he might have had an estate at the time of keeping the gun, though not at the time of the conviction: it should therefore have been

(*o*) R. *v.* Wheatman, Doug. 232.

alledged,

alledged, that the defendant *prædict. die et anno* had not £100 *per annum (p).*

These determinations agree so fully in the same doctrine, as to leave no doubt of the conclusion to be drawn from them; nor is that conclusion shaken by any contradictory decision of a modern date. There is, however, one case, which, since it is appealed to in the arguments of some of the former cases, as a precedent for dispensing with a specific negative of all the qualifying circumstances accompanying an offence, it may be proper to notice here more particularly, for the purpose of pointing out its precise effect.

The case alluded to, is that of *The King* v. *Theed*, which was a Conviction for obstructing an excise officer in the discharge of his duty. The stat. 8 Ann. c. 9. s. 10, upon which it was founded, enacts that the officer, " at all times, by day or by night, and *if in the night then in the presence of a constable*, or other lawful officer of the peace, be permitted to enter the house, &c. of persons employed in making candles as therein mentioned;" and, by s. 13, a penalty of £20 is imposed upon the owner obstructing such entry. In the present Case the Information *(q)*, after stating the defendant to be a maker of candles and the house in question used in that business, set forth that *Caleb Wilson*, being then and there an officer of and for the duties of Excise, &c. (properly describing him), pursuant to and in execution of the power to such officer given by the said statute, *upon the 30th of August*, at, &c. did lawfully enter into the said house, to take an account of the quantity of candles there made. The Information then went on to state the obstruction. Upon this Information the defendant was regularly convicted of the facts therein contained. Upon the Conviction being removed

(p) R. v. Silcot, 3 Mod. 281.
(q) See the Conviction, 2 Lord Raymond, 1375.

into

into the court of King's Bench by *certiorari*, Mr. *Lee*, for the defendant, took an objection, that it did not appear that the entry of *Wilson* the officer into the house was lawful. The statute requires, that if the entry be in the night, it be in the presence of a peace officer; now here it is laid, that *Wilson* entered *the 30th of August*, but not said whether in the day or the night; it might be in the night, and then it was not lawful, because it is not said to be in the presence of the constable; and if the entry was not lawful the Defendant was not guilty of an offence in refusing to permit him to take an account, &c. To this it was answered, and held by the Court, that the entry is laid in the Information to have been made lawfully, and it does not appear upon the face of the Information to have been wrong, and therefore the Court will not intend that it was so, when the Information and Conviction say he entered lawfully. If it had been unlawfully, the defendant would have had the benefit of his defence before the Justices: the Information pursues the clause of the act.—The Conviction was affirmed *(r)*.

The court will not intend unlawfulness.

It is evident upon consideration of this Case, that it does not controvert the general position established by the foregoing authorities, as to the necessity of specifying negatively all the exculpatory qualifying circumstances annexed to the offence. The Case adverted to, allowing that it remains unimpeached by the authorities recited, at the most only proves that the Court will not gratuitously presume a fact not raised by any thing on the record, for the purpose of requiring the addition of some qualifying circumstance. A lawful entry being stated generally on the 30th of August, the Court would not, without any grounds and contrary to the ordinary intendment of the words, assume the entry to be in the night, merely for the sake of

(r) R. *v.* Theed, 2 Lord Raymond, 1375. S. C. shortly reported, 1 Str. 608. 8 Mod. 319. Cited in arg. R. *v.* Jarvis, 1 Burr. 148. 1 East. 645, note.

raising

raising the objection to the want of the constable's presence. If the entry had been stated to be in the night of the 30th of August, without also alledging that it was in company of a peace officer, it would doubtless have been bad.

Argumentative qualification not to be negatived.

In regard to the *kind* of qualifications necessary to be negatived, it may be proper to remark that the rule applies only to those expressly named; and therefore it is not necessary to negative a mere *constructive* qualification. Thus, in Conviction on 5 Ann. c. 14, which expressly mentions only those qualifications specified in 22 & 23 Car. 2, it is held unnecessary to negative the Defendant's being Lord of a Manor, that being only an inferred or argumentative qualification, collected from the statute 5 Ann. c. 14, but not expressed either in that or 22 & 23 Car. 2. *(s)*.

The want of the necessary negative averments in cases within the rule is not merely a formal but a substantial defect, and is not therefore aided by a provision in the statute that the Conviction shall not be vacated for want of form *(t)*. And it is demonstrated by the foregoing examples, that the allegation of being *contrary to the form of the statute* will not cover the omission of any material circumstance in the description of the offence *(u)*; for those words are no more than the conclusion of law, which must be warranted by sufficient premises *(v)*.

(*s*) R. v. Pickles, 1 Burr. 150.
(*t*) R. v. Jukes, 8 T. R. 542.
(*u*) 4 Burr. 2279. 1 Burr 679. *Id.* 154, 155. 3 Mod. 280. 6 East. 417; in all which the Convictions were quashed for this defect, notwithstanding the words "*contrary to the form of the statute.*" And see Hamper's case, 2 Hawk, c. 25. s. 10. Rook's case, Hardr. 20; but *vide* 1 Str. 497. Cro. Eliz. 749. Dy 312. There is a case, R. v. Lammas, Skin. 562, where in a conviction for keeping a warehouse for low wines, the *Information* alledged the Defendant to be a common distiller, of which there was *no evidence*, but the adjudication was that he be convicted of the said offence *against the form of the statute*, and the court seemed to think it was well enough by reason of those words, for it should be intended he was a common distiller, otherwise it would not be an offence; *sed cur. adv. vult.*
(*v*) 2 T. R. 222. 8 T. R. 542.

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What Exemptions not required to be negatived.

It will be remembered, that the Rule, requiring all the Exceptions annexed to the offence to be negatively set out on the face of the record, was stated to apply only to such as are *contained* in, or *incorporated* with the *enacting* Clause, by which the offence is created. This distinction is sufficiently marked throughout the cases already adduced in support of the Rule *(w)*, in all of which it is plainly signified, that those Exemptions which are the subject of distinct proviso, being matters of defence, need not be noticed in the charge; inasmuch as the absence of these does not form a constituent part of the offence, but the existence of them is a matter of extenuation which the party accused must shew himself entitled to by way of defence. This distinction seems to be now clearly established, notwithstanding the opinion intimated by Mr. Serjeant *Hawkins (x)*, that a Conviction on a penal statute ought expressly to shew that the defendant is not within any of its provisoes.

Exemptions in separate provisionary clause.

Therefore, in a Conviction on 3 Car. 2. c. 3. s. 2, for keeping an alehouse without licence, it was objected, that the Act contains a proviso (s. 5.) exempting persons who have been punished by the former law of 5 & 6 Edw. 6. c. 25, and therefore that the fact of the defendant not having been proceeded against under that act, should have been averred. The objection was over-ruled; because, as it was said, that exemption coming in by way of *proviso*, should have been insisted upon in defence. It appeared by the Conviction, that the defendant was asked what he had to say, and therefore, the Court said, it was reasonable to presume he had no such defence to make *(y)*.

On a Conviction for a forcible entry, on 15 Rich. 2. c. 2, and 8 Hen. 6. c. 9, it was objected, that it should appear by the Conviction that the defendant had not been

(w) See in particular R. v. Jukes, 8 T. R. 542, and 1 East. 646.

(x) 2 Hawk. P. C. c. 25. s. 113.

(y) R. v. Ford, 1 Str. 555.

three

three years in possession (according to sect. 7 of 8 Hen. 6. c. 9.) But, by the Court, that comes in by way of proviso, and he that would have the benefit of it must plead his possession *(z)*.

For the same reason a Conviction on 9 Geo. 2. c. 23. s. 1 for retailing gin without a licence, 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. *(a)*.

Exemptions in *subsequent* Statute.

Agreeably also to this doctrine, it is held, that if a subsequent Statute make an exception to a former one, it is incumbent on the Defendant to shew by way of defence that he comes within the exception. For example, the Statute 22 Car. 2. c. 1 prohibits the assembling at any conventicle or meeting for religious worship, except according to the liturgy; but by the 1 Will. & Mary, c. 18. s. 1. 3. 19, persons and meetings complying with certain regulations are declared to be not liable to the penalties of the act of Car. 2. It has been resolved, that in a Conviction for this offence on the 22 Car. 2, it is unnecessary to negative any of the exemptions in the statute of 1 Will. & Mary, c. 18.; and that even an imperfect enumeration of those exemptions is wholly surplusage and does not vitiate *(b)*.

So we have seen, that in Convictions on the game laws, it is not necessary to negative the "being lord of a manor," that being only a qualification inferred from 5 Ann. c. 14, but not mentioned in 22 & 23 Car. 2. *(c)*.

Charge must be positive, not evidence only.

Lastly, the information must contain a direct charge of the Offence specified by the Act of Parliament, and not merely facts amounting to a presumption of guilt, however sufficient such facts may be as *primâ facie* evidence

(*z*) R. v. Layton, 1 Salk. 352. *Vide* 2 Cro. 199.
(*a*) R. v. Bryan, 2 Str. 1101.
(*b*) R. v. Hall, 1 T. R. 320.
(*c*) 1 Burr. 150. 153. *Ante*, p. 93.

to

to support a charge for the specific Offen
ter understood by the following Case
Ann. c. 18. s. 3, for selling bread
The charge in the *Information* (
wanting so much weight of &c.
of the defendant, a common b
opinion that the charge ough
sale of so much bread b
deed, the Court said, tha
ter's shop, it is good
bread, but still it is b
that what is but
ment (*f*).

opinion that
out. Two other Judges
, but expressly founded that opi-
ure of these orders, which they assimi-
ers of bastardy. The argument of counsel
which seems to have been adopted by the majority of
the Court admits that in convictions for deer stealing or
the like, where fines are imposed, it is usual to set forth
that the party was summoned.

In this last case, it should be observed, the order is merely for suppressing the alehouse, and therefore bears much less affinity to the case of a Conviction than the former one, which comprehended a sentence of imprisonment.

Distinction between orders and convictions.

This seems a proper place to say a few words upon the distinction between orders and convictions, with a view of attempting some determinate criterion of separation between them.

(*g*) R. *v.* Venables, 2 Lord Raymond, 1405. 8 Mod. 378. 1 Str. 640. Sess. Cas. 210.

(*h*) *Id. ib.* and see R. *v.* Allington, 1 Str. 678.

(*i*) 8 Mod. 309.

In

of no question. But it is necessary to remark, that, a different rule having prevailed in respect to proceedings classed under the denomination of *orders*, which are not always easily distinguishable in their nature from convictions, some confusion and uncertainty may at first view, from the occasional similarity of the proceedings, appear to subsist in the rule as applied generally to those of the latter description. The cases however in which the necessity of stating the Summons has been dispensed with or denied will be found upon examination to belong strictly to the class of orders, and their authority to be confined to those instruments. It would be beside the present purpose to inquire into the grouuds of this distinction. It is sufficient that the cases alluded to recognize and are founded upon it, so that they are in reality so many authorities in support of the necessity of the practice in Convictions. This conclusion will be sufficiently apparent from a reference to the cases themselves. Of these the one most directly in point, though not the first in order of time, is the following:

Not in orders.

An order was returned to a *certiorari*, made by two Justices of Peace under 5 & 6 Edw. 6. c. 25. s. 3 for suppressing unlicensed alehouses, which recited the service of a former order discharging the defendant from selling ale, and then further stated, that after the service of that order the defendant had continued to sell ale; therefore the Justices ordered him to be committed for three days according to the statute, and to find surety not to sell ale, &c. It was objected that the defendant did not appear to have been summoned to answer the charge for which he was committed, and after much deliberation and debate it was declared by the court unanimously, that the party ought in fact to be heard, and that the Justices would be guilty of a misdemeanor if they decided without giving him notice, but they said, that "since in this sort of orders for suppressing alehouses, keeping bastards, &c. summonses have

not been set out, they would intend that the Justices having jurisdiction had proceeded regularly and that there was a Summons; it not appearing by the order that there was none, or that there was an ill summons, for if that appeared it would be fatal, as leaving no room to make it good by intendment *(g)*. It being afterwards proved by affidavits that there was no Summons in fact, the Court granted an information against the Magistrate *(h)*.

In the course of that argument a case was cited as having been determined a short time before upon an order of the same kind. This was the case of *The King* v. *Austin (i)*, by the slight report of which no very correct idea is conveyed of what passed upon the discussion of the question. It appears that the Court was divided on the objection of there being no Summons set out in the order. Pratt, C. J. is stated to have delivered an opinion that the Summons ought to be set out. Two other Judges held it to be unnecessary, but expressly founded that opinion upon the nature of these orders, which they assimilated to orders of bastardy. The argument of counsel also, which seems to have been adopted by the majority of the Court admits that in convictions for deer stealing or the like, where fines are imposed, it is usual to set forth that the party was summoned.

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In truth it is not easy to fix any rule for distinguishing in the abstract between what things are the subject of *orders* and what of *convictions*. Practice seems chiefly to have been consulted in the distinction. Before the statute of 4 Geo. 2 convictions were always recorded in Latin, whereas orders were returned in English; and we find this circumstance referred to as a criterion used by the Court in determining that a particular instrument, viz. a judgment of removal of a clerk of the peace by the Justices in sessions, should be considered as an order, and not as a conviction, and consequently as not requiring the evidence to be set out *(k)*.

The cases which seem to come the nearest to the nature of *convictions*, and which nevertheless have been treated as *orders*, so as to let in the less rigorous rules applicable to the latter, are the following, viz. orders of bastardy under 18 Eliz. c. 3.; penal proceedings under 5 & 6 Edw. 6. c. 25 against persons continuing to keep a public house after an order of Justices to suppress it; and those against tenants fraudulently removing goods to avoid distress under 11 Geo. 2. c. 28.

Orders of bastardy, as the name imports, have always been considered to belong to the class of orders; and therefore they do not contain any allegation of the defendant's presence during the examination *(l)*. Lord Holt indeed declared upon one occasion that he could not see any reason for the distinction between orders of bastardy and convictions *(m)*. However, the words of the statute 18 Eliz. c. 3 which direct the Justices to *take order* for the keeping of the bastard child, &c. as well as the nature of the proceeding, which is more for the purpose of indemnity to the parish than of punishment for an offence,

(*k*) R. v. Lloyd, 2 Str. 900.
(*l*) Burn's Justice, tit. Bastard.
(*m*) R. v. Lomas, Comb. 289.

may appear to account for the uniform practice in treating these as of a different class from penal convictions.

The reasons which have prevailed in regard to the case secondly alluded to, that of a proceeding under 5 & 6 Edw. 6. c. 25 for keeping open an alehouse after an order to suppress it, seem to be that the defendant is guilty of a contempt in disobeying the first order, and that the power of imprisonment in that case is something similar to process of attachment *(n)*. However it should be observed, that the necessity of a previous summons in fact (though it need not be stated in the order) is somewhat inconsistent with that mode of considering it.

With regard to the third case, that of a penal proceeding against a person for assisting in the fraudulent removal of goods to avoid a distress under 11 Geo. 2. c. 19. s. 4, the language of that Act certainly seems to point out a proceeding altogether similar to that which is understood by a summary conviction, and there can be little doubt that it would be regular in this form, of which there exist many precedents. But it is nevertheless certain that those proceedings have been not only deemed valid in the shape of *orders*, but upon that ground only have been allowed to admit of informalities which would have been fatal in a conviction. There are on the files of the Crown Office several instruments of this kind, which, as well as being upon the file of *orders* and not of *convictions*, are returned in consequence of writs of *certiorari* "to return all orders," whereas the *certiorari* for a conviction is always "to return all records of conviction;" of these is *Rex* v. *Bissex*, T. 29 & 30 Geo. 2, and soon after *The King* v. *Middlehurst*. The former of these cases is given at length in Burn's Justice *(o)*; and after some discussion upon the question whether the matter was properly the subject of an order, it was agreed to be regular in that

(*n*) R. v. Venables, 2 Lord Raymond, 1405.

(*o*) 1 Burn. 528, tit. Distress.

form.

form. Mr. J. Denison, in delivering the resolution of the Court, expressed himself to this effect:—I think the most material question is, whether this is an order or a conviction. If a conviction the evidence ought to have been set out. It was so held by Lord Hardwicke in the case of *The King* and *Lloyd (p)*; and in that case it was objected, that as it subjected the party to a penalty, though in the statute it was called an order, yet it should be construed as a conviction; but the Court said, every act of the Justices which subjects the party to a penalty shall not be construed as a conviction. I understood from my Lord Hardwicke, in the case of *The King* and *Lloyd*, that his ground of the difference was founded upon the expressions of the statute, and not upon the penalty; as where the words of the statute are, "of which he shall be convicted," it is to be construed a conviction. Here it is extremely strong; the statute calls it an order, and in the nature of it it is an examination upon a complaint *(q)*.

The other case upon the same statute, R. *v.* Middlehurst, is reported by Sir J. Burrow. In that the objection to the offence being charged in the alternative, viz. for removing *or* concealing the goods, was over-ruled expressly upon the ground that this was an order *(r)*.

The only criterion furnished by these cases for distinguishing when penal proceedings are to be considered as orders, and when as convictions, is that alluded to by Lord Hardwicke, viz. whether they be so denominated by the statute *(s)*.

It sufficiently appears however that the decisions before mentioned cannot govern the case of Convictions; for that these were treated as belonging to a different class; and that the judgments were founded entirely upon that consideration *(t)*.

(*p*) 1 Str. 996.

(*q*) There seems, however no doubt that it would have been good as a conviction, R. *v.* Morgan, Cald. 156.

(*r*) 1 Burr. 399.

(*s*) R. *v.* Bissex, *supra*.

(*t*) *Ante*, p. 97.

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There is one early case indeed in which a similar doctrine is said to have been applied to a Conviction. That case is reported as follows: *Ford* was convicted in a summary way on the statute of deer stealing. To which it was objected, that it did not appear on the record that the defendant had any notice to come and make his defence, and *citatio est de jure naturali,* that none be convicted without an opportunity of making defence: *quod curia concessit,* but this being by persons by law intrusted with the administration of justice we will intend they have proceeded regularly and legally, if the contrary appear not *(u)*. Of this case it is impossible to judge correctly, as no extract is given from the conviction itself, and it is not impossible but the defendant might there have been stated to have appeared in fact, which as will be seen in the following section would dispense with the necessity of stating a Summons. But without resorting to that supposition, the practice seems to be since that time so well established the other way that this single case cannot now be considered as of sufficient weight to turn the scale.

It is at this day established as well by authorities as by received practice, in regard to *convictions,* that the fact of a Summons is indispensably necessary to be shewn on the record; except where the *appearance* of the defendant renders it immaterial. The necessity of such an averment, it may be observed, is taken for granted in all those cases where the omission of it has been held to be cured by the defendant's appearance *(v)*, for if it had been deemed altogether unnecessary no such question could have arisen. The same conclusion may be drawn from those cases where the question has been whether a general averment of being duly summoned be sufficient. But there are not wanting direct authorities upon the point. It is laid down by Lord C. J. Holt, "that these summary jurisdictions ought to be held strictly to form, and every thing ought to appear regular

(u) R. v. Ford, 12 Mod. 453. (v) *Vide infra.* Appearance.

gular in them. The Justices ought to make a memorandum, that on such a day a complaint was made; that thereupon a summons issued returnable on such a day; that the defendant did not appear, or could not be summoned." *(w)* In another report of the same case *(x)*, Powell J. is represented to have said, "that if no Summons had been shewn *perhaps* the Court would have intended one according to the precedents;" but this saying, if accurately reported, probably referred to a general allegation of being duly summoned in contradistinction to the particular mode of stating it used in the case then under consideration, viz. by specifying the place and day of the return, which appeared to be an impossible one and was on that account held to be bad.—Mr. J. Buller also treats the point as settled by established practice; for in a case which came before the Court upon a different question, he enumerates among the points in which "the Court in considering Convictions is always strict, that of seeing that the party convicted has been summoned and heard or that it has been his own fault." *(y)*

A much later case however than any of these is shortly reported by Mr. Caldecott, which affords an authority directly in point; as follows:—The defendant was convicted before a Justice of Peace, on the game act not being qualified. The Conviction was quashed, because it did not appear that the defendant was summoned, or had an opportunity of defending himself. It is necessary in case of Convictions to set out a Summons, for in such case nothing is to be intended *(z)*.

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(*w*) R. *v.* Dyer, 1 Salk. 181.
(*x*) 6 Mod. 41.
(*y*) R. *v.* Green, Cald. 391.
(*z*) R. *v.* Hawker, Tr. 8 & 9 Geo. 2. Cald. 391. note (*a*). In addition to the authorities above cited, it may be permitted to adduce the opinion of a very eminent Lawyer in confirmation of the conclusions submitted in the text, with which I have been favored from a MS. of a gentleman eminent at the Bar:—Rex *v.* Braine, 2 Geo. 3. Conviction for deer-stealing, stating the information and depositions of the witnesses, but no summons or appearance. Upon which Sir James Wallace's opinion is in the following words:—"I am of opinion

Manner of stating the Summons.

It may be concluded therefore, that a Summons is not only necessary in fact, but that it must appear upon the face of the record. Another question then remains as to the manner in which it is required to be stated. But it should be premised, that this question can then only be material when the defendant is found by the record to have been convicted in his absence, and on his default.

It is not fully settled whether it be sufficient in such case to state generally that the defendant had been *regularly* or *duly summoned*, without describing more particularly the time and place at which the Summons was returnable. The reason which may be suggested for requiring that particularity is to enable the Court to judge whether it was reasonable.

A *dictum* attributed to Lord C. J. Holt requires that the record should state a Summons returnable on a day certain *(a)*. In the first case wherein we find this question directly in discussion, the Conviction only stated that the defendant, "*being duly summoned,*" made default. Parker, C. J. thought this a serious objection; but another Judge, Powis, was of opinion, that the allegation *debité summonitus* imported all reasonable circumstances *(b)*. The report however of this case is somewhat loose; and other defects in the Conviction might probably prevent any decision being given upon this point. In a subsequent case, an averment *licet debité summonitus ad hoc tempus*

opinion the Court will quash this Conviction. The principal objection is, that it does not appear the party was ever heard before the Justice in his defence, or ever summoned for that purpose. In some cases the Court has presumed the Justice has acted right unless the contrary has appeared, and to be sure it does not appear the party was not summoned; but these have been orders made by Justices of Commitment &c. and not Convictions." And it appears by the same note, that in Hilary Term, 2 Geo. 3. the Conviction was quashed upon the motion of Sir J. Wallace.

(*a*) 6 Mod. 41.

(*b*) Regina *v.* Green, 10 Mod. 213. *post.* Sec. 6. Evidence.

et

et hunc locum, (referring to the day and place of the Conviction,) was held to be sufficient *(c)*.

It is prudent however to follow in this respect the form generally used in the precedents of best authority, which, in cases of Convictions by default, take care to state that the defendant was summoned to appear at a certain time and place; and those must be such as to afford him the reasonable means of complying with the Summons and of being fairly heard.

Summons, when insufficient.

But though it may admit of a question whether or no it be sufficient to state a Summons generally, there is no doubt that if the Summons be particularly set out and appears upon the face of it to be irregular, as by being prior to the information, the Conviction will be bad. And if it should appear that the time allowed by the Summons was too short, that seems to be a well-founded objection. Thus one of the defects insisted on in the case of The King *v.* Mallison *(d)* was, that the Summons was to appear immediately. The Conviction was not indeed quashed on that ground; but it was said to be bad throughout, which seems to imply the assent of the Court to the validity of that objection as well as the others. In another case *(e)*, it seems to be admitted that a Summons to appear on the same day would have been bad, but for the appearance of the defendant which cured the defect.

Some of the precedents go so far, in cases where the defendant has not appeared, as to state the evidence upon oath of the service of the Summons, which ought in fact to be had before a Conviction by default; and it is certainly more regular, though perhaps not absolutely necessary, to state it; more particularly in cases where the Acts of Parliament (as is sometimes the case) specially authorize

(*c*) R. *v.* Simpson, 3 Geo. 1. 10 Mod. 248. 382. 1 Str. 46. S. C. This case is cited by Parker, C. J. 8 Mod. 309. 11 Geo. 1. as an authority that "*having been summoned*" is sufficient.

(*d*) 2 Burr. 681.

(*e*) R. *v.* Johnson, 1 Str. 261.

the

the Magistrate to proceed in the defendant's absence, after oath made of the service of a regular Summons *(f)*.

Section 4. Of stating the Defendant's Appearance.

The next step set out on the record is the defendant's appearance at a certain day and place. If this be regular and subsequent to the information, it removes all objection to the irregularity *(g)*, or want of a summons *(h)*.

Cures irregularity in stating Summons.

At least if it be also stated, that he did not require further time to make his defence. In a case where the Conviction, after stating the information, proceeded in these words: "of which said information, and of the offence therein charged upon him as aforesaid, the said T. S. on the said 6th day of January at &c. had notice: whereupon the said T. S. *appeareth*, and is then and there on the said 6th day of January present before me to hear, &c." and after setting out the evidence, and that the defendant was called upon for his defence, and pleaded, were added the words, "nor doth the said T. S. require any further time for that purpose." This was held to be sufficient, notwithstanding an objection that the defendant was not stated to have been summoned beforehand but only to have had notice of the charge. Lord Kenyon said, justice requires that a party should be duly summoned and fully heard before he be condemned, but if he be stated to be present at the time of the proceeding and to have heard all the witnesses, and not to have asked for any further time to bring forward his defence, if he had any, this has at all times been deemed sufficient *(i)*. But if the Appearance is alledged on an impossible day, or on one which is shewn by the record to have been prior to the in-

On impossible day, bad.

(*f*) *Ante*, p. 18, &c.
(*g*) 1 Str. 261.
(*h*) R. *v.* Barrett, 1 Salk. 383. R. *v.* Aiken, 3 Burr. 1785. R. *v.* Stone, 1 East. 649.
(*i*) R. *v.* Stone, 1 East. 640. 649.

formation,

formation, the Conviction is bad. Thus, where it was stated that the defendant was summoned to appear, and did appear on *Tuesday* the 17th day of April, and it was seen, by reference to the almanack, (which the Court agreed they ought to take notice of) that there was no such day as *Tuesday* the 17th of April, that day being on *Friday*, the Conviction was quashed on that ground *(k)*. So the Summons and Appearance being described on the 2d of October 1 Geo. 2, the information and deposition being on the 2d of November, 1 Geo. 2, this incongruity was held to be fatal *(l)*.

The Appearance may be stated in the past tense *(m)*; and according to one case *(n)* may be either in person or by attorney. It seems also, that if the place be not mentioned, it will be intended to be at the place where the information appears to be laid (*o*); and this, though the examination of witnesses and the judgment are stated at a different place from the former (*o*).

2. If the defendant does not appear, we have already seen that judgment in his absence will be valid (*p*).

Section 5. Confession, Statement and Effect of.

1. After the appearance of the party, the record proceeds to state either his Confession, or his denial and plea to the charge. Regularly it should appear that the Defendant was called upon to plead before the evidence was given: but there is no objection to its having been taken before, if it appears to have been read over to him and that he confessed the charge (*q*). That a Conviction may be founded upon the Confession of the party though the

(*k*) R. *v.* Dyer, 1 Salk. 181.
(*l*) R. *v.* Kent, 2 Lord Raymond, 1546.
(*m*) 1 Barn. 212. 300.
(*n*) 1 Str. 46.
(*o*) R. *v.* Swallow, 3 T. R. 284.
(*p*) *Ante*, p. 20.
(*q*) R. *v.* Hall, 1 T. R. 320.

Act

Act of Parliament speaks only of proof by witnesses, has been shewn in a former chapter (*r*). To be effectual however for that purpose, it is now to be observed, that the Confession recorded must not only appear to agree with the charge, but must contain an admission of such specific facts as amount to the complete offence complained of. For, as the following authorities shew, the Confession only admits the charge but not the legal effect of it.

Admits only the fact, not the law.

In a Conviction for trading as a hawker and pedlar without licence, on the old acts against that offence, (3 and 4 Ann. c. 4. s. 4, 9 and 10 Will. 3. c. 27, and 8 and 9 Will. 3. c. 25), the Information stated, that the Defendant was found offering to sale silk handkerchiefs and trading as a hawker, pedlar, or petty chapman; and that he did then and there offer to sell a parcel of silk handkerchiefs, &c. without having a licence. After the Appearance of the Defendant it was stated, that being asked for his defence, why he should not be convicted of the said offence so charged in form aforesaid, he freely confessed "that he the said Defendant did offer to sell silk handkerchiefs to the said T. P. (the informer) in manner as is mentioned in the aforesaid Information, and that he hath no licence."—The Conviction was quashed for the insufficiency of the charge, a single act of trading not being deemed sufficient to constitute a hawker and pedlar within the Act (*s*): and it being insisted, that the Confession of the Defendant cured the defect, by admitting the offences, because if he had a legal defence, he might have availed himself of it, Lord Mansfield would not allow it to have that effect, observing, that the Confession is only of the fact that he sold the handkerchiefs to T. P. not that he traded as a hawker and pedlar (*t*).

But in another Conviction upon the same statute, it was alledged that the defendant was apprehended for trading

(*r*) *Ante*, p. 22.
(*s*) *Ante*, p. 69. See the observations upon this case, p. 70.
(*t*) R. v. Little, 1 Burr. 613.

as

as a hawker and pedlar, and was charged upon oath before the Justice with having sold a piece of muslin *as a hawker pedlar and petty chapman*, which fact he confessed, this was held to be sufficient to warrant a Conviction for not producing a licence on demand by the Justice *(u)*.

Confession does not extend the charge.

The following case is in point to shew, that a Confession cannot extend or help out the description of the offence as charged in the information. The Conviction, which was for killing fish, set forth as the relation of the informer, that on the day and place therein mentioned the defendant did fish in a certain brook there named, and did then and there take and kill the fish, not having a just right or claim to take kill or carry away any such fish, and the said stream being private property. It was also stated, that another witness, not alledged to be upon oath, came and informed that R. H. is the owner of the said stream. The defendant appearing and being called upon for his defence, " of his own accord confessed all and singular the said premises to be true in manner as the same are charged in the said information." This Conviction was quashed, on the ground that the facts of the ownership and of the owner's dissent did not sufficiently appear. It was urged in support of the Conviction, that it was warranted by the Confession of the whole charge, part of which was that R. H. was the owner; but the Court as to that point only took notice, ' that as the ownership (or rather, it should be the owner's dissent) is not sufficiently charged, neither is it confessed: the Confession goes no further than the matters charged: the words in the Conviction " not having any just right or claim" are the words of the informer only, and they are too general.' *(v)*

So, if a fact be penal only under certain circumstances, and those are omitted in the charge, the Conviction is

(u) R. v. Smith, 3 Burr. 1475. (v) R. v. Corden, 4 Burr. 2279. 2282.

bad,

bad, notwithstanding it be stated that the defendant fully acknowledged the premises to be true as charged, and did not shew any sufficient cause why he should not be convicted thereof *(w)*. Nor will such an acknowledgment warrant a judgment upon a statute not applicable to the offence; as a judgment under 17 Geo. 2. c. 5. s. 2. against one as a disorderly person, upon a charge of playing at bowls, that not being one of the things described by that act as constituting a disorderly person *(x)*.

Section 6. Evidence, Statement of.

Names of the witnesses.

The next and most important part of the Conviction consists in the evidence; which we now proceed to consider. And first, all the witnesses should be described by name. This is the invariable practice; and is more particularly necessary where any part of the penalty is given to the informer, in order that the Conviction may appear not to be founded upon the testimony of the informer himself. Whatever doubts may formerly have existed, it is now fully established by a series of determinations, to be a fatal objection in those cases, if the informer appears to be also the witness *(y)*: excepting, of course, where the act enables the informer to be a witness either by an express provision for that purpose, or by implication, as by awarding part of the penalty to the person on whose oath the party is convicted *(z)*. For the same reason, wherever a penalty exceeding £20 is given to the poor of the parish where the offence was committed, the Conviction is bad if the witness be described as of that parish.

(*w*) R. *v.* Clarke, Cowp. 35.
(*x*) *Id. Ib.*
(*y*) R. *v.* Stone, 2 Lord Raymond, 1545. R. *v.* Tilly, 1 Str. 316. R. *v.* Robotham, 3 Burr. 1472.
(*z*) As in the statute 7 Geo. 1. c. 12. It may be made a question whether this objection would invalidate the Conviction, except where it is founded upon the single testimony of the informer.

But

But if the penalty do not exceed £20 the objection is removed by 27 Geo. 3. c. 9.

The depositions must appear to be upon oath, or affirmation in the case of a quaker, for that is the only legal mode of receiving testimony. It is sufficient if it be stated to be upon oath, without the additional averment, usual in the earlier precedents, that the Magistrate was legally authorized to administer the oath, for the law takes notice of his being so authorized by the Act upon which the proceeding is founded *(a)*. Oath.

With regard to the manner in which the evidence should appear to have been given, it can only be stated as an acknowledged maxim, that as it should in point of fact be given in the presence of the defendant, (if he appears) so it must be either in terms so alledged upon the record, or expressed in such a manner that it may be presumed without inconsistency to have been so. The authorities are too much at variance to admit of fixing any general rule consistently with them all for ascertaining under what circumstances the *presence* of the defendant is to be presumed. The weight of precedent however at present seems to justify the conclusion, that wherever the defendant's appearance and the evidence are stated to have taken place on the same day, the presumption is in favour of the whole having passed in his presence. The following are the cases in which the question has been variously treated, and from an attention to which the judgment can best be directed in each case that may arise:— Allegation of defendant's *presence.*

1. The first case *(b)*, which occurs upon this subject, is that of the *King* v. *Baker (c)*. The report of this Cases.

(a) R. v. Picton, 2 East. 195.

(b) In the report of the case of R. v. Speed, *an.* 11 Will. 3, as given in Carth. 502, it is mentioned as one of the objections, that it did not appear that the witness gave evidence face to face. No notice however is taken of this point in the judgment, and the Conviction was confirmed. The point is not noticed at all in the report of the same case, 1 Lord Raym. 183.

(c) 2 Str. 1240.

case

case is not so full and satisfactory as might be desired in regard to a decision that has laid the foundation of a rule which is avowedly maintained by the authority of precedent alone. The case is as follows:—Conviction for keeping a Lottery-office. It was stated that one *Jones* gave information, and that *M.* a credible witness proved the fact; that due summons issued, and the Defendant appeared; it then proceeded in these words, " and the information aforesaid, and the said evidence thereupon given being now here read unto and fully understood by the said *Francis Baker*, he is asked what he has to say," &c.—It was objected, that it should appear that the evidence was given in the hearing of the Defendant, whereas it was only *read*, whereby the defendant loses the benefit of a cross-examination. But the Court held it well enough, for all is a history in the present tense, and supposed to pass at the same time, and if it had been heard it might be said to be only hearing it read. In these cases it is enough that it does not appear to be wrong, and it is laid to be fully understood by him *(d)*. Upon this statement of the case a remark obviously occurs that for any thing which appears, the defendant might have confessed the charge; a circumstance which would materially alter the effect of the decision as a general authority.

The next case applicable to the present question, and which seems to import an opposite conclusion, is the following:—A conviction on the act of 12 Geo. 1. c. 34, to prevent unlawful combinations among workmen in the woollen trade, stated, " that T. E. on, &c. cometh before us, (naming the Justices) and upon his oath before

(*d*) *Id. ib.* Sir J. Burrow, in allusion to this case, (2 Burr. 1164) relates, that one of the Judges declared, " that there was no law requiring the presence of the witness face to face." As it seems however to be admitted in all the subsequent determinations, that the law does require the witness to be in point of fact confronted with the Defendant, the authority of the case itself is diminished in so far as the opinion thus expressed may be supposed to have contributed to it.

us deposed, that the Defendants I. Vipont, &c. employed in the wool-combing business by him, had severally confessed that they had agreed, &c. (importing an unlawful agreement to raise wages)". Whereupon the said I. Vipont, &c. appearing before us to answer the said charge, and having heard the said charge, and in the presence of the said T. E. being called upon by us to shew cause why they should not be convicted for unlawfully entering into such combination as aforesaid, and having nothing to say, nor being able to make out any thing to defend themselves, thereupon, *by the oath of the said T. E.* are convicted, &c. *on the day and year aforesaid.*— Against this Conviction it was objected, that no Evidence is stated to have been given in the presence of the Defendants; only that the charge was *read* to them in the presence of the witness. The Court declared this objection to be fatal. *Lord Mansfield*, the Evidence ought to be taken over again in the defendant's presence, unless he confesses: now here they do not confess before the Justices, and the Evidence only is, that they had formerly confessed this combination to the witness. In the Case of Rex *v.* Baker, the Court went upon the supposition that the defendant was present when the Evidence was given, and did actually hear it given. *Mr. J. Denison* concurred. The Evidence, he said, must be given in the *presence* of the Defendant, that he may have an opportunity to cross-examine. In the case of Rex *v.* Baker, nothing wrong appeared upon the face of the Conviction: and therefore the Court supposed and took it to have been rightly transacted. *Mr. J. Wilmot* agreed that the witnesses ought to be examined in the presence of the party accused; but here, he observed, it appears plainly enough that Eaton the witness was not so examined in their presence (*e*).

Upon a comparison of this with the foregoing Case of

(*e*) R. *v.* Vipont, 2 Burr. 1163.

Rex *v.* Baker, from which the Court did not express any dissent, the only difference appears to be, that in that Case the whole, viz. Information, Examination, Appearance, and Judgment being in *the present tense*, and one day only mentioned, it was considered as sufficiently indicated by the Conviction that the whole passed at one and the same, and not at several different times, and of course that the Defendant must have been present during the examination: whereas in the latter Case of Rex *v.* Vipont, though one day only is mentioned, it is stated first, that T. Eaton *deposed* (in the past tense), and this being also the *complaint* at which the Defendants would not in ordinary course be present, the Court considered this statement as clearly indicating that the Defendants were *not* present at the time of the alledged deposition, and as therefore excluding the presumption which was justified by the circumstances in the Case of Rex *v.* Baker. With this consideration the two cases do not appear to be in contradiction to each other, for the presumption in the former case is qualified with the condition that nothing appeared in the state of the proceedings inconsistent with it. That the Court in the decision of Rex *v.* Vipont, had this distinction in view is obvious from the consideration that they do not appear to have had any intention of questioning, much less of overthrowing the principle adopted in the former case, which it is likewise to be observed, has constantly stood its ground since, and been followed up by subsequent determinations, as the instances adduced in the sequel attest:

Presence presumed on the same day.

By these it will appear to have now become an established maxim in the construction of Convictions, that when the whole proceedings have taken place in one day, it will be presumed that the Evidence was given in the Defendant's presence, provided there be nothing in the statement to contradict that supposition. The following Cases will be found to concur in establishing this Rule: viz.

1. The Defendant *Aiken* had been convicted on the Hawker's and Pedlar's Act, and Sir. F. Norton objected to the

the Conviction, that the witness was not examined in the presence of the Defendant: and therefore he did not hear the Evidence, as far as appears upon this Conviction. But the Court were unanimously of opinion that the objection was not well founded, for it may be *presumed* that the witness was examined in his presence *(f)*.

This brief note does not enable us to judge in what respect the case was distinguishable from that last recited; it appears however from another part of the case, (what is not shewn in Rex *v.* Baker,) that the Defendant denied the fact, and so far it is a more satisfactory authority than that case.

The principle however is more explicitly recognized in a later Case; where, in the Conviction the Appearance of the Defendant and the Evidence were set out as follows: viz. "afterwards, upon the aforesaid day, and in the year aforesaid, he the said Samuel Kempson having been duly summoned, appeareth, and is there present before me in order to make his defence against the said Charge and Information, and having *heard* the same, is asked by me the said Justice, if he can say any thing for himself why, &c. who pleadeth that he is not guilty of the said offence; nevertheless *on the said 14th day of* September, one credible witness *R. C.* now cometh before me the said Justice, &c. and upon his oath deposeth and saith, that, &c. &c. and thereupon the said S. Kempson before me, &c. by the oath of one credible witness aforesaid, is convicted of the said offence."—Upon an Exception that the Evidence did not appear upon the face of the Conviction to be given in the presence of the Defendant, it was adjudged that enough appeared to shew that the witness was examined in the presence of the Defendant; for it must

(f) R *v.* Aiken, 3 Burr. 1785. The case of R. *v.* Baker, 2 Str. 1240, is added in the text, as if that was used as an authority in the decision. The reporter himself makes a reference in the margin to R. *v.* Vipont, 2 Burr. 1164.

be supposed that all that passed was at one and the same time *(g)*.

Finally, the question was set at rest by the following case, which has ever since been considered as a binding authority:—A conviction on 5 Ann. c. 14. s. 4, stating (according to the precedent, 2 Burn. 308.) the information on the *8th* of *December*, the defendant's appearance and denial of the charge on the *9th*, and that on the *said 9th* of December the witness deposed upon his oath to the fact charged, but without *expressly* stating the deposition to have been in the defendant's *presence*. The principal question discussed related to another point; but after that was disposed of, the case stood over on a doubt entertained by the Court, whether it sufficiently appeared that the evidence was given in the Defendant's presence. But afterwards Mr. J. Ashhurst said, that in looking into the authorities, they found it to have been held, that in cases like the present, the Court would intend, that as the whole proceedings are stated to have passed on the same day, the evidence was given in the presence of the Defendant *(h)*. It may be collected from the expressions of Mr. J. Buller, and Mr. J. Grose, that their concurrence in this opinion was influenced, and that of the latter almost wholly founded upon a deference to the precedent given by Dr. Burn, and the inconvenience of overturning it.

Notwithstanding the censure frequently cast upon this decision, particularly by Lord Kenyon *(i)*, it has ever since

(*g*) R. *v.* Kempson, Cowp. 241. These words are cited by Mr. J. Buller, in the case of R. *v.* Thompson, 2 T. R. 18, 23.

(*h*) R. *v.* Thompson, 2 T. R. 18.

(*i*) Lord Kenyon never failed to express a strong disapprobation of this decision, which passed before his accession to the Bench. In the first instance reported, which raised the point after he sate there (R. *v.* Burwell, 6 T. R. 75.) he remarked that the Conviction there discussed was defective, because it did not appear that the witness was examined in the defendant's presence; and alluding to the precedent in Burn, declared it to be erroneous in this particular. As that case however was disposed of upon another point, no decision took place upon this, and the above can only be considered

since prevailed. Thus, where the objection was taken to a Conviction stating the Defendant's appearance and plea of not guilty on the 16th of September, and that on *the said* 16*th*, a credible witness swore, &c. Lord Kenyon declared that though he should have had great doubts if it were *res integra*, yet as it had been so lately decided in The King *v.* Thompson, that where the evidence is given on the same day that the defendant appeared, it will be intended that it was in his presence, and as that precedent might have guided the Magistrates since, he was inclined to support the Conviction; which was accordingly affirmed *(k)*.

Thus also the defendant was stated to be summoned and to have appeared on the 4th of June, 1805, and the Conviction was signed and sealed on the same 4th June, 1805: upon this statement it was agreed that the proceedings were to be taken as one continued act from the appearance to the Conviction; therefore that the evidence was to be presumed to have been given in the Defendant's presence, since his departure during the continuance of the transaction would not be intended *(l)*.

Though at a different place.

2. In the foregoing cases the proceedings appeared to be all at the same place, as well as on the same day; but the same presumption has been admitted where the appearance was at one place, and the deposition of the witness was stated to be at another, the whole transaction being on the same day, as in the following instance: Where, the Conviction after reciting the information at *Kelling* in the county of Norfolk, proceeded to state, that afterwards on a subsequent day, 27*th of October*, the defendant having been summoned appeared and denied the charge; and that on the said 27*th of October*, at *Holt* in the said county, I. C. the witness upon his oath

considered as Lord Kenyon's individual opinion; which (see 1 East. 648, n.) seems to have remained unaltered as to the propriety of the decision in The King *v.* Thompson, though in R. *v.* Lovet, 7 T. R. 152, he admitted that the rule must be sustained.

(*k*) R. *v.* Lovet, 7 T. R. 152.

(*l*) R. *v.* Crisp, 7 East. 589, 3d Resolution.

swore,

swore, &c. The objection to the want of a sufficient allegation of the Evidence being given in the defendant's hearing was over-ruled. Lord Kenyon said, it will be understood that the summons to appear, and the appearance, were at Kelling, the place first mentioned, and the objection as to the defendant's presence not being alledged, he said, has been over-ruled in former cases, which, notwithstanding the introduction of another place *(Holt)* must govern the present (*m*).

The maxim however must be understood with this qualification, that nothing appears upon the face of the Conviction to contradict the intendment. For where it appears, that in fact the evidence was given in the defendant's *absence,* the objection, it is presumed, would be valid, although the proceedings were stated to be all on the same day.

Witness stated to be re-sworn where necessary.

3. Where the information and deposition are on a day prior to the defendant's appearance, and he denies the charge, it must appear not only that the witness was again present to confront the Defendant, but that he was *re-sworn* in his presence.—Thus, a Conviction after setting forth the information on the 14*th of September,* proceeded to state the deposition on oath of the fact by E. Tye, a credible witness, on the same 14th day; " and *afterwards* on *the* 15*th day* of September, the Defendant appeared, and having heard the said charge, and the aforesaid deposition of the said E. Tye having been read over again to the said E. Tye in the presence and hearing of the Defendant, and the said witness having again affirmed his said deposition to be true in the presence and hearing of the said Defendant, he denied the Charge, but did not produce any evidence in his defence, and was thereupon convicted."—This Conviction was quashed; it being held that the witness ought to have been *re-sworn* in the Defendant's presence *(n).*

(*m*) R. *v.* Swallow, 8 T. R. 286, *per* Lord Kenyon.

(*n*) R. *v.* Crowther, 1 T. R. 126.

The

The reason of requiring the witness to be re-sworn is, that the Defendant may have an opportunity which the law allows of cross-examining the witness: and consequently it is unnecessary where the charge is confessed. For where that was the case, it was held sufficient that the depositions taken on a former day were stated to be *read over* again in the presence of the Defendant, without its being also stated that the witnesses were re-sworn to the truth of them *(o)*.

Not necessary where defendant confesses.

Section 7. Of setting out the Evidence at Length.

As the record of Conviction is intended to exhibit an exact account of the Magistrate's proceedings, and to shew that the judgment has been legal and regular, it is most material that the facts should be fully disclosed, in order that the judgment upon them may appear to be well founded. Accordingly it is now, though contrary as it seems to what was formerly held *(p)*, established as a *general* rule, with one exception only, that the evidence must be set out particularly, and that sufficient proof must appear upon the face of the record to sustain every material part of the charge, and to warrant the adjudication.

General Rule.

It is laid down by Lord Mansfield as an undoubted maxim *(q)*, that in a Conviction the evidence must be set out, in order that the superior Court may judge of it. It has been likewise solemnly recognized as a known distinction between Orders and Convictions, that in the former it is allowed to state the result only of the evidence, whereas the same mode of stating it would be undoubtedly bad in a Conviction *(r)*. In a very early case

(o) R. *v.* Hall, 1 T. R. 320.
(p) 1 Salk. 369.
(q) 1 Burr. 1163.
(r) R. *v.* Lloyd, 2 Str. 999, *ante*, p. 97. The earliest case which mentions the point as expressly decided,

case *(s)*, the Conviction was quashed, because the Evidence was not set forth. It was only laid that the witness was sworn *de veritate præmissorum*, and that it did appear from what was sworn to the Justice that the defendant was guilty; but, it was said, it ought so to have appeared to the Court.

Again, a Conviction for taking pilchards *contra formam statuti* was quashed, and the reason assigned was, because the witness swore generally that the defendant was guilty of the premises; for that is taking the law upon himself *(t)*. Likewise, a Conviction on the Candle Act was set aside because the evidence was not set out, it being only alledged that the offence was fully and duly proved *(u)*.

Afterwards, the law was declared in the clearest manner upon solemn deliberation in the following Case *(v)*: This was a conviction on 19 Geo. 2. c. 21. s. 13, of a clergyman for neglecting to read the Act against profane swearing. The Information contained a complete charge of the offence, alledging the defendant to be the Parson, and to have officiated as such on the days mentioned in the Act of Parliament, and that he neglected to read, &c. as the Act required. After reciting a Summons and non-appearance of the Defendant, it went on to state in substance as follows; viz. "That thereupon the Justice pro-

decided, contains indeed a resolution directly opposite to what is affirmed in the text. It is there said, that exception was taken to a Conviction on 13 Car. 2. c. 10, in which the Information was, that Defendant, with greyhounds chased &c.; and the witness is stated to have made oath *de veritate præmissorum*. The objection, it is said, was over-ruled, the Court holding, "that *de veritate præmissorum*," without setting out the Evidence specially, was well enough. R. *v.* Pullen, 3 W. and M. 1 Salk. 369. But as this case stands alone, contradicted by subsequent and uniform authorities, and has been declared not to be law, (4 Burr. 2064) it is scarcely necessary to notice it further here. The very next case which occurs, R. *v.* Green, 10. 210. 12 Ann. 10 Mod. 212, is an authority the other way, and proves that this case had not been considered as a sound decision.

(s) The Queen *v.* Green, 10 Mod. 212.

(t) R. *v.* Baker, 1 Str. 316.

(u) R. *v.* Theed, 2 Str. 919, 2 Barnard. 16. 73.

(v) R. *v.* Killett, 4 Burr. 2063.

ceeded

ceeded to examine into the truth of the said charge, *and the same as set forth being duly proved* before him, as well by the oath of R. E. as of G. C. a credible witness, he adjudged the defendant guilty, and convicted him in £5." The Court held, that the evidence ought to be set out. They said this was clearly so settled in *Rex* v. *Bissex*, Trin. 1756, 29 & 30 Geo. 2, in this court: whereas here it is only said, the same as set forth being duly proved. They referred to *The Queen* v. *Green (w)* as having decided that it ought to appear to the Court from the nature of the Evidence specially set forth, that the defendant was guilty, and to the case of *Rex* v. *Vipont (x)*, as agreeing in that doctrine. So it was also, they said, settled in the case of *Rex* v. *Lloyd*, M. 8 Geo. 2, reported in *Strange (y)*, and relied on by Mr. J. Denison in delivering the resolution of the Court in the case of *The King* v. *Bissex*; where he declared that the case of *The King* v. *Pullen* (of oath made *de veritate præmissorum* generally without setting it forth specially, being sufficient in convictions) is not law now, it having been since that Case quite settled, that upon a Conviction it is necessary that the Evidence should be set forth, that the Court may judge whether the Justices have done right. But upon an Order it is not necessary, because the Court will presume they have done right *(z)*.

The principle of the foregoing is taken as established law in a more recent Case; which was as follows:—A Conviction on the Mutiny Act, s. 71, for refusing to quarter military officers. The Conviction ran in these terms: "Whereupon witnesses being examined on oath, and the said *W. Read*, the defendant, having neglected and refused to attend, after being duly summoned to answer such complaints and informations, and having duly considered on the Evidences, I, the said *W. D.* (the

(*w*) *Ante*, p. 120.
(*x*) 2 Burr. 1165.
(*y*) 2 Str. 999, *ante*, p. 97.
(*z*) 4 Burr. 2064.

Justice)

Justice) am of opinion that the said *W. Read* did refuse to find such proper quarters for, &c. as by the said Act are required, and I do accordingly adjudge and convict," &c. The Court, when the objection was mentioned to the particular Evidence not being set out, without hearing any argument, declared that the question was not open, and that the Conviction could not be supported *(a)*.

From this concurrence of express authorities, it can no longer be doubted that the Rule so often and so solemnly recognized is to be regarded as the *general* law; and that the single exception which has been admitted with regard to one class of Convictions must be considered as an anomaly which cannot be drawn into any general consequence, nor afford a precedent for any other class of Convictions than that to which it particularly relates.

Exception, Convictions on *Game* Act.

The Cases alluded to are all upon the Game Act, 5 Ann. c. 14. The first is that of *The King* v. *Hartley*, which is as follows:

The Conviction was on 5 Ann. c. 14, for *keeping* and *using* a *greyhound* to kill and destroy the game *(b)*. It was objected to on this ground, viz. that it was not fully and sufficiently stated that there had been a using of the greyhound, that is, how and in what manner, and for what purpose; that the witness took upon him to judge what is game, which is a matter of law, but that regularly he should specify the animal destroyed for the Court to judge of. Lord Mansfield:—"Convictions must certainly be precise, that the Court may see whether the offence committed falls within the jurisdiction of the Magistrate; and whatever the consequences are, they must be quashed if not so. In this Act two offences are described, a keeping and a using; and the Legislature mean that there may be a keeping to destroy, &c. which is not necessarily to be

(*a*) R. v. Reed, Doug. 469.
(*b*) A copy of the Conviction itself is subjoined in the Appendix.

proved

proved by an using to that purpose. The *keeping* therefore of a thing prohibited being an offence under the Act, it is necessarily *primâ facie* Evidence of a keeping for the purpose prohibited; and it is incumbent on the Defendant to shew that it is kept for another purpose, as that in the present case it is a house dog, a favourite dog, or a particular species. The description cannot be more precise, unless some particular instance of using is shewn, which, if keeping of itself constitutes an offence, cannot be necessary *(c)*."

It cannot fail to be remarked, that the judgment in this case is grounded upon the circumstance that a keeping alone is sufficient to support the Conviction, agreeably to what had been before decided *(d)*; and that the mere offence of *keeping* does not admit of a more particular proof. In this respect therefore there is an obvious and fundamental distinction between this and the case of keeping and using a *gun* for destroying game; *that* being an engine which may be kept for an innocent purpose, and the keeping of which alone, it has been decided, is not enough to justify a Conviction for the penalties *(e)*.

Notwithstanding this difference however, the last mentioned Case has been considered as a conclusive authority in support of the same general mode of stating the Evidence in a Conviction for keeping and using a gun. The Case is as follows:

Conviction on 5 Ann. c. 14, which (pursuing the form in Burn's Justice) *(f)*, recited the Evidence in these words, after the plea of Not Guilty: "Nevertheless R. T. one credible witness, upon his oath saith, that Thompson (the Defendant), on the 7th day of December, in the year aforesaid, at &c. (negativing the qualifications in 22 & 23 Car. 2.) did keep and use a gun to kill and destroy the

(*c*) R. *v.* Hartley, Cald. Cas. 175.
(*d*) R. *v.* Filer, 1 Str. 496.
(*e*) R. *v.* King, 1 Sess. Cas. 88, cited in R. *v.* Filer, 1 Str. 496.
(*f*) 2 Burn. 308.

game."

game." A doubt was suggested by the Court itself, whether the Evidence were sufficiently set out. When this question came to be argued, it was not disputed that by the general rule it was necessary to state the Evidence particularly, but it was insisted that it was sufficiently stated in this Case, and that the same form of Conviction had been almost universally used on similar occasions (*g*). Two of the learned Judges, *Ashhurst* and *Buller*, declared themselves of opinion that if this had been a new Case the Conviction could not have been supported; but considering that the precedents were usually in this form, and that the Conviction in *The King* v. *Hartley* (*h*) was similar to the present, they thought it better to support it than overturn so many precedents. *Mr. Justice Grose* strongly dissented, declaring his opinion to this effect: "The Justice should return particularly all the facts, and the conclusion in the Conviction; first the information, the summons, the appearance or default; that the Information was read to the Defendant; that he was asked what he had to plead, the whole of the Evidence particularly, and the adjudication. The witness should swear to the *facts* and not to the *law:* and in this case it is almost incredible that the witness should have sworn in the manner in which this Evidence is set out; the Justice should not have received it, if it were offered in this general way, but should have questioned the witness as to the manner in which this gun was kept, for what purpose it was used, and what particular kind of game he killed or attempted to kill. All these particulars should have been specially set forth, in order that we might judge whether they constituted an offence

(*g*) This position, though adopted by the Court, Mr. Boscawen justly observes may be questioned. In R. *v.* Kempson, Cowp. 241, and R. *v.* Crowther, 1 T. R. 125, the fact seems to be otherwise. In the latter the act of shooting a partridge is expressly sworn to. There is also a precedent among those of Mr. Boscawen, tit. Game, said to have been settled by Mr. Dunning, in which the fact is circumstantially described.

(*h*) *Vide supra*, p. 122.

within

within the Act. Here the witness swore to the law, namely, that the Defendant kept and used a gun to kill and destroy the game *(i)*." On a subsequent day, however, *Mr. J. Grose* signified, that as the precedent in *Burn* (though it seemed to him a faulty one) had been recognized in the case of *The King* v. *Hartley*, he should agree in supporting it on account of the inconvenience of overturning an established precedent *(k)*.

Since this decision, the same form has been supported in Convictions for the particular offence there specified, though the Court has generally taken occasion to express their disapprobation of it.

In a later case *(l)*, a Conviction on the same statute, setting forth in the deposition, " that the Defendant on such a day did keep and use a certain dog called a setting dog, and also a certain engine called a gun to kill and destroy the game," was not objected to: but a criminal Information was moved for against the Magistrate for not having stated all the Evidence. In fact, Evidence had been given by the Defendant to shew that he was game-keeper of a manor, which the Magistrate thought insufficient. The Court, after hearing affidavits on both sides, came to an opinion that the Magistrate had not acted corruptly; but might have been misled by the precedent in *The King* v. *Thompson (m)*, and therefore did not grant the information: but at the same time they expressed in strong terms that it is the duty of Magistrates in all cases to state the whole of the Evidence, and not merely the result of it.

The determination however of the Court to abide by the form above mentioned in Convictions of this particular

(*i*) R. *v.* Thompson, 2 T. R. 18.

(*k*) *Ib.* 24. It is observable that at the time when this case (R. *v.* Thompson) was decided, Trin. 27 Geo. 3, Mr. Caldecott's report of R. *v.* Hartley had not been published; nor does it appear that any note or report of the argument and reasons of the judgment was under the inspection of the Court at the time.

(*l*) R. *v.* Lovet, 7 T. R. 152.

(*m*) *Supra*, note (*k*).

class,

class, has been finally declared in a recent Case where the question was brought forward for the avowed purpose of obtaining a re-consideration of the former decisions. In that Case, the Evidence ran in terms similar to those used in *The King* v. *Thompson*, viz. "That the Defendant, on the day and place there mentioned, did keep and use a certain engine called a gun to destroy the game." All the arguments against this general mode of stating the Evidence were recapitulated; and all the instances in which it had been censured by the Court were collected and urged. But by Lord *Ellenborough*:—All the arguments against this form of Conviction were discussed and considered in *R.* v. *Thompson*, and though the Court disapproved of it, still they held themselves bound to support it. The point therefore having been decided again and again, we cannot have it discussed any more *(n)*.

These Cases, while they admit an exception in one particular class of Convictions, afford the strongest confirmation of the general Rule. And as the Court has been careful in the foregoing Cases to ground their judgment upon precedent alone, it is almost superfluous to add, that Magistrates ought not to be misled by these instances to adopt the same general mode of stating the result of Evidence instead of the Evidence itself in Convictions for any other offence than that to which those Cases are confined. Mr. Boscawen therefore has properly cautioned Justices of the Peace against relying on the case of *The King* v. *Thompson* in framing any other Conviction than those under the same Act of Parliament; for, he observes, the Court will hardly extend the authority of a Case determined upon precedent alone, and contrary to the general principles so clearly laid down by them, to any case that does not fall exactly within the letter of it *(o)*.

(*n*) R. v. Pearse, 9 East. 358. (*o*) Bosc. 108.

Before

Before we conclude this subject, it may be proper further to take notice, in the words of Mr. Justice Le Blanc in the last mentioned Case, that if a Magistrate endeavour to shelter himself from detection by merely stating the offence in the terms of the Act of Parliament as if it were the legal effect of the Evidence, when the Evidence itself would not warrant the conclusion, he subjects himself to a criminal information upon a proper case laid before the Court *(p)*.

And in the Case of *The King* v. *Lovet* before cited *(q)*, though the Court did not think fit to grant the Information, yet they thought the charge sufficiently serious to entertain the application; and it was only upon hearing the Magistrate's affidavits that they discharged the rule, supposing him to have been misled by precedent. In all cases therefore where any Evidence is given by the Defendant, it will be prudent in Magistrates to state fully in the Conviction all the material Evidence on both sides, rather than incur the hazard of a proceeding, which even upon its most favourable termination must be attended with certain inconvenience and expence. In so doing they will act most agreeably to justice as well as to the principles of law. For even in those cases on the game laws where a more concise statement has been tolerated, it has generally been censured by the Court: while on the other hand, a Conviction for keeping and using a greyhound to destroy game, in which not only the particular proof of the fact by the witness swearing to having seen the Defendant course and kill a hare, but also the Evidence for and against his qualification were recited, was greatly approved and recommended by the Court as a precedent to be followed in future *(r)*.

(*p*) R. *v.* Pearse, 9 East. 359.
(*q*) *Ante*, p. 125.
(*r*) R. *v.* Clarke, 8 T. R. 220. *Vide* also, R. *v.* Davis, 6 T. R. 177, and R. *v.* Stone, 1 East. 640, where the fact of killing a pheasant was particularly stated.

Section

Section 8. *Of the Proofs necessary to be stated.*

Having shewn the propriety of stating the Evidence at length, we are in the next place to examine what Evidence is necessary, in order to support the adjudication. We have already seen, in treating of the offence as described in the Information, what is requisite to constitute a legal and sufficient charge: it need only to be repeated here, that the Evidence must support that charge by proof of every material fact, assigning a specific *date* and *place* to the offence. The degree of evidence, and the credit due to the witnesses, provided it be legally admissible, is exclusively for the judgment of the Magistrates; and the reason for requiring it to be set out in the Conviction, is not to canvass their conclusion, but to ascertain that the premises upon which they have proceeded are legal.

Of what facts proof must be stated.

Of fact within jurisdiction.

1. First then, the fact proved must appear to be within the Jurisdiction of the convicting Magistrate.—Thus, a Conviction before the Lord Mayor of London for selling coals short of measure, contrary to 16 and 17 Car. 2. c. 2, was quashed, because it was not proved that the coals were sold in London, or the liberties thereof, without which the Lord Mayor has no jurisdiction (*s*).

So also in a Conviction for illegally insuring lottery tickets against 22 Geo. 3. c. 47, the Information laid the fact in Great Queen Street, in the county of Middlesex; and the Evidence was as follows: "T. J. deposeth, that on the 10th day of May he insured personally with the said Jefferies (the Defendant) No. 18,433, and paid 2*s*: 9*d*. to recover one guinea if drawn on the third day of drawing." It was objected, that the Evidence did not prove the offence to have been committed in the place

(*s*) R. v. Highmore, 2 Lord Raymond, 1220.

laid

laid in the Information, or within the jurisdiction which it ought to do wherever the jurisdiction is local. The Court were of that opinion, and the Conviction was quashed for that reason *(t)*.

The strictness with which this proof is required is exemplified by the following Case: Strictness as to Locality.

This was a Conviction on 41 Geo. 3. c. 38, against a manufacturer for combining to refuse work. The Act gives a general form for the Conviction, in which it is merely required to state the offence, without any thing pointing to the date or place. The offence was in substance stated in the following manner, viz. "That the Defendant on a certain day (he being then employed by G. S. &c. of Wallington, in the county before mentioned, in the trade of a calico printer carried on by them at Wallington aforesaid, and whilst he was such workman and so employed as aforesaid) refused to work with one S. B. then also employed by G. S. &c. in the said manufacture carried on by them at Wallington aforesaid." This Conviction was quashed because it was not expressly averred *where* the refusal was given, so that it did not appear to be within the jurisdiction of the Magistrate. Lord Ellenborough in delivering the judgment observed, that the words *then and there* were not to be exploded altogether, and they had sometimes more meaning than was commonly imagined *(u)*.

No presumption from the manner of describing the fact can supply the omission of a direct averment of its being within the requisite jurisdiction. A strong instance of the strict application of this maxim is found in the following Case; which arose upon a Conviction on 5 Geo. 3. c. 14. s. 3, for killing fish in a private stream. The Justices were described as of the county of Warwick, in which the Conviction was made. The Evidence set forth that Locality not supplied by *intendment*.

(*t*) R. v. Jefferies, 1 T. R. 241. (*u*) R. v. Hassel, 13 East. 142.

the Defendant was seen to draw a draught net in the river or stream called Thame, "which runneth *between* Bromford-Forge, in the parish of Ashton, in the county of Warwick, *and* Castle Bromwich in the said parish of Ashton in the said county of Warwick." The Conviction was quashed because the place where the Defendant fished was not positively stated to be in the county of Warwick, but only between two places situated in that county. The Court said, they could not presume the place itself to be within the jurisdiction of the Magistrates. It must expressly so appear: but it did not necessarily follow that the intermediate course of the stream was in the same county with the two *termini (v)*.

To the same effect is the following:—Conviction by the Justices of Middlesex, for having in the Defendant's *custody and possession* a private still, contrary to 19 Geo. 3. c. 50. The deposition contained as follows, viz. that the witness went to the house of the defendant at Edmonton, in the county of Middlesex, and that he found *in the garden of the said house* a private still just worked off, &c. This was held to be bad, because it did not appear that the garden in which the still was found was in the county of Middlesex. For, the Court said, the house might be in one county and the garden in another; and it did not therefore appear that the offence was committed within the jurisdiction of the convicting Magistrate *(w)*.

Not sufficient to aver in the adjudication.

Neither is it sufficient that the place may be collected by intendment from the adjudication of the Magistrate: it must expressly appear out of the mouth of the witness. Thus, in a Conviction, where the *place* of committing the offence no otherwise appeared than by the Justice's awarding the penalty in these terms, viz. "to the poor of the parish of C. in the county of *Kent*,

(v) R. v. Edwards, 1 East. 279. (w) R. v. Chandler, 14 East. 282. 274.

within

within which parish the aforesaid offence was committed;" this was held to be insufficient; for though the Magistrates stated themselves in the Conviction to be Justices of the county of *Kent*, yet the Court said their jurisdiction (meaning the fact of the offence being within that county of which they were Justices) must appear otherwise than out of their own mouth *(x)*.

Time of offence. Evidence of.

2. We have stated *(y)* that the Evidence ought also to fix a certain date to the offence in respect of *time*. To support the Conviction it is absolutely necessary that there be proof of an offence committed on a day prior to the Information; which must be shewn positively and not by implication; otherwise the Conviction will be imperfect. An instance of that defect is contained in the following Case:—A Conviction on 12 Car. 2. c. 23. s. 31, for having concealed vessels used in distilling contrary to the Act. The Information appeared to be given on the 30th of March. The Defendant's appearance was on the 5th of April, on which day the witness swore "Quod prædictus F. *modo habet et custodit eadem duo et concelata vasa;*" whereupon the Defendant on the same day was convicted. To this it was objected, that the offence proved was the having concealed vessels on the 5th of April, which must be a different offence from that mentioned in the Information of the 30th of March, because though he had the vessels on the 5th of April he might not have had them on the 30th of March, and therefore that the Evidence not

Must be prior to Information.

(x) R. v. Johnson, 1 Str. 261. The same case is cited in Barnardiston, 383, with a difference only as to the county, which is there said to be Middlesex, instead of Kent. The point decided is not very perspicuously marked in Strange, but is explained by the note in Barnardiston, which states it thus: viz. Objection, that the offence does not sufficiently appear in the place where the Justices belonged to. It no otherwise appeared that the offence was in Middlesex than in the judgment; which was to forfeit a certain penalty to the poor of the parish of *Chelsea infrà quam* the offence was committed; and upon this exception the Conviction was quashed.

(y) *Ante*, p. 128.

being conformable to the Information, there is a Conviction without an Information. Holt, C. J.—"The Evidence is of a fact subsequent to the Information, and though *eadem* may be Evidence that he had them at the time of the Information, yet Convictions should be certain and not taken upon collection." And as to what had been urged that the Justices may proceed without complaint or information, or that if that be necessary, they may proceed upon it *instanter*, the Chief Justice answered, "that there must be an Information or complaint; and though a Conviction upon an Information *instanter* may be good, yet it ought then to be declared to be made so, and not to be grounded as here upon an Information which is not proved, the Evidence being of a fact subsequent to it; but if it had been of a preceding fact it had been good *(z)*."

As a certain time is usually limited by statute for a summary prosecution before Justices of Peace, it is necessary on that account also to fix the offence to a certain date, in order that the proceeding may appear to be within the prescribed period. For if that be not shewn either by positive proof of the day or by express reference in the Evidence to a date previously mentioned, the Conviction cannot be supported; as is exemplified in this Case:—A Conviction on the Malt Act, 42 Geo. 2. c. 38. s. 30, stated an Information to have been exhibited on the *29th of May*, 1805, charging "that the Defendant within three months now last past did wet certain corn, &c." The Evidence stated was, that the witness on the *22d of May* (without mentioning the year) found a floor of malt then in the operation, &c. (so proceeding to state the fact of the offence). The Conviction was quashed on account of the defective manner in which the date was alledged in the Evidence. Lord *Ellenborough*—"The Evi-

(z) R. v. Fuller, 1 Lord Raymond, 510.

dence

dence ought to appear to support the Information; and the Justices should either have stated the 22d of May 1805, if they so understood the witness, or if they had any doubt should have inquired more particularly of him the date of the fact. Here the date of the year neither appears expressly nor by any words of reference to any certain date. We cannot supply the omission of the Justices. As it stands, the offence does not appear to have been committed within three months before the prosecution commenced, which is necessary to give them cognizance *(a)*."

It is sufficient however to refer to a date already mentioned and ascertained. Thus, where a Conviction was dated the 4*th* of June, and the Information, exhibited the 29*th* of May, charged the offence within three months now last past, viz. on the 12*th* of May *now last past*, it was held sufficient that in the Evidence the fact was sworn to have happened on the *said* 12th of May *(b)*.

Between such and such a time, good.

It has already been noticed, that in respect to the date of the fact as laid in the Information, it has been held sufficiently certain to charge that it was committed *between* such a day and such a day *(c)*: and there is one authority, here subjoined, for admitting the same latitude in the *Evidence*.

This was a Conviction for deer-stealing *(d)*. According to the record of conviction which remains filed in the Crown Office, the Evidence, (which is in the same words as the Information) states the killing, "*inter ultimum diem Julii & sextum diem Augusti et inter duodecim menses ante informationem*:" the Judgment is, "*quod convictus sit de præmissis.*" To the objection for want of certainty

(*a*) R. *v.* Woodcock, 7 East. 146.
(*b*) R. *v.* Crisp, 7 East. 390.
(*c*) *Ante*, p. 61.
(*d*) R. *v.* Hugo Simpson, 10 Mod. 248. The Conviction is filed in Hilary Term, 12 Anne.

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in the proof, it was answered that it was next to impossible for the witness to be able to swear to every day, and it is not to be intended that there were more deer stolen than one; and moreover Eyre, J. said, that it had been sufficiently settled in Chandler's case *(e)*, to be well enough.

Objection to.

It should not however pass unobserved, that such uncertainty is open to more serious objections in this part of the Conviction than where it is confined to the Information, nor does it seem defensible by the same reasons. And it may be suggested that as the admissibility of this loose mode of proof contrary to analogy and principle, rests upon one or at most upon two instances, a prudent Magistrate might hesitate to convict without testimony of a more precise date.

Manner of setting out Evidence.

3. Having explained the manner of describing the offence in Evidence as to the place, time, &c. it now remains briefly to point out the proper manner of setting forth the proofs of the criminal matter. As the body of the offence, which is afterwards to be proved, must be fully described in the Information, what relates to the substance of the description has been sufficiently treated of under that head *(f)*. All that is required in regard to the *evidence* is, that it substantially supports the facts there charged.

(e) *Ante*, p. 62. It does not however appear by the reports of that case, that the objection was to the Evidence: it is only said to have been so charged in the Information. It may be observed that the mention of a precise day is less material in the Information, because even if stated, the informer is not tied up to that day, 1 Salk. 369. 1 Lord Raymond, 582. Nor will the generality of the *charge* embarrass the party in his defence, so long as the fact must in proof be fixed to a certain day; for if not prepared immediately with evidence applicable to that particular day proved, he may require time to adduce it, which the Magistrate would be bound to grant. But on the other hand, if the same vague and uncertain description is admitted in Evidence, it is manifest that the defendant cannot have the benefit of proving his innocence, without being driven to the hardship of accounting for every day within the time specified, which, as the interval chosen may be of indefinite latitude, might be very difficult for him to do.

(f) *Vide supra*, p. 65. *et seq.*

The

Information and Evidence not to be mixed.

The Information and the Evidence ought to be kept perfectly distinct, and it will be an objection, if they be so confounded as not to let it appear distinctly what is Information and what is Evidence *(g)*.

That every positive ingredient in the offence must be repeated in the *proof*, and is not to be taken by reference merely to the Information, appears from the following instance of a Conviction, on 6 & 7 Will. 3. against profane swearing &c. which Act rates the punishment according to the degree and age of the party. A Conviction for this offence, it was held, must recite the proof of the defendant's age, viz. above 16 years, for that is an ingredient in the offence; and it was held moreover, that this proof could not be supplied by intendment, though the defendant was properly described in the Information, and the witness in swearing to the fact spoke of the *said* defendant *(h)*.

Evidence to *negative* exemptions, whether necessary to state.

4. It has been stated that every positive fact necessary to constitute the offence charged, must be supported by the proofs. A question here arises whether it be necessary in the Evidence to notice the *negative* allegations of the charge. It has been seen, that in describing the offence in the information, all the qualifications and exemptions annexed to the offence itself or to the person of the offender must be enumerated and expressly negatived. But whether the Evidence must also *particularly* negative those properties, or whether a *general* negative to that effect

(*g*) R. *v.* Green, Cald. 391.

(*h*) 7 East. 397. See the observations there made by Lord Ellenborough and Mr. J. Lawrence, on the case of R. *v.* Tuck, (2 Lord Raymond, 1386. 1 Sess. Cas. 354.) in which it is reported to have been held, that the facts of the defendant's being a gentleman, and above 16, were sufficiently proved by using the words, "the said I. T." in the Evidence, the information having already described him as a gentleman, and above the age of 16. Those learned Judges declared the law to be otherwise, and signified that there must be some mistake in the report of that case at least as to the age; though Lord Ellenborough inclined to think that the description of gentleman might be adopted into the Evidence by reference to the information.

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be sufficient, or again whether even *that* be requisite, are questions that have not been fully settled: the only Case reported, in which the point came directly in issue, having been left undetermined by reason of an equal division of opinion among the Judges of the Court of King's Bench.

Cases. The first case relevant to this point, is that of The *King* v. *Marriott*, in 4 Geo. 1, on the statute 5 Ann. c. 14, for keeping a greyhound: there it was merely stated, that one W. T. came and *informed* that the Defendant, "*not being a person qualified*" &c. did the act complained of: and though the Conviction is not reported at length, it sufficiently appears by the expressions of the Judges, particularly of Eyre, J. that the depositions of the witness were in the same form, viz. that the defendant *existens persona minime qualificatus* did on such a day, &c. commit the offence specified. It was said by *Parker*, C. J.—That *existens* should be the conclusion of the Justice, and not the words of the witness; for he ought not to swear generally that a man is not qualified, and such a general proof will not be good. This is only an invention, to support a conviction in general terms, which would be bad if the particular facts were alledged. *Eyre*, J.—"Though this is only the recital of the Justices, we must intend the evidence to be taken in the same manner. The witness cannot be indicted for perjury in swearing that the defendant was not the son of an Esquire, &c. because he has conceived the matter in such general terms. I do not see how he could honestly swear this; for I believe had he been asked as soon as he had said the defendant was not qualified, what the qualifications are, he could not have told you."—The Conviction was finally quashed; and it is said by the reporter that the principal reason was declared to be because the witnesses had taken upon themselves to judge of the qualifications *(i)*.

(i) R. v. Marriott, 1 Str. 66.

After

After this was the Case of The *King* v. *Jarvis*, on 30 Geo. 2. *(k)*. In this case, the Information, which was for using a setting dog and net, stated, " that the defendant was not qualified by any laws or statutes of this realm to kill game, or keep or use any nets, dogs, or other engines for the destruction of the game." In the Evidence it appeared that the witness, besides swearing to the fact of keeping and using, &c. deposed, " that the Defendant at the time when he so kept and used the said setting dog, &c. was not qualified by any laws or statutes of this realm to kill game, or to keep or use any nets, dogs, guns, or other engines for the destruction of the game, contrary to the form of the statutes in that case made and provided." The objection upon which the Conviction was quashed, viz. that the qualifications were not specifically negatived, applies, as in the last case, equally to the Information and to the Evidence. But the language of the Judges comes more closely to the latter. Lord *Mansfield* said, in the case of Rex *v.* Marriott *(l)*, where the witness swears only generally, it was holden insufficient: and the Justices who convict upon the evidence of the witness, can have no other or further ground to go upon than what the witness swears. In *Bluet q. t.* v. *Needs (m)*, it was agreed (and is given as the reason why the general averment is not good on a Conviction) that it must be made out before the Justice that the party had no such qualification as the law requires, before the Justice can convict him: and the Justice must return that he had no manner of qualification: here the witness swears only generally that the defendant was not qualified: the Justices adjudge it generally only: the stream can go no higher than the spring head: so the conclusion which the Justices draw from

(*k*) 1 Burr. 148. but see a report of the same case from a note of Lord Ashburton, when at the bar, cited by Lord Kenyon, in R. v. Stone, 1 East. 643.

(*l*) *Supra*, p. 136.

(*m*) Com. 525.

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the testimony of the witness must be as general as that testimony. " Mr. J. *Denison* said, it was a clear case, and that it was fully settled and established, that in these Convictions the want of the particular qualifications mentioned in the act of 22 & 23 Car. 2. ought to be negatively set out; if not, the Justices have no jurisdiction to convict the defendant as an offender. And the Evidence and Adjudication ought both of them to be that he has not these qualifications which are specified in that act or any of them *(n)*."

The language and reasoning of the Judges in both these cases certainly argue a decided opinion that the qualifications ought to be negatived in the Evidence as well as in the Information: but, since in both of them, the Informations were defective in the same particular, and that would have been of itself a sufficient ground for quashing the Convictions, it is left doubtful upon these cases, what the decision would have been if the Evidence alone had omitted to negative the qualifications.

The question was again agitated without being decided in the Case of The *King* v. *Crowther (o)*, which arose on the same statute 5 Ann. c. 14, for using a gun. In this, the Information negatived expressly all the qualifications; but in the Evidence no notice whatever was taken of them either particularly or by a general negative. The Conviction was quashed for another reason. But the Court took notice, as to the omission to *disprove* the qualifications, that there was no case in which it had been directly decided that the Evidence should negative every particular exception; and that it could not be so from the nature of the case.

The only Case that has brought the question directly and formally into discussiou, is the following: which

(n) 1 Burr. 148. As to the expression of Mr. J. Denison, that the qualifications should be negatived in the *Adjudication* as well as the Evidence, see *post.* tit. *Judgment.*

(o) 1 T. R. 125.

leaves

leaves it still without any decisive solution. This was a Conviction for the same offence as the last, viz. keeping and using a gun. The *Information* specifically negatived all the necessary qualifications. The *Evidence* set forth the depositions of the witnesses to the fact of killing, but not to the Defendant's disqualification, which was not noticed in that part of the Conviction. The Court were equally divided upon the legality of this Conviction. Two of the learned Judges, Mr. J. *Lawrence* and Mr. J. *Le Blanc*, considered it sufficient to charge the want of qualifications in the *information*, which they admitted to be necessary. Reasoning from the general principle of evidence which does not require a negative of any fact to be proved by the party who asserts it, but imposes the proof upon the other party who would avail himself of the affirmative where it is within his knowledge, they were of opinion that the Magistrate was authorized in concluding the Defendant disqualified from the want on his part of any proof of qualification, after having received notice by the information and summons that the want of qualification formed part of the charge, against which he had to defend himself. Lord *Kenyon* and Mr. J. *Grose* held the contrary opinion, considering the law as having been established by the concurrent authority of Lord *Mansfield*, and the Judges *Denison* and *Foster*, whose authority had been confirmed by the course of precedents since, in such a manner that it could not be overthrown without manifest confusion *(p)*.

Upon a question so balanced it would be presumptuous to offer an opinion, but judging from the usual form of the precedents, particularly of those which were allowed to have so much weight in deciding another point *(q)*, the received impression as appears from the reference subjoin-

(*p*) R. *v.* Stone, 1 East. 636.

(*q*) Burn, tit. Game, the authority of which was deferred to in the decision of R. *v.* Thompson, 2 T. R. 18.

ed,

ed (*r*), seems to have formerly been, that the *Evidence* should go to a specific denial of the qualifications. That this was understood to be the effect of the decision in The *King* v. *Jarvis* (*s*), there is reason to suppose, from a precedent settled a few years afterwards by Mr. Dunning, (who had taken an elaborate note of that case) (*t*), negativing all the qualifications in the Evidence (*u*). The precedents in all the reported cases, since that time up to the time of *R.* v. *Stone* (*v*) before-mentioned, which contain the Convictions at length, agree in the same form, with the exception of The *King* v. *Crowther* (*w*), in which the omission was specially objected to, though on another account no decision took place. The same form is also followed in the Convictions on the 5 Ann. c. 14, annexed to Burn's Justice, under the title Game; and in that of The *King* v. *Clarke*, which is entitled to somewhat the greater attention, as it was recommended by the Court as a model, on account of the manner in which the Evidence was recited, though not indeed with a view to this particular point. These considerations may suggest the prudence at least of adhering to a form so long used till a conclusive determination shall have set the question at rest (*x*).

Proof of specific quantity, sums, &c.

4. With regard to the precision necessary in another point, namely, in specifying exact *sums*, or quantities, where they constitute a necessary ingredient in the offence; the following Cases occur as worthy of notice.—It was held to be requisite in a Conviction for not accounting and paying over money collected for tolls under a Turnpike Act, to particularise the sums alledged to be received, and

(*r*) R. *v.* Hartley, 22 Geo. 3. (Cald. 175) Appendix. R. *v.* Thompson, 27 Geo. 3. 2 T. R. 18. R. *v.* Davis. 35 Geo. 3. 6 T. R. 177. R. *v.* Clarke, 8 T. R. 220. See moreover the precedents published by Mr. Wentworth, vol. vi. p. 14, and p. 17, and the observations subjoined to the former by a gentleman eminent at the bar.

(*s*) 1 Burr. 148, *ante*, p. 137.

(*t*) This appears from the report of R. *v.* Stone, 1 East. 636, where that note is published.

(*u*) The precedent is to be found in Boscawen, p. 137.

(*v*) *Ante*, p. 139.

(*w*) 1 T. R. 125, *ante*, p. 138.

(*x*) 2 Burn. 410, ed. 1793.

the

the times of receiving them, so that the party may be able to defend himself upon a second charge (*y*).

Also, wherever the Magistrate is directed to award certain damages by way of Compensation to the party injured, there must be proof of some precise number or quantity by which the damage may be measured. Thus, a Conviction on 43 Eliz. c. 7, for cutting down lime-trees was held to be defective for not alledging the number of trees, the Magistrate being by the Statute to assess the *quantum* of damages according to the injury (*z*).

Evidence must be of identical offence in Information.

5. The Evidence must go to establish the identical offence, which forms the subject of the Information. It is not therefore sufficient that there appears to be Evidence of another Offence of the same kind, and subject to the same penalty (*a*).

Degree of Evidence necessary to be stated.

6. As to the degree and sufficiency of the Evidence, and the credit due to the witnesses, the Magistrates alone are the judges. In this respect they are placed in the situation of a Jury (*b*); and therefore whatever the Court of King's Bench upon an inspection of the proceedings, would deem sufficient to be left to a Jury on a trial, will be considered by them adequate to sustain the conclusion drawn by the convicting Magistrates. Beyond that the Court will not exercise a judgment upon the credit or weight due to the facts from which the conclusion is drawn. This criterion is accurately illustrated by the following example: This was a Conviction on 5 Ann. c. 14, for keeping and using a gun with intent to kill game. The witness deposed, "that the Defendant, on the day specified, did keep and use a gun with intent to kill game, and that the witness was satisfied the Defendant did keep and use the said gun for the purpose aforesaid, from the circumstance of his hearing a gun go off, and observing that it was fired

Instances.

(*y*) R. *v.* Catherall, 2 Str. 900.
(*z*) R. *v.* Burnaby, 2 Lord Raymond, 900, and see the Conviction itself, 3 Lord Raymond, 25.
(*a*) R. *v.* Smith, 8 T. R. 588.
(*b*) 6 T. R. 375.

by

by the Defendant, who was then walking about a piece of ground with that apparent intent." It was objected, that neither the keeping nor the using a gun is of itself an offence, without proof of its being used to kill game; but it is not hinted that it was fired at game in the instance spoken of by the witness. Lord *Kenyon*, here was Evidence tending to prove the offence. That being the case, we have no authority to enquire farther, and see whether the conclusion drawn by the Magistrate be or be not the inevitable conclusion from the Evidence. It is sufficient in Convictions, if there were such Evidence before the Magistrate as would be sufficient to be left to the Jury. Here we cannot say there was no Evidence of the fact for the consideration of the Magistrate (*c*).

What sufficient.

Again, on a Conviction for selling to one *Robert Chappel* thirty loaves of bread, which had not been baked twenty-four hours (39 & 40 Geo. 3. c. 74.) The witness *Mary Chappel*, swore that the loaves were brought to the shop kept by her in the Defendant's cart, and by his servant; another witness proved that a hand-bill had been delivered to him, signifying that a Mr. Smith (the Defendant's name) had opened a shop at *Chappel*'s to sell bread: and the Defendant said in his defence, that he had sent the loaves to *Chappel*'s with orders not to sell them till the following day. It was objected, first, that there was no Evidence of any sale at all, the witnesses having merely proved, that the bread was brought to *Mary Chappel* in the Defendant's cart. Another objection raised by the Court was, that there was no Evidence of a sale to *Robert* Chappel, it being rather of a sale to *Mary* Chappel. The Court thought there was no foundation for the first objection; for there was *some Evidence* from which the Magistrate might draw the conclusion of a sale by the Defendant. But the objection that it did not appear to be a sale to *Robert* Chappel they

(*c*) R. v. Davis, 6 T. R. 177.

thought

thought decisive: declaring that if there had been any Evidence whatever (however slight) to establish that point, and the Magistrate who convicted the Defendant, had drawn his conclusion from that Evidence, they would not have examined the propriety of his conclusion; for the Magistrate is the sole judge of the weight of Evidence (*d*).

The same criterion will be found to be kept in view throughout the ensuing Cases, whether the determination of the superior Court has been to confirm or set aside the conclusion of the Justices. In those in which the Court has declared the Evidence insufficient, that judgment may be referred to the want of sufficient legal Evidence to have gone to a Jury:

In a Conviction for deer-stealing on 3 and 4 W. and M. c. 10, the Evidence stated was that the Justice entered into a glover's house, and finding a deer-skin, asked him how he came by it, the glover said he bought it of *I. S.* who not giving a good account of himself was convicted. This was held sufficient; the Court held that the Justice might convict the person that sold the skin, for the Statute would be easily evaded if the deer-stealer could discharge himself by a sale (*e*).

Where the Court will judge of the Evidence.

The following Case shews however that the Court of King's Bench will so far take notice of the sufficiency of Evidence upon which the Conviction is framed, as to set that aside, if they think the Evidence too slight to warrant it.—This was a Conviction "for *knowingly harbouring, keeping, and concealing, and permitting to be knowingly* harboured, &c. a quantity of tea unlawfully imported." The *Evidence* stated in the Conviction was, that in a field about a quarter of a mile from the Defendant's house, and

(*d*) R. *v.* Smith, 8 T. R. 588.

(*e*) R. *v.* Jennings, 1 Salk. 383. The case of possession unaccounted for, is now expressly provided for by 16 Geo. 3. c. 30. s. 5, which repeals the former, and introduces new regulations with regard to this offence. The above case however, though no longer of use as a precedent, may nevertheless serve to illustrate the present subject of enquiry.

which

which field the witnesses swore they believed to be in the Defendant's occupation, two of his servants were seen by the witnesses loading the tea in question into a cart with two horses, which one of the witnesses swore were the Defendant's. Another witness proved, that in a conversation with the Defendant, he said, " It was unfortunate for him that his servants had taken his cart and horses without his knowledge." The Conviction further set forth, that the Defendant in answer to the charge declared he knew nothing of his servants having the tea, but did not produce either of the said servants, or any other Evidence whatever. Upon this Evidence, which was all set out as above, the Conviction and Judgment followed. The Conviction being removed into the King's Bench by *certiorari*, a rule was obtained to shew cause why it should not be quashed as to the penalty for *knowingly* harbouring, &c. for want of sufficient Evidence as to that part of the offence: to that extent accordingly the rule was made absolute *(f)*.

In the foregoing case the Court probably considered the facts stated as not sufficient to have been left to a Jury on the question of the Defendant's knowledge. In a later Case, where the question was of a similar kind, the facts were as follow: the Offence was on 19 Geo. 3. c. 50, for having in the Defendant's custody and possession a private still. The Evidence recited, that there was found by the witness under a pig-stye, in the garden of the Defendant's house, a private still just worked off, a worm-tub, and worm, and six wash backs, containing one hundred and fifty gallons of wash. Among several other objections urged against the Conviction, one was, that the Evidence did not support the charge of the still being in the custody and possession of the Defendant, and that it was not even stated that the garden was in the Defendant's possession *(g)*.

(f) R. *v.* Hall, Cowp. 728.

(g) The counsel in support of this objection referred to R. *v.* Abbott, Doug. 553, where it was said in argument, that if goods be found in the party's possession, his knowledge shall be presumed, but not when they are found in his grounds.

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In consequence of other defects in the Conviction, it became unnecessary to determine this objection; but from what was thrown out by the Court in the course of the argument, their opinion may be collected to have been against the objection, and they intimated that the circumstance of the articles being found concealed in the defendant's garden, with the appearance of being just worked off, was Evidence sufficient for the Magistrates (who in these cases, Mr. J. *Grose* observed, are put in the place of a Jury) to find the fact that they were in the Defendant's custody and possession. A doubt however was thrown out by one of the Judges, (Mr. J. Le Blanc) upon the ground that the Defendant was not stated to be either in the house or on the spot at the time *(h)*.

Presumptive Evidence.

It has been held on a Conviction for selling bread under the lawful weight (8 Ann. c. 18. s. 3.) that the fact of the servant selling bread in the master's shop is good Evidence of its being the master's bread. It is however no more than Evidence, and the charge against the master must be directly for selling bread; for where the offence stated was merely that the servant sold bread in his shop, this was held to be bad, as charging by way of offence what was only the evidence of it *(i)*.

Particular description of offender, proof of.

8. If the offence is confined to persons of a particular description, there must be competent Evidence of their answering that description. Thus, a Conviction for trading as a hawker and pedlar without a licence (3 & 4 Ann. c. 4, and 9 & 10 Will. 3. c. 27. s. 8.) was held not to be supported by Evidence of a single act of selling a parcel of silk handkerchiefs to a particular person; for that bare act of sale, it was held, did not shew the defendant to have been such a person as by law is required to take out a licence *(k)*. But under the same statute (8 & 9 Will.

(h) R. *v.* Chandler, 14 East. 273.

(i) R. *v.* Bradley, 10 Mod. 156; and see R. *v.* Smith, *ante*, p. 143.

(k) R. *v.* Little, 1 Burr. 609; See the observations upon this case, *ante*, p. 71. As far as may be collected from a very careless report, the same point seems to have

9 Will. 3. c. 27. s. 8.) for trading as a hawker and pedlar *without a licence*, Evidence of the Defendant's refusal to produce a licence on demand, was deemed sufficient proof of his not having one, which was the offence he was convicted of *(l)*.

What intendment admitted in Evidence.

9. Though the general rule be that no material omission in the Evidence as to the description of the Defendant, in those particulars which are necessary to constitute the offence, can be supplied by intendment *(m)*; yet how far that rule may be qualified in favour of what is necessarily and plainly to be collected from the facts stated, though it be not expressly averred, may be judged from what is laid down in the following case:

This was a Conviction on the Malt Act, 42 Geo. 3, the offence, which was that of wetting Malt, was laid on the *twelfth* of May; and the witness, an Excise Officer, after stating "that Defendant *is* a Maltster," (which it was agreed must refer to the day of the Conviction, and not to the day laid for the offence,) went on, "that he surveyed the Malt-house of the said Defendant on the said *twelfth* day of May, and found a floor of Malt in operation." A doubt was suggested, whether the Evidence sufficiently shewed the Defendant to have been a Maltster at the time of the offence committed. It was argued for the affirmative, first, that it was sufficiently alledged by reference to the Information, the witness having spoken of the *said* Defendant, who had been sufficiently described

have been decided in another Case, Loft, 184.

In R. *v.* Salomons, 1 T. R. 251, the offence charged was, the keeping an Office for the sale of Lottery Tickets, viz. the sale of a Ticket, No. 34,907, and receiving money for the share in the said Ticket, without a licence. It was objected on the authority of the above case of R. *v.* Little, that the Defendant was not described as a person from whom by the act a licence could be required, inasmuch as a licence was not necessary for the sale of one Ticket only. But the Court gave no opinion on this point.

(l) R. *v.* Smith, 3 Burr. 1475, and note. It has been held in an action for penalties against *an Inn-keeper*, on the Post-horse Act, that it is not necessary to shew the licence itself of the Defendant, but as against him it is sufficient Evidence that he had written over his door, "licensed to let post-horses." Radford *v.* Briggs, 3 T. R. 637.

(m) *Ante*, p. 129.

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in the Information *(n)*: the Court however did not concur in this argument. It was therefore further contended, that the fact of the Defendant being a Maltster at the time of the Offence, viz. 12th of May, must necessarily be collected from the whole of the Evidence, and the majority of the Court were of that opinion. Lord *Ellenborough*—"If any material fact were wanting in the Evidence, to make out the charge, I should be very unwilling to supply it by intendment; but taking the whole Evidence together, it does sufficiently appear that the Defendant was a Maltster at the time of the offence committed. All the difficulty arises from the order in which the Evidence was taken down. The Witness begins by stating that the Defendant *is* a Maltster, which would refer to the time he is speaking, the 4th of June. But without adverting to that, see how the Evidence would stand without it. The Witness deposed, that on the 12th of May he *surveyed* the *Malt-house* of the Defendant: how it could not be then the Defendant's Malt-house, nor could the Officer then have surveyed it, unless the Defendant had entered the Malt-house as a *Maltster*, it would otherwise have been mis-called the Defendant's *Malt-house*. The term *survey* too is used in *Malt Acts*, and I believe the Officer has no authority to survey a Malt-house unless it be entered as such." *Grose*, J. thought the fair import of the Evidence was that the Defendant was a Maltster on the 12th of May, when the Witness, as an Excise Officer *surveyed his Malt-house*. *Le Blanc* J. agreed in the same opinion, but *Lawrence*, J. said, "I have great doubts whether the fact of the Defendant's being a Maltster at the time of the offence sufficiently appears. I have always considered, that in these summary Convictions, the Evidence necessary to support the charge ought to be precise; and it is not usual to have recourse to inference, in order to support a Conviction. Suppose the Evidence had only been, that

(n) This was contended upon the alledged authority of R. v. Tuck, *ante*, p. 135, but the Court denied the authority of that case.

the Officer surveyed the Defendant's Malt-house, can we infer merely from the word *survey*, that the Malt-house surveyed was a Malt-house entered by the Defendant, and that he was a Maltster at the time? This, I think, would be going further in support of a Conviction than any case has yet gone the length of." The Conviction was affirmed *(o)*.

On this head of the sufficiency of Evidence admitted by the Magistrates, it may be noticed, that in a Conviction on 5 Ann. c. 14. s. 4, for keeping and using a greyhound, not being duly qualified, it was held that the Magistrates were justified in founding the Defendant's want of qualification, upon the circumstance of his having on a former occasion, before the same Magistrates, acting as Commissioners under the Income Act, sworn to an estate under £100 a year *(p)*.

Appropriate terms, use of.

10. No precise form of words is necessary in stating the proofs of the offence. It is sufficient if the deposition be in terms ordinarily intelligible, having regard to the usual import of technical modes of speech adapted to the subject. Thus, it being an offence by 42 Geo. 3. c. 38. s. 30, to wet corn or grain, *making into Malt*, within twelve days of being taken out of the cistern, the Witness, an Excise Officer, on a Conviction for this Offence, stating, "that he found a floor of Malt in operation, very wet, which had been watered within four days of being taken out of the cistern," was held sufficient, notwithstanding the objection, that *Malt* is not equivalent to *Corn making into Malt*. By the Court, "It is stated to be a floor of Malt in operation, which implies that it was not finished. This is the language of the Witness which must have a reasonable intendment, and is to be construed according to the common parlance, and the general understanding of mankind, according to which the language used is certain enough. If indeed it could have been shewn that there is any way in which a floor of Malt

(o) R. v. Crisp, 7 East. 389, 397.

(p) R. v. Clarke, 3 T. R. 220.

could

could be in operation, for any other purpose, than of making into Malt, a doubt might have been thrown upon it. But none such has been suggested" *(q)*.

11. It does not often happen that the Magistrates, when they acquit the party, are called upon to make a record of their proceedings. But if they be so called upon by writ of *certiorari*, and their return discloses a *primâ facie* case, upon which the Defendant might have been found guilty, nevertheless, the Court of King's Bench, upon the principle already mentioned of considering the Magistrates in the situation of a Jury, will not interfere with their judgment. Thus, where a proceeding on 7 Geo. 2. c. 19, had been instituted for using sulphur in drying hops; to a writ of *certiorari*, which had been issued by the prosecutor, in order that the Magistrates might return a special case, which it was expected they would do, they thought proper to make a return, setting out the deposition of a Witness to the fact of the Defendant having thrown half a pound of sulphur upon a charcoal fire then using for drying hops, "but because the Informer, J. L. does not produce before us any other Evidence against the said Defendant, and because all and singular the premises being heard, and fully understood by us the said Justices, it manifestly appears to us, that the said Defendant ought not to be convicted of the premises above laid to his charge, therefore it is considered that he be *acquitted*, and he is acquitted." On this record being returned to the *certiorari*, the Court said, the Evidence given was entirely and exclusively for the Justices below; who, they said, were placed in the situation of a Jury; and as they had acquitted the Defendant, the Court could not substitute themselves in the place of the Justices acting as jurymen, and convict him. They could no judge of the credit due to the Witnesses, whom they did not hear examined. They could only look to the form of the

Acquittal, conclusive.

(q) R. v. Crisp, 7 East. 393, 394, 4th objection.

Conviction,

Conviction, and see that the Defendant, if convicted, had been convicted on legal Evidence. That on this return, they must consider that the Magistrates had determined on the facts, and not on the law, as distinguished from the facts *(r)*.

Section 9. *Of stating the Defence in the Conviction.*

It is the duty of the Magistrate to state in the Conviction, not only the Evidence in support of the charge, but also the allegations and proofs adduced by the Defendant in answer to it. The matters of defence consist either in a denial of the fact, or the assertion of some excuse, qualification, or exemption allowed by law. We have before seen, that if the act appears to be done in the *bonâ fide* assertion of title or property, the summary jurisdiction of the Magistrate is ousted *(s)*.

A former Conviction likewise for the same fact would be a good defence. Some penal Acts of Parliament have indeed a clause to that effect *(t)*, which, however, it is presumed, is a superfluous provision, since there can be no mode of proceeding known to the law of England, by which a delinquent can be punished twice for one offence.

Section 10. *Of stating Adjournment.*

To what time may be.

If either the Defendant or the Prosecutor requires time for adducing further proofs, the Magistrate may adjourn the hearing; and where that is done, the Adjournment

(r) R. *v.* Reason, 6 T. R. 376.
(s) *Ante*, p. 11.
(t) As for example, the statute 3 Car. 1. c. 3. s. 5.

should

should be regularly stated in the Conviction, that it may appear to have been made within the legal time. For if a certain time be limited within which the *Conviction* must take place, a Conviction after that period cannot be supported, though it appears upon the face of it to be upon an Information commenced in time, and adjourned with the consent of the Defendant to a future day (*u*).

It is otherwise where the limitation applies to the time of *prosecuting* the offence; for then if the Information appears to be in time, it is well, though the Conviction appears to be made after the specified period had elapsed (*x*).

Section 11. *Of the Judgment—As to the Form of.*

We are in the next place to consider the *Judgment* as it appears recorded upon the Conviction.

Must be warranted by premises.

It is obvious from what has been said in the preceding sections, that the Judgment in point of law must be such as the premises warrant: for though the conclusion of the Magistrate as to the facts is absolute, it is by no means so as to the legal consequences of those facts, which it cannot in the least alter or extend (*y*).

The Judgment consists of two parts, viz. the Conviction, and the Sentence or award of punishment; to which may be added as a branch of the latter if it is pecuniary, the distribution of the penalty, and in some cases also the assessment of the costs. These will be treated separately in their order.

(*u*) R. *v.* Tolley, 3 East. 467.
(*x*) *Ante*, p. 12, 61.
(*y*) 2 B. P. 127. R. *v.* Smith, 1 East. P. C. 183. See however R. *v.* Lammas, *infra*, p. 152, note (a).

1. There

No formal style necessary.

1. There is no formal style of adjudication necessary, in Convictions as in Judgments at common law. It is enough if it be said, "therefore the Defendant (naming him) is convicted of the premises, or of the offence," &c. followed by an adjudication of the forfeiture, without the formal words, "therefore it is considered," &c. *(z)*. It has also been held that a Judgment in these terms, viz. "that J. S. (the Defendant) according to the form of the statute is convicted," is a sufficient adjudication that he is convicted of the offence charged *(a)*.

The words "that the Defendant is convicted," were held to be sufficient in a Conviction, though the form prescribed by the statute, and intended to be pursued, used the words "duly convicted" *(b)*.

Quære, if Adjudication must negative qualifications.

Notwithstanding an expression let fall by Mr. J. Denison, in the case of *The King* v. *Jarvis (c)*, that the adjudication as well as the Evidence ought to negative all the qualifications annexed to the offence, it seems to be now the received opinion, and supported by practice, that it is not necessary; or at least that a general adjudication by the Magistrate that the Defendant is not qualified, is sufficient *(d)*.

(z) R. v. Speed, Carth. 502, *per curiam*, and S. C, 1 Lord Raymond, 583.

(a) R. v. Thompson, 2 T. R. 18. A Case is reported relative to a Conviction of one as a common distiller, on the statute 3 W. & M. c. 15, for keeping a private warehouse for low wines, in which the effect of the words in the adjudication "according to the form of the statute," is said to have been carried so far as to supply the want of Evidence of the Defendant being a common distiller, which was necessary by the Act. R. v Lammas, Skin. 562. It appears however by the report itself that no judgment was given in the Case. Mr. Boscawen notices the Case with a *quære* if it be law. Bosc. 109, 110.

(b) R. v. Jefferies, 4 T. R. 768.

(c) 1 Burr. 148, *ante*, p. 137.

(d) See R. v. Crowther, 1 T.R. 125, and the following, viz. 4 T. R. 767, 7 T. R. 250. 8 T. R. 284. Bosc. 35.; and the observations accompanying the precedent in 6 Wentw. 14.

2. Some

Judgment of *forfeiture* necessary.

2. Some doubt may be entertained whether, according to the earlier authorities, it was thought indispensable that the Judgment should contain in form an adjudication of *forfeiture* as well as of *conviction (e)*: but it is superfluous to examine into those authorities on either side, since it is now fully established that the Judgment must contain both. Thus, a Conviction for deer stealing was quashed, because it was only *convictus est*, without "*quod foris faciat (f)*;" for though the penalty was both ascertained and distributed by the Act (3 & 4 Will. & Mary, c. 10.), and that was relied on as an argument in support of the formality of the Judgment *(g)*, the Court said it was like a verdict without a judgment: that although the Act fixed the penalty, there must be a Judgment to levy it; for every execution must be founded upon a previous Judgment; and that all the precedents were so.

Though penalty fixed by statute.

It is apparent, as well from a consideration of the Act alluded to, as from the reasons assigned for this Judgment, which has been repeatedly recognized and confirmed since *(h)*, that the Judgment of forfeiture is indispensable, although all the penal consequence of the Judgment be strictly defined by the statute; for the Act there referred to, as it is observed by Mr. J. Wilmot *(h)*, in commenting upon the Case, not only makes the penalty certain of £20 for every offence, but appropriates the distribution of it likewise.

(*e*) In the report of the Case of *Rex* v. *Chandler*, as represented in Salkeld, 378, it is said to have been resolved, that *ideo consideratum est quod convictus est*, without *quod foris faciet*, is enough: but in the more full, and apparently more accurate, report of the same Case, 1 Lord Raymond, 583, the objection made and over-ruled, is said to have been that the judgment was "*quod foris faciat*," without the formal words, "*ideo consideratum est*," which the Court held to be well enough. The same Case is reported 5 Mod. 446, where the objection taken is stated to have been, that it was "*foris facit*," instead of "*foris fecit*."

(*f*) R. *v.* Hawks, 3 Geo. 2. Str. 858. 1 Barnard. 300. S. C.

(*g*) S. C. Fitz-Gib. 124.

(*h*) *Per* Wilmot, J. R. *v.* Vipont, 2 Burr. 1166, and R. *v.* Harris, 7 T. R. 438.

The

The same point is decided in a later Case upon the authority of the foregoing. This arose upon a Conviction for killing two hares, under 1 Jac. c. 27. The Judgment was, "that the Defendant be, and he is hereby *convicted*, &c. according to the form of the statute," but no award of any penalty. The punishment is fixed by the statute, viz. 20*s.* for each hare, and unless that be forthwith paid, commitment for three months. Another question which might have arisen, viz. whether the statute were still in force, was waived, the Court being clearly of opinion, that the Conviction could not be supported for want of an adjudication of the penalty. Lord *Kenyon*, recapitulating the case of *The King* v. *Vipont*, mentioned below, said, that notwithstanding some old cases *(i)*, the Judgment is an essential part in every Conviction let the punishment be fixed or not; and so it was held on the statute for deer stealing, though the penalty there was certain *(k)*.

Where discretionary.

If an express adjudication of the penalty be necessary where it is fixed by the statute itself, it must be still more indispensable where the punishment is discretionary, for in that case the Conviction is manifestly imperfect and inefficient without it. Accordingly, it was so held in a Case which arose on the following proceeding:—The Defendants, *Elwell and others*, were convicted on view by three Justices for a forcible detainer, and were committed "till they should pay a fine to the King." The warrant of commitment being brought up by *habeas corpus*, the Court refused to enter into the consideration of it till the Conviction itself was in Court, which being brought up by *certiorari*, the Judgment therein appeared as follows; "that the said *E. Elwell*, &c. are convicted of the said forcible entry according to the form of the statute," &c. It then awarded that they be committed "*quousque finem fecerint pro offensis suis prædictis.*" The warrant of com-

(*i*) Salk. 371. 383, had been cited; but see note, p. 153.

(*k*) R. v. Harris, 7 T. R. 238.

mitment

mitment therefore being till the payment of a fine which had not been assessed, the Defendants were discharged from the commitment, and the Conviction was quashed *(l)*.

So in a Conviction, on 12 Geo. 1. c. 34, prohibiting unlawful combinations among workmen, and inflicting an imprisonment at the discretion of the Justices, the conclusion was, "Thereupon the aforesaid J. V. &c. are convicted before us for unlawfully, &c. (stating the offence), contrary to the Acts of Parliament in that case made and provided." The Court declared that the Conviction was clearly bad, for want of any Judgment of the Forfeiture. They said, a Conviction is equal to a verdict and Judgment, but that this was a verdict without a Judgment *(m)*.

The same rule applies to Convictions upon those statutes which assign a corporal punishment only, as well as upon those by which the penalty is pecuniary *(n)*. Where punishment corporal.

(*l*) R. *v.* Elwell, 2 Lord Raymond, 1514. 2 Str. 794.

(*m*) R. *v.* Vipont, 2 Burr. 1163, note. A Case occurred, R. *v.* Ashton, Trin. 9 Geo. 1. on the statute 1 Geo. 1. c. 48, for destroying fruit trees, in which the Judgment was only *ideo consideratum est quod convictus est;* and though that point was not then decided, it appears to have been the sense of the Court, that the Conviction was bad on that account. R. *v.* Ashton, 2 Burr. 1166; Lord Kenyon, 7 T. R. 238, remarks, that the Case is reported in Modern Cases (8 Mod. 175.) but is there totally mistaken, as nine in ten, he says, in that book are. The report alluded to however, is very consistent with what is laid down in the Cases cited, for it is said, "The Court seemed clear to quash the Conviction, for there ought always to be a Judgment, '*quod foris faciat,*' or '*quod committatur,*' for the act gives no pecuniary penalty." That case therefore is an authority for requiring the same adjudication of punishment where it is corporal only (for such is the case under 1 Geo. 1. c. 48.) as where it is pecuniary: and is cited for that purpose by Mr. J. Wilmot, 2 Burr. 1166. It is singular therefore, considering the usual accuracy of Mr. Boscawen, that in the statement of that Case, as referred to by him, p. 118, which appears by the marginal note to be cited from 8 Mod. 175, it should be represented as having been held, that since there was no forfeiture for the offence, *ideo consideratum est quod convictus est* was sufficient. And so far from the Case as reported in 8 Mod. 175, being contrary to the quotation of it by Mr. J. Wilmot, as intimated in a note by the same learned writer, p. 122, it will appear upon examination to agree with it very exactly.

(*n*) R. *v.* Vipont, 2 Burr. 1163. R. *v.* Ashton, 8 Mod. 175. 1 Sess. Cas. 346. See the observations in the last note.

Section

Section 12. *Of including several Offences and Penalties in one Judgment.*

There seems to be no objection to including in one Conviction, several distinct offences and penalties of the same kind.

A Conviction on the Game Laws stated as well in the Information as the Evidence, that the Defendant on three several days separately specified, kept and used steel traps, &c. to destroy game; the Judgment was, that "he is convicted, and for his several offences aforesaid hath forfeited the sum of £5 for each offence, making together the sum of £15. A doubt was raised whether the defendant could legally be convicted of more than one penalty in the same Conviction, and at all events it was contended, that the adjudication should distinguish more precisely the number of penalties of which he was convicted. But Lord Kenyon declared there was no objection that the Defendant had been convicted of several penalties, which he said was the constant practice in actions, and not unfrequent in Convictions: and that the word *convicted* applied to the several offences charged and proved, and taking the whole adjudication together it was evident enough that the words "for his several offences aforesaid," meant the three offences charged *(o)*.

Several penalties may be included in one Conviction.

Several acts.

When several acts are charged to have been committed, it must depend upon the construction of the statute to which they refer, whether distinct penalties are incurred and ought to be awarded for each, or whether the several acts form but one aggregate offence, and require but one penalty.

Or offenders.

The same question is also often to be determined in regard to the acts of *joint offenders*, who may in some cases

(*o*) R. v. Swallow, 8 T. R. 284, 6.

be

be liable to separate penalties, sometimes to one collective penalty.

First, As to offences consisting of several acts; if distinct and complete acts are committed on *different days*, such as the killing game on each day, no ambiguity can arise; for under such circumstances it is clear that the offences are distinct and subject to separate penalties, as in the case just referred to. But the ambiguity arises upon a repetition of similar acts in pursuance of one object on the same day. On different days.

With regard to cases of this description, no general rule can be laid down; but the law in each case must be determined by the nature of the offence, and the manner in which the particular statute applicable to it is worded.

In the following Cases it has been decided, that on the statute 5 Ann. c. 14. *(p)*, the killing several hares in the same day incurs only one forfeiture *(q)*: On same day. Single penalty for several acts.

A Conviction *super præmissis* for three penalties of £5 each, on 5 Ann. c. 14, for killing three hares, is bad where it appears that all is done on the same day, for the statute does not give £5 for every hare, it being all but one offence *(r)*. Killing several hares.

The following Case to the same effect more explicitly points out the distinction between acts on different days, and on the same day. Conviction on 5 Ann. c. 14.—One exception was, that the Defendant was charged with so many five pounds as he killed hares. The Court was of opinion, that the offence for which the statute gave the forfeiture was the keeping dogs and engines, not killing the hares. They said, "Killing never so many hares on the same day is but one offence; but if a man keep dogs and hunt several

(p) The words of the statute are, "If any person or persons not qualified, &c. shall keep or use any greyhounds, setting dogs, hayes, lurchers, turnmels, or any other engines to kill and destroy the game, and shall thereof be convicted upon the oath of one or two credible witnesses, by the Justice, &c. the person or persons so convicted shall forfeit the sum of 5*l.*

(q) R. v. Swallow, 8 T. R. 286.

(r) Marriott v. Shaw, Com. Rep. 274.

ral days, and kill hares, and it be laid severally, distinguishing the days, the offence is severed, and he shall forfeit £5 for each (*s*)." This is agreeable to the doctrine acted upon in the Case of *The King* v. *Swallow*, before cited (*t*). And Lord Mansfield, in a Case before him (*u*), mentions it as an established point, that killing more hares than one on the same day is only one offence. When it is said therefore, in the case of *The King* v. *Gage* (*v*), that a Conviction for using a greyhound in killing four hares, *per quod* he forfeited £20, passed unobjected to on this ground, it may be presumed, since nothing appears in the report to contradict the supposition, that the acts were laid on different days.

In like manner, though either the fact of keeping and using a setting dog for destroying game, or of keeping and using a gun for the same purpose, is a breach of the Statute, yet if a Conviction state that the defendant, on a certain day, kept and used a certain setting dog, and also a certain engine called a gun, for destroying game, the adjudication should only be for a single penalty; for going in pursuit of game with a dog and gun on the same day is but one offence (*w*).

So on the statute 29 Car. 2. c. 7, which enacts that no tradesmen, &c. shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord's day, it has been held that only one penalty can be incurred by a baker for the exercise of his calling on the Lord's day, though it consisted in separately selling a number of different loaves (*x*).

Where several penalties on same day.

The question, whether several acts committed on the same day makes the offender liable to distinct or cumulative penalties, was much discussed in a Case arising on the Statute 12 Geo. 2. c. 36, which, though it relates to an

(*s*) R. v. Matthews, 10 Mod. 27.
(*t*) *Ante*, p. 156.
(*u*) Cripps v. Durden, Cowp. 640.
(*v*) Str. 546.
(*w*) R. v. Lovet, 7 T. R. 152. See the Act, *ante*, p. 157.
(*x*) Cripps v. Durden, Cowp. 640.

action,

action, and not to a Conviction, affords a doctrine applicable to both. That Act makes it unlawful for "any person to bring into this kingdom for sale any book or books first composed, and printed and published in this kingdom, and reprinted in any other country, and declares "that if any person shall import, or shall sell, publish, or expose to sale, any such books, knowing them to have been so reprinted, every such offender, besides forfeiting the said book or books, shall forfeit the sum of five pounds, and double the value of every book which he shall so knowingly sell, &c. In an *action* for penalties under this Act, it was held that two penalties were recoverable for selling two books on the same day, provided the sales were distinct (*y*).

Several offenders.

2. In the same manner, though several offenders may be included in one Conviction for offences jointly committed, it depends upon the wording of the particular Statutes applicable to each Case, and the quality of the offence, whether each person be liable to a distinct penalty, or all collectively to but one.

Where *joint* penalty.

On the Statute 5 Ann. c. 14. s. 4, the words of which are recited in a foregoing page (*z*), it has been held, that two persons cannot be convicted in separate penalties for using a greyhound (*a*). The same construction had before been put upon the Act, in an action against nine persons for keeping a lurcher, in which it was determined that only one penalty could be recovered against all (*b*).

In the foregoing Cases, the offence is in its nature single; and the penalty, not being by the words of the Act, expressly

(*y*) Brooks *q. t. v.* Milligan, 3 T. R. 509.

(*z*) *Ante*, p. 157, note.

(*a*) R. *v.* Bleasdale, 4 T. R. 809.

(*b*) Hardman *v.* Whitacre, Bull. Ni. Pri. 189. 2 East. 573, and see Marriett *v.* Shaw, Com. Rep. 274, *ante*, p. 157. The case of *Partridge* v. *Naylor* may also be referred to as apposite to the subject. In that case a judgment for several penalties against three persons respectively, for impounding a distress in several hundreds contrary to 1 & 2 P. & M.

expressly severed, as it would if it were specifically imposed upon each person convicted, can only be forfeited jointly. But if either the penalty be imposed by the Act upon each person convicted, even where the offence would in its own nature be single; or, if the quality of the offence be such that the guilt of one person may be distinct from that of the others: in either of these Cases the penalties are several.

Where *several* penalties.

The first of the following Cases affords an instance of separate penalties being incurred by an Act which is in itself single, but the punishment is made separate by the terms of the Statute.

The former deer-stealing Act 3 W. and M. c. 10, declares "that if any person or persons shall unlawfully course, hunt, &c. any deer, without consent of the owner, and shall be convicted thereof, *every person* so offending by unlawful hunting, &c. shall forfeit for every such offence £20. Upon this Statute it was resolved, that every person concerned in a joint Act of coursing, &c. forfeits £20; and a Conviction of several persons with an award of distinct penalties against each, was held to be right *(c)*.

The ensuing Case presents an instance in which the question as to distinct penalties was decided by reference to the quality of the offence.—From this Case, though not strictly belonging to the class of summary Convictions, an accurate principle of discrimination may be deduced with reference to the present subject.

This was an Information by the Attorney-General against three persons on the Statute of 8 Geo. 1. c.18. s. 25, for assaulting and resisting Custom-house officers in the execution of their duty, and rescuing goods which had been seized. The Statute declares "that if any person or per-

P. & M. c. 12, was reversed; and the error assigned was, that there should have been but one 5*l.* and one trebling of damages, Cro. Eliz. 480. A similar example is found in the case of Barnard v. Gostling, 2 East. 569, on the statute 37 Geo. 3. c. 90. s. 26.

(c) R. v. Drake, 2 Str. 489.

sons

sons shall, &c. the *party* or *parties* shall, for every such offence, forfeit £40."—A verdict having passed against the Defendants for £40 each, Mr. Buller obtained a rule to shew cause why the Judgment should not be arrested, on the ground that by the Act of Parliament the offence was entire, and only one penalty of £40 given for one and the same offence. The Cases that were cited in support of the rule, were those we have above noticed *(d)*. Lord *Mansfield*, "There is no cause of greater ambiguity than arguing from Cases without distinguishing accurately the grounds upon which they are determined. The true reason of the Cases which have been cited in support of the motion, and the distinction between these Cases and the present is this. Where the offence is in its nature single, and cannot be severed, there the penalty shall be only single; because though several persons may join in committing it, it still constitutes but one offence: but where the offence is in its nature several, and where every person concerned may be separately guilty of it, there each offender is separately liable to the penalty; because the crime of each is distinct from the offence of the others, and each is punishable for his own crime.—Under the Statute of 9 Ann. c. 14, killing a hare is but one offence in its nature, whether one or twenty kill it, it cannot be killed more than once. If partridges are netted by night, two, three, or more may draw the net, but still it constitutes but one offence. But this statute relates to an offence in its nature several: it is a several offence at common law; and the Statute adds a further sanction against that, which each man must commit severally. One may resist, another molest, another run away with the goods; all these are distinct acts, and every one's offence entire and com-

(*d*) Hardman *v.* Whitacre, *ante*, p. 159, n. (*b*). Partridge *v.* Naylor, *ib.* note (*b*). p. 159. Marriott *v.* Shaw, *ante*,

plete in its nature. Therefore each person is liable to a penalty for his separate offence *(e)*."

Form of Judgment where two or more offences charged.

3. Where two distinct offences are charged in the Information, Judgment that the Defendant is convicted of the *said* offence is bad.—Thus, on the Lottery Act, 22 Geo. 3. c. 47, the Information of *N. Barrett* charged that *H. Salomons* on the 27th of December 1785 kept an Office for *dealing* in shares of tickets in the State Lottery, and did on that day receive of one A. a sum of 3*s.* for a share in No. 34,007, without a licence, contrary to the form of the statute: *and* the said H. S. on the said 27th of December, at the same place, did receive of the said A. 3*s.* for *registering* a Lottery Ticket then undrawn, without a licence. After stating the Evidence of the witnesses, the Conviction proceeded to adjudge the said H. Salomons guilty "of the offence charged upon him in and by the said Information of the said N. Barrett, and that he be convicted of the said offence charged upon him in and by the said Information, according to the form of the statute in that case made and provided: and the Justices likewise awarded him to forfeit and pay for his *said* offence £100. By the Court, "The Conviction is bad for the duplicity of the charge; the Defendant is charged with *dealing* in shares of Lottery Tickets, and with *registering*, without a licence; and he is convicted of the said offence; so that it does not appear of which offence he is convicted. A Conviction must be good in all its parts; the Information must be supported by the Evidence, and the Judgment must be supported by both. Here the Defendant is charged with two distinct offences,

Said offence bad where two.

(*e*) R. *v.* Clarke, *et al.* Cowp. 610. The same principle of having regard to the quality of the offence in determining whether the penalties are joint or several, when the Statute is ambiguous, has been adopted in the construction of the Toleration Act, 1 W. and M. c. 18, s. 18, which inflicts a penalty of 20*l.* on any person or persons who may disquiet or disturb any congregation permitted by the Act. Upon this it has been decided that several persons for a joint disturbance are liable to separate penalties of 20*l.* each, R. *v.* Hube and others, 5 T. R. 542.

each

each of which would subject him to a separate penalty; and supposing they could both have been included in one Conviction, which is to be doubted, the Defendant should have been convicted of both. A Judgment for too little is as bad as a Judgment for too much *(f)*."

Said offence, where sufficient.

In a subsequent Case, however, on the statute 19 Geo. 3. c. 50, the Conviction set out a complaint and information, that one T. A. an Officer of Excise discovered in the custody and possession of the Defendant, certain private and concealed vessels for making low wines, and other materials for distillation, viz. one head, six wash backs, &c. *(each* of which makes the person, in whose possession they are found concealed, liable to a penalty of £200,) and alledging, that Defendant for the said private still forfeited one penalty of £200. After stating the Evidence, which corresponded exactly with the Information, it was adjudged as follows, viz. " that the said C., for his *said offence*, forfeit £200." The Court thought this Judgment was not exposed to the objection in that of *R.* v. *Salomons*, just mentioned; because here the *Information* having specified for what particular offence the penalty was claimed, viz. for possessing a concealed still, there was no uncertainty as in the former case, to what the penalty was referable *(g)*.

And if an offence is alledged in the Information, accompanied with a charge of some act not punishable by summary Conviction, yet a Judgment, that the Defendant is convicted for the *said offence* is good, as referring to that fact which is the proper subject of this mode of punishment. Thus, a Conviction on the Act 3 & 4 Will. and Mar. c. 10, against deer stealing, charged, that the Defendants with force and arms *broke and entered* a park where deer were usually kept, without consent of the owner, and then and there *unlawfully coursed one fallow deer*, &c.; and the Judgment of conviction and penalty were *for the offence aforesaid*. It was objected, that there

(f) R. v. Salomons, 1 T. R. 251. *(g)* R. v. Chandler, 14 East. 267. 4th objection.

was no statute against breaking and entering the park, and that the penalty being for the aforesaid offence generally, could not be distinguished. But the objection was overruled, for the Court said the *offence* was hunting the deer *(h)*.

Section 13. *Of the Penalty, Form of Award and Distribution, in the Conviction.*

Penalty must be certain.

In awarding the Penalty, whether pecuniary or corporeal, it is essential that it be certain and determinate, and such as is warranted by the statute. We have seen that a Conviction adjudging that the Defendants were convicted, and awarding an imprisonment "till they should pay a fine to the King," without ascertaining its amount, was held to be bad *(i)*. So, a Conviction awarding the offender to pay £15, together with the charges previous to and attending the Conviction," was quashed for uncertainty: and the commitment upon it discharged, for the imprisonment in that case was merely a mode of enforcing payment, and while the sum remained uncertain, the Defendant could not be released *(k)*. So, where the statute enabled the convicting Magistrate to levy, as well the penalties as the costs and charges of the distress, &c. a Conviction, adjudging that the Defendant had forfeited so much for penalties, "together with the reasonable charges of recovering the same," was set aside as defective in not ascertaining the exact sum *(l)*.

Corporal punishment.

On the same grounds, where a discretion is given to the Magistrates in awarding a corporal punishment, that which is discretionary must be distinctly ascertained by the Con-

(*h*) R. *v.* Drake, 2 Sho. 489. 1st objection.
(*i*) R. *v.* Elwell, Str. 794, *ante*, p. 155.
(*k*) *Per* Lord Mansfield, R. *v.* Hall, Cowp. 60.
(*l*) R. *v.* Symonds, 1 East. 189.

viction.

viction. Thus, the Vagrant Act 17 Geo. 2. c. 5 having empowered the Magistrate to order an incorrigible rogue to be employed after his imprisonment in his Majesty's service, either by sea or land, a Conviction under that Act *(m)* was deemed invalid *in toto*, because the Judgment only ordered the Defendant after his imprisonment "to be sent and employed in his Majesty's service," without determining whether by sea or land *(n)*.

What included in the Judgment.

Whatever is made by the statute a constituent part of the punishment, and not left in the discretion of the Magistrate, must necessarily form part of the Judgment expressed in the Conviction. Thus the statute 20 Geo. 2. c. 19, for the better regulating of servants in husbandry, authorizes the Magistrate upon Conviction to punish the offender by commitment to the house of correction, there to remain and *be corrected*, and held to hard labour for a time not exceeding one month: the Court of King's Bench were of opinion, that in a Conviction and commitment under this statute, *correction*, by which they understood whipping, was a necessary part of the Judgment *(o)*.

Not to mix penalties by different statutes.

2. In affixing the punishment of an offence, which may be proceeded against upon one or other of two different statutes, care must be taken not to blend the penalties under both *(p)*. The necessity of attending to this particular is exemplified by the following case:

The statute 20 Geo. 2. c. 19, relating to servants in husbandry, empowers the Magistrate, upon complaint by the master of any misdemeanour, miscarriage, or ill-behaviour in his service, to punish the offender by commitment to the house of correction, there to remain and be corrected, and held to hard labour, not exceeding *one* calendar month. A subsequent statute, 6 Geo. 3. c. 25

(*m*) The Conviction was for an offence to which the provisions of the Vagrant Act are extended by 39 & 40 Geo. 3. c. 50; but the punishment is under the former Act.

(*n*) R. v. Patchett, 5 East. 341.

(*o*) R. v. Hoseason, 14 East. 606.

(*p*) An instance of an error of this kind is found in R. v. Clarke, Cowp. 35.

for

for regulating apprentices and persons working under contract, enacts, that if any labourer, or other person, after contracting for any time, shall leave his service, or be guilty of any other misdemeanour, he may, upon complaint, be committed to the house of correction for any time not exceeding *three*, nor less than *one* month. The Court of King's Bench had occasion to consider the form of a precedent, which, blending the two Acts, awarded a commitment, correction, and hard labour, (as in the statute 20 Geo. 2. c. 19,) but assigned the time of imprisonment *three* months, pursuant to the statute 6 Geo. 3. c. 25, and not to that of 20 Geo. 2. c. 19, whereby the imprisonment is only for *one* month. The Court upon considering both the Acts, were of opinion that the punishments inflicted by each could not be mixed, and that the form alluded to was incorrect *(q)*.

Time of fixing penalty not controvertible.

3. If the Penalty appears to be properly ascertained by the Conviction, the Court of King's Bench will not inquire when it was fixed; for if determined at any time before the Conviction is formally drawn up and returned, it will be sufficient upon that return *(r)*.

Where a statute inflicts a Penalty, and orders the offender to be committed, or set in the pillory, on failure of payment, or of sufficient distress, it is sufficient to adjudge

(*q*) R. *v.* Hoseason, 14 East. 605. The particular Conviction then before the Court was not exposed to this objection, because the time of imprisonment therein was for one month, which is authorized by both statutes. The form of the precedent, which was discussed, is given in Burn's Justice, tit. Servants, and follows the words of 6 Geo. 3, as to the time of imprisonment for *three* months, (or any less time, not short of *one* month) and at the same time adds, hard labour and correction, which are only given by 20 Geo. 2.

(*r*) 2 Lord Raym. 1514. R. *v.* Layton, 1 Salk. 352. Lambard, 151. What is said by the Court in the case of R. *v.* Dimpsey, 2 T. R. 97, *post*, that a Judgment is an entire thing, and that part cannot be given at one time and part at another, does not invalidate the position laid down in the cases above cited: for that was said with reference to an omission in the Judgment, as returned to the *certiorari*, in not appropriating the penalty, and was in answer to a suggestion from the bar, that the distribution might be made afterwards.

the

the penalty and distribution, without noticing the contingent punishment *(s)*.

Mitigated Penalty.

4. The Magistrate can in general impose no other than the precise Penalty directed by the statute; and has not, as incident to his jurisdiction, any power to lessen it. A Judgment for too little is as faulty as a Judgment for too much *(t)*. The discretionary power of *mitigating* the Penalty, therefore, only exists in cases where it is expressly vested in the Magistrate by particular statutes *(u)*.

Judgment cannot be severed.

5. A Conviction must be good in all its parts *(v)*. The Judgment in particular, being an entire act, cannot be severed, and therefore, if it be bad as to part, the whole is thereby vacated, although the several parts may be in their nature distinct. Thus, a Conviction for not accounting for tolls, and also for not paying over the receipts, being defective as to the latter offence, for not specifying the sums, though correct as to the former, was discharged altogether *(w)*.

There is one instance indeed of a Conviction for harbouring smuggled goods, including both a Judgment for the penalty and condemnation of the goods, in which the former part, viz. for the Penalty, not being supported by the Evidence, was set aside, and the Conviction allowed to stand for the remainder: but that is stated to have been by consent *(x)*. And on a Conviction, as an incorrigible rogue, already mentioned, where the Judgment ordered the offender to be imprisoned, &c., and afterwards sent into his Majesty's service, the latter part being defective for not specifying the particular service, it was held that the whole Conviction must be quashed, though there was no objection to that part which directed the imprisonment. For when it was suggested, that the defective part of the Judgment need not vitiate the rest, which was

(*s*) R. *v.* Chandler, Carth. 501. 5th objection. 5 Mod. 446. S. C.
(*t*) R. *v.* Salomons, 1 T. R. 252, *ante*, p. 163.
(*u*) See the preamble to the Act of 51 Geo. 3 c. 120.
(*v*) *Per curiam*, 1 T. R. 251.
(*w*) R. *v.* Catherall, 2 Str. 900.
(*x*) R. *v.* Hale, Cowp. 728.

valid

valid and distinct, the Court answered, that the Judgment was entire and could not be split; and accordingly the rule for quashing the Conviction was made absolute generally *(y)*.

Section 14. *Of appropriating the Penalty in the Conviction.*

Distribution of Penalty, how awarded.

The *appropriation* of the Penalty is either fixed by the statute itself, or it is left to the discretion of the convicting Magistrate to assign the object or proportion according to which it is to be disposed of. In the former case, that is where the statute itself makes a complete and determinate disposal, the Conviction need not contain any express award to that effect. Thus on the old Deer-stealing Act, 3 & 4 Will. and Mar. c. 10, which ordered the Penalty to be divided equally between the poor of the parish and the party grieved, it was held sufficient to award a forfeiture of the Penalty, without proceeding to specify the application *(z)*. This is the usual mode wherever the statute applies the Penalty with such certainty, that the Judgment can be unequivocally carried into effect by reference to the Act alone *(a)*. The form of the Judgment in such cases usually awards the Penalty to be distributed as the Act directs *(b)*.

Where unnecessary.

Where specific distribution necessary.

But where any discretion is vested in the Magistrate, either as to the object or rate of appropriation, or where any sum is to be assigned by way of satisfaction or reward, the Judgment must in such cases specifically ap-

(*y*) R. *v.* Patchett, 5 East. 344. *Ante*, p. 165.
(*z*) R. *v.* Barrett, 1 Salk. 383.
(*a*) 8 East. 573.
(*b*) See R. *v.* Thompson, 2 T. R. 18, where the Conviction was confirmed without any objection to it, on account of its being in that form. At that time the Penalty was given by the Act, half to the informer, and half to the poor, though it has since been altered and given wholly to the informer.

point

point the manner and proportion in which the Penalty is to be distributed.

Thus, by the Mutiny Act, 26 Geo. 3. c. 10, the Penalty for not receiving a soldier according to billet is directed to be applied in the first place to make satisfaction to the soldier for his expence, and the remainder to the overseers of the parish. A Conviction under this Act, adjudging only that the Defendant had forfeited £5, "to be disposed of as the law directs," was deemed irregular: for in that case, the distribution of the Penalty was held to be a necessary part of the Judgment, which ought to appear on the record *(c)*; not merely in the general terms of the Act, but specifying the exact sum *(d)*.

Specification of party entitled to.

In like manner, where the amount is ascertained by the Act, but the description of persons entitled is the subject of the Magistrate's selection; or even where both the amount and the description of persons are determined, but the individuals answering that description are uncertain, in each of these cases, the Magistrate must exercise his discretion in these particulars at the time of the adjudication, and make the requisite selection by name of the party entitled. And that must appear upon the record so as to leave no part of the Judgment or execution liable to uncertainty.

This is exemplified in the case of a Conviction under the statute 42 Geo. 3. c. 119. s. 5, prohibiting unlawful Lotteries, which statute directs the penalty to be applied, one-third to the King, one-third to the informer, and the other third to the person apprehending or securing the offender. The Conviction in question stated the offender to have been *brought before* the convicting Magistrates by W. C. and J. P. two of the beadles of the parish. The adjudication, after declaring the Defendant to be convicted of the offence, proceeded in these terms, viz.; "for which said offence, I do adjudge her to forfeit and pay the sum of £100, to be applied and distributed, when paid, as the

(*c*) R. v. Dimpsey, 2 T. R. 96. (*d*) See R. v. Symonds, 1 East. 189.

law

law doth direct." This case was very fully considered, upon the objection, that the person entitled to the last third of the Penalty for apprehending and securing the offender, should have been distinctly named and pointed out by the Magistrate. It was contended in answer to the objection, that the persons by whom the offender was stated to have been "brought before the Magistrates" sufficiently answered that description, or if not, that the unappropriated portion remained in the Crown. But the Court decided that the objection was well-founded: that the application of the Penalty should have appeared distinctly upon the face of the Conviction: and that it was bad for the uncertainty in the objects of the distribution *(e)*.

Informer's share.

It is the policy of most of the statutes inflicting penalties, to give part of the Penalty to the informer *(f)*. The proportion is now generally one-half. At first it was commonly one-fourth, afterwards one-third by later statutes, and lastly, one-half. Even this large proportion, says an eminent writer on the penal statutes, seldom hath its effect *(g)*.

To the poor of the parish where, &c.

Since the 18th year of Elizabeth, when the first instance is found, it has been a frequent practice to appropriate

(*e*) R. *v.* Seale, 8 East. 568. 573. *Note*, the statute 32 Geo. 3. c. 53, regulating the seven public offices in Middlesex and Surrey, provides, that the Penalties levied by the Justices, under that Act, shall (except the informer's share) be paid to the receiver appointed by the Act. This clause is only to warrant the Magistrates in paying the money to the receiver, but does not vary the form of the Convictions made at those offices. *Per* Buller, J. 5 T. R. 341.

(*f*) The policy of this expedient is enforced in the preamble to a clause of an old statute, 25 Hen. 8. c. 9, concerning Pewterers, which, after reciting a former Act, proceeds to take notice, "that forasmuch as the forfeiture therein is to the only use of the King's highness, and that any party searching or finding the articles there condemned, is not entitled to have any benefit thereby, it hath not been known that any person or persons have taken any pains to search or make enquiry thereof, by reason whereof divers evil-disposed persons, &c. daily go about from village to village, selling such pewter and brass, which is not good, and using such deceivable weights and beams, as they did before the making of the said Act, to the great hurt and detriment of the King's subjects," for which reason it is enacted by that clause, that half the forfeiture shall belong to the informer.

(*g*) Barrington's Observations on the Statutes, 207, n. (*a*).

some

some part of the Penalty to the *poor* of the parish where the offence is committed; and the following points merit attention relative to the proper form of adjudication in such cases:

Vill presumed co-extensive with *parish*.

In a Conviction under the statute 5 Ann. c. 14, which appoints half the Penalty to the poor of the parish where the offence happens to be committed, it was held to be no objection that the offence was alledged to be *apud villam de Mottram Andrews*, for, it was said by the Court, that if there be such a parish as Mottram Andrews, it shall be intended to be co-extensive with the *vill:* but if the offence was committed in a vill, which was extra-parochial, then the informer shall have the whole *(h)*.

If such an objection could now be got over at all, consistently with what has since been laid down, it must be where the adjudication of the Penalty, as in that case, is merely "to be distributed as the statute directs." For it has been decided, that an award expressly to the poor of a *township*, where the statute speaks of a *parish*, is irregular.

To poor of *township*, bad.

This was so decided in the case of a Conviction on the Meeting Act, 35 Geo. 3. c. 6. s. 68, the 85th section of which orders that the Penalty after making satisfaction as therein ordered, shall be paid to the overseers of the *parish* where the offence is committed. The act also prescribes a short form of Conviction, concluding thus, "and I do hereby declare and adjudge that the said A. B. hath forfeited the sum of £—— for his offence aforesaid, to be distributed as the law directs, according to the statute in that case made and provided."—In the Case in question the fact was stated "at Ullesthorpe;" and the Judgment was in these terms, viz. "I do hereby adjudge and direct, that out of the said sum of 40*s.* so forfeited, 15*s.* be applied in making satisfaction to, &c.; and that 25*s.*, the remainder, be paid to the overseers of *the township of Ullesthorpe aforesaid*, for the use of the poor of the said

(*h*) R. v. Wyatt, 2 Lord Raymond, 1478.

township,

township, according to the statute, &c." It was alledged and admitted to be the fact, but it did not appear upon the face of the Conviction that Ullesthorpe was a township supporting its own poor. But the Court, without admitting that if the fact had so appeared it would have supported the Conviction, were clearly of opinion that as it stood it was irregular *(i)*.

Statute-form not sufficient, in what cases.

It may be noted by the way, as an observation arising from another part of the Case last cited, that it is not always sufficient to adhere literally to the Form given by Act of Parliament; where, from the nature of the Case, the general terms of adjudication used in that form do not suffice to ascertain that which the express provisions of the statute require to be ascertained. The form annexed to the Act there referred to (35 Geo. 3. c. 6. s. 68.) has the words, " to be distributed as the law directs, according to the statute in that case made and provided:" but the statute itself expressly directs the Magistrate to fix a sum to be given by way of satisfaction to the soldier aggrieved (sect. 85.). It is clear therefore that a Judgment, pursuant to the general form, could not be executed for want of ascertaining that sum; therefore a departure from the Form given by the statute, by using a more precise specification, was deemed not to be any objection: and indeed it is difficult to see how the Conviction could have been sustained, if it had merely adopted the general form, without ascertaining what part of the Penalty should be given in satisfaction to the party grieved, for that is a matter entirely in the Magistrate's discretion. Lord Kenyon, with reference to that point, said, " Where a form of Conviction is prescribed by statute, it is in general most safe to adopt the very words used; but taking the whole of this Act together, the Legislature could not intend that there should be a literal adherence to the form prescribed *(k)*."

(*i*) R. *v.* Priest, 6 T. R. 538. (*k*) 6 T. R. 538.

Section

Section 15. *Of awarding Costs.*

Power to award.

Till the statute 18 Geo. 3. c. 19. was passed, there was no general power enabling the convicting Magistrate to award *costs* to either party; though such a provision had occasionally been inserted in particular Acts. But by that Statute it is enacted, "That where any complaint shall be made before any Justice of Peace, and any warrant or summons shall issue in consequence of such complaint, it shall be lawful for any Justice who shall have heard and determined the matter of such complaint to award *(l)* such costs to be paid by either of the parties to the party injured; and likewise to levy the sum so awarded by distress, or if effects cannot be found, to commit to hard labour for any time not exceeding one month, nor less than ten days, or until the sum so awarded, together with the expences of the commitment, be paid *(m)*: Provided nevertheless, that where the penalty or penalties shall amount to or exceed *five* pounds, the said costs shall be deducted by the said Justice or Justices according to his or their discretion, out of the said penalty or penalties, so that the said deduction shall not exceed one fifth part of the said penalty or penalties; and the remainder of the said penalty or penalties shall be paid to or divided among the person or persons who would have been entitled to the whole of the penalty or penalties in case this Act had not been made."

18 Geo. 3. c. 19.

When to be deducted out of penalty.

From what has been intimated under a former head *(n)*, it is sufficiently obvious that the sum so awarded must be ascertained in the Conviction. The Justice moreover must himself ascertain the sum. An award "of such

Costs at discretion of third person, bad.

(*l*) See Form of awarding Costs, Appendix, tit. *Costs*.

(*m*) See the Form of the Warrant of Distress and Commitment for Costs, in the App. tit. *Costs*.

(*n*) *Ante*, p. 164, &c.

costs

costs as to certain other persons (by name) shall seem reasonable," is bad; for an authority of this kind cannot be delegated *(o)*.

Section 16. *Conclusion.*

Attestation. The Conviction concludes with an attestation under the hand and seal of the Magistrate, which is the only proper mode of authenticating it as the record of his proceedings *(p)*.

Date. Along with the attestation the date is usually affixed. And it is material where the time for Conviction is limited by statute, that the date should bring it within that time when compared with the date alledged for the offence:

Thus, on a statute requiring the offence to be prosecuted within twelve months, a Conviction dated 13th August, 1708, for an offence committed 14th August, 1707, was deemed objectionable, though it contained an averment of the Defendant "being duly prosecuted within twelve months after the offence:" for the Justices, it was said, might construe twelve months to mean twelve calendar months, or a year, whereas by law it is twelve lunar months only *(q)*.

(*o*) R. v. St. Mary's, Nottingham, 13 East. 57, note.
(*p*) *Ante*, p. 42.
(*q*) *Per* Holt, C. J. R. v. Peckham, Comb. 439.

PART III.

PROCEEDINGS SUBSEQUENT TO CONVICTION.

CHAPTER I.

Of the Proceedings in Execution;—Recognizance, Distress, Imprisonment, &c.

WE are now to consider the proceedings ulterior to the Conviction. These are either on the side of the prosecution, in furtherance of the Conviction; or on behalf of the party convicted, for reversal or relief. The business of the present chapter will be to describe the several modes of enforcing the object of the Conviction, viz. by Recognizance, Distress, and Commitment: the last of which is either a primary punishment, or only secondary to a pecuniary one.

Recognizance against future offence.

1. The powers of the convicting Magistrate are confined in general to enforcing the punishment for the particular offence against which Judgment has passed, the usual jurisdiction of the Magistrate not enabling him to compel the offender to give security against a future breach of the law. But in cases of summary Convictions under the Revenue Laws, that power and duty is added by 47 Geo. 3, sess. 2. c. 66. s. 43.

Section

Section 2. Of levying the Penalty by Distress.

Distress.

2. The mode of enforcing the payment of pecuniary fines is usually by distress or imprisonment. The power of proceeding by these compulsory methods is derived entirely from special statutory provisions, and is not any necessary consequence of a Conviction. If a Statute only confers a power to convict, without making provision for the recovery of the penalty, there seems be no compulsory means of carrying such a law into effect *(a)*.

Power derived from Statute.

It is usual therefore for the Statutes inflicting penalties to contain an express authority for this purpose. It is sometimes directed to be exercised *immediately*, upon non-payment of the penalty; in other Cases only upon failure of payment after a certain number of days.

When the Justice is empowered to issue his warrant on refusal or neglect of payment for a certain number of days, it seems to be understood that no *demand* is necessary to enable him to do so after the expiration of that time *(b)*.

Suspended by appeal.

Those Statutes which give a power of appeal to the party convicted frequently also provide, that upon the appeal, and security given for prosecuting it, the distress shall be stayed till the determination of the appeal. In such cases, after the Appeal decided, if the time limited for making the distress be expired, the Magistrate may, it seems, issue his warrant immediately without any fresh demand; for the time runs from the order *(c)*. But if the warrant has been issued before, and suspended by the appeal, it is better, after the decision of the appeal, to apply to

(*a*) This seems to be taken for granted in the preamble to the Statute 15 Geo. 3. c. 14, which reciting, that by a former Act 14 Geo. 3. c. 44, certain penalties had been inflicted, *but no provision made for the recovery of them*, gives a power to recover the same by distress and sale, or imprisonment.

(*b*) *Semb.* Wootton v. Harvey, 6 East. 75.

(*c*) *Id. ib.*

the

the Magistrate, and lay the facts before him before proceeding to the execution of the warrant *(d)*.

Wherever it is necessary to administer an oath or affirmation for levying any penalty, or making distress in execution of a Conviction, a general power is given for that purpose by 15 Geo. 3. c. 39, to any Justice acting under the Statute which authorizes the levy.

Warrant.

The proper mode of proceeding is for the Justice, either forthwith, if immediate payment be enjoined by the Statute, or otherwise, at the expiration of the limited time, to make a warrant under his hand and seal directed to the constable or other proper officer of the parish or district in which the goods to be distrained upon are found. The warrant shortly recites the Conviction *(e)*, and commands the officer to levy the sum specified, directing to whom it is to be paid. Many Acts of Parliament furnish a form to be used, which in all such cases should be followed.

In general the warrant should appoint a time and place for returning it *(f)*.

By whom executed.

The constable is the proper officer to execute the warrant *(g)*. And if it be delivered to him a reasonable time before the day appointed for the return, he is bound to execute and return it; and is indictable for refusal or wilful neglect *(h)*. For constables, who at common law were originally subordinate officers to the conservators of the peace, are now the proper officers of the Justices of the Peace who have succeeded to that capacity *(i)*.

If the warrant be directed *to all constables generally*, no one in particular can execute it out of his own district, for

(*d*) *Per* Lawrence, J. 6 East. 79.

(*e*) See the form, Appendix, tit. *Distress*.

(*f*) R. *v.* Wyatt, Fortesc. 127. 2 Lord Raymond, 1189. 1 Salk. 380.

(*g*) It was said in argument, Carth. 78, and appeared to be assented to by the Court, that a Justice of Peace cannot direct his warrant to his servant, or to any other person but to the constable or parish officer. This must however be understood to include the known officers in borough or other special jurisdictions.

(*h*) R. *v.* Wyatt, Fort. 127. See the precedent of an indictment for this offence, *Precedents*, tit. Constable, and see 2 Lord Raymond, 9. 2 Roll. Rep. 78. Hawk. P. C. 2. c. 16. s. 5.

(*i*) Fort. 129.

it is directed to him only by his name of office, and no one has authority *eo nomine* out of his district. But if the warrant be directed to a particular constable by name, *he* may execute it any where within the jurisdiction of the Magistrate *(k)*.

In what manner.

By the 27 Geo. 2. c. 20. s. 2, the officer, upon the execution of the warrant, is bound, if required, to shew the warrant to the person whose goods are distrained, and to suffer a copy of it to be taken.

It is laid down by Mr. Serjeant Hawkins *(l)*, that upon the warrant of a Justice for levying a forfeiture where the whole or any part thereof belongs to the King, the officer is justified in breaking open outer doors for the execution of the warrant: but there seems to be no such power by law in other cases, where no part of the penalty is vested in the Crown.

Goods of *feme covert.*

If the offender be a *feme covert*, (who is subject to this species of Conviction) *(m)*, and the Act of Parliament authorizes the recovery of the penalty by distress and sale of the offender's goods, the goods of the husband are not liable to be distrained for the penalty *(n)*. In the Statute 22 Car. 2. c. 1, is inserted a special provision, "that if the person offending be a *feme covert*, cohabiting with her husband, the penalties incurred by the Act shall be levied by warrant as aforesaid, upon the goods and chattels of the husband *(o)*."

Default of distress within jurisdiction.

If the offender be not possessed of sufficient goods to answer the penalty within the Jurisdiction of the convicting Justice, there was formerly no means of prosecuting the levy upon any effects elsewhere; but now by the Statute 33 Geo. 3. c. 55. s. 3, it is enacted, "that in all cases where any penalty, &c. shall be directed to be levied by

33 Geo. 3. c. 55.

(k) Carth. 508. Salk. 176. Hawk. P. C. b. 2. c. 13. s. 30.
(l) B. 2. c. 14. s. 5. cites 2 Jones, 233, 234.
(m) *Ante*, p. 60.
(n) 11 Co. 61. b.
(o) See also 7 Jac. 3. c. 6. s. 28, which enacts, that if any married woman being lawfully convicted of recusancy, shall not conform within three months, she may be committed till conformity, unless her husband shall pay the penalty of 10*l.* a month.

warrant

warrant of any Justice, by distress and sale of the goods of any person, if such sufficient distress cannot be found within the limits of the jurisdiction of the Justice granting such warrant, on oath thereof before any Justice of any other county, &c. to be indorsed on such warrant, the penalty, &c. by virtue of such warrant and indorsement, may be levied by the person to whom it was originally directed, by distress and sale of the goods of the offender in such other county or jurisdiction; provided that no Justice by whom the warrant is so indorsed shall be answerable for any irregularity in obtaining it."

Levying for costs.

Except where special provision was made for levying the costs and charges, no more than the bare penalty could in any case be levied, until the Statute 18 Geo. 3. c. 19, before mentioned, which first authorized the Justice to give costs, and at the same time authorized the recovery of the amount in addition to the penalty *(p)* if under five pounds. If the penalty amounts to, or exceeds that sum, the costs are still to be deducted out of it, provided the deduction does not exceed one-fifth of the penalty. The form of the *warrant (p)*, for levying the costs separately is fixed by the Statute.

Distress not replevisable.

As to the right of replevying goods taken for a penalty the result of the authorities seems to be, that, a distress for a penalty under a regular warrant from a Justice on a summary Conviction, being in the nature of an Execution, the goods so taken within the authorized jurisdiction are not replevisable. Lord Chief Baron Gilbert indeed *(q)*, has delivered an opinion, that if any inferior jurisdiction issues Execution, a replevin is lawful; and the reason assigned is because the inferior jurisdiction being restrained within particular limits, the officer is obliged to shew that he took the goods within those limits. But it must be observed, that the only authority cited in support of that opinion *(r)*, does not sufficiently warrant it; for the ques-

(p) *Ante*, p. 178. For the form of the warrant to levy the costs, see Appendix, tit. *Costs*.

(q) Gilbert's Replevin, 161.

(r) Aylesbury *v.* Harvey, 3 Lev. 204.

tion was not there agitated, and the final decision was against the plaintiff in replevin *(s)*; and however great the deference due to that opinion, it is opposed by authorities in which the contrary position seems to be recognized to be the law: Thus,

In nature of execution.

It was decided by the Court of Common Pleas, in *Bradshaw's* Case, anno 12 Will. 3, that where an Act of Parliament orders a distress and sale of goods, this is in the nature of an Execution, and replevin does not lie *(t)*:

Afterwards in 9 Geo. 1, an attachment *nisi* was granted against the town-clerk of Guildford and a person who had been convicted on the Game Act, the former for granting, and the latter for suing out a replevin of goods distrained for the penalty. Though the Information in that case was refused, it was solely upon the ground that the Court would not interfere by Information for a contempt of the inferior jurisdiction, which the replevin in that case was said to be *(u)*:

Attachment for.

But afterwards in 2 Geo. 2, an Attachment was granted against a person who had replevied three horses seized under a Magistrate's warrant as forfeited by being driven in a waggon contrary to the regulations of a Turnpike Act *(v)*. The only reason why the attachment in that case was not issued also against the sheriff as prayed, was, that he was ignorant of the existence of the warrant, which the party himself knew. Lastly, anno 16 Geo. 2, an attachment was issued against the under sheriff of Cumberland for granting a replevin of goods distrained on a Conviction for deer stealing *(w)*.

It

(s) See the note of Mr. Durnford to Pearson v. Roberts, Willes, 673, in which this opinion of Lord Ch. B. Gilbert is discussed and controverted.

(t) 6 Bac. Abr. 55. oct. tit. Replevin.

(u) R. v. Burchett, 1 Str. 557.

(v) R. v. Sheriff of Leicestershire, Barnard. 110.

(w) R. v. Monkhouse, 2 Str. 1184. It is added in the note to the later editions that the sheriff was advised and had express notice before he granted the replevin that the goods were irreplevisable; and that the ground of the decision was, that the Conviction was conclusive, and its legality could not be questioned

Sale of distress.

It is fully settled that by the words in an Act of Parliament authorizing the penalty to be levied by distress, is to be understood distress and *sale* (*x*).

The officer who sells, ought to sell for ready money, and if he sells upon credit, he is immediately responsible for the money (*y*).

The warrant ought to set a time for the sale, and that, except it be fixed by the Act which imposes the penalty, is required by 27 Geo. 2. c. 20, to be within not less than four, nor more than eight days.

Return of warrant.

The constable is bound, at the time assigned for the return of the warrant, to certify to the Justice what he has done upon it (*z*).

He is not indeed bound to return the warrant itself, which may be necessary for his own justification (*a*). And therefore it is a prudent precaution in the prosecutor to retain a duplicate of the warrant delivered to the constable, that it may be evidence if required. If the constable refuses to certify what he has done, or if he has levied the penalty, and refuses to pay it over, he may be proceeded against by indictment or information; or, it seems, the Justices before whom the warrant is returnable, may fine

Constable refusing to return.

tioned in a replevin. In *Pearson* v. *Roberts*, Willes, 668, which was a replevin of goods taken under a Justice's warrant, for a penalty after Conviction on the Highway Act, the Court purposely avoided coming to any decision upon the question whether a replevin would lie; being of opinion that the action failed on another ground.

The case of goods taken under a distress for a Poor's Rate, is not applicable to the present; for there the replevin is held to lie, upon the express wording of the act of 43 Eliz. upon which the rate is founded.

In the case of *Pritchard* v. *Stevens*, 6 T. R. 522, which was a replevin of goods taken under a warrant from the Commissioners of Sewers, the Court refused to quash the proceedings upon a summary application. But no conclusion can thence be drawn that the proceedings were legal; the grounds of the refusal being, that the affidavits did not sufficiently shew the fact of the goods being taken in execution after a judgment; and therefore the Court left it to the defendant to put that fact upon the record.

(*x*) R. v. Speed, 1 Salk. 379. 12 Mod. 329. S. C. Carth. 502. R. v. Nash, 1 Lord Raymond, 990. Morley v. Stocker, 6 Mod. 83. Anon. Sir T. Jones, 25.

(*y*) *Semb.* Morley v. Stocker, 6 Mod. 83.

(*z*) 1 Salk. 380, R. v. Wyatt.

(*a*) 2 Lord Raymond, 1196.

him.

him. One or other of these is the proper remedy for the prosecutor to resort to, if the requisite duty is not fulfilled; but the Court of King's Bench will not grant a *mandamus* to a constable to return the warrant on a Conviction removed into that Court by *certiorari (b)*.

Section 3. Of the Disposition of, and Manner of accounting for Fines.

Disposal of fines.

All fines for offences created by any penal Statute would, if not otherwise appropriated by the Statutes themselves, belong to the Crown (*c*).

Sundry Acts have been passed to regulate the mode of accounting for, and paying such fines as arise upon summary Convictions before Justices.

The matter, as far as relates to Convictions at the seven Police offices in London, Middlesex, and Surry, is regulated by the Act of 42 Geo. 3. c. 76, by which Act a receiver is appointed, and books ordered to be kept for the accounts, and certain remedies and proceedings pointed out in case of neglect in obeying those regulations.

By 50 Geo. 3. c. 41. s. 30, his Majesty's share of all fines received by Justices for offences against the Hawkers and Pedlars Act, are required to be paid by them at the next Quarter Sessions to the Clerk of the Peace, or other such officer within the county or place where the Conviction was made; who is directed to remit the sums received to the Commissioners for licensing hawkers and pedlars, with a schedule containing the names of the parties, the offences, and the amount of the sums.

For all penalties due to the Crown concerning the payment, of which there is no special statutory direction, the Statute

(*b*) R. *v.* Nash, 2 Lord Raymond, 990. Morley *v.* Stocker, 6 Mod. 83, which is the same case under a different title.

(*c*) Hawk. P. C. b. 2. c. 26. s. 17. R. *v.* Millard, 2 Str. 808.

41 Geo. 3. c. 85, has provided a general regulation, by enacting, "that it may be lawful for every Justice of the Peace, acting out of sessions for any county, city, &c. to receive all fines imposed by him, or any other Justice of the Peace acting as aforesaid, and not made payable to any body corporate, commissioners, or other persons, and to give receipts, which shall be a sufficient discharge to the parties; and that every such Justice by himself or clerk shall keep an account of all such fines so received, and annually, previous to the Michaelmas sessions, pay into the hands of every sheriff of the county, &c. all such fines or shares of fines, as are due to his Majesty; and the sheriff is required to give an acquittance accordingly." General direction 41 Geo. 3. c. 85.

The Justice is also (by section 2), to transmit the accounts of all such fines to the Clerk of the Peace of the county, city, &c.

If the fines are imposed by two Justices, the account is to be kept, and the payments, &c. made by the Justice residing nearest the place where the sessions are held.

By the fourth section, the Clerk of the Peace is to deliver to the respective constables, &c. in ten days after the sessions, an account in writing of the several fines or shares to which any persons in their several districts are entitled; whereupon the constable is to give notice to such persons that they may apply to the Justices for the same. Notice to persons entitled.

Section 4. Of Commitment for Punishment, or in default of Payment, &c.

1. The power of imprisoning is given either as an original punishment, or as the means of enforcing payment of a pecuniary fine, or in any other manner compelling obedience to the sentence of the Magistrate. Duty of Justices in Commitment.

This power, in regard to offences cognizable by a summary jurisdiction, is derived solely from Statute, and is

is altogether of a distinct nature from that which Justices possess in regard to infractions of the peace.

If a statute assigns this mode of punishment in the first instance, it follows immediately upon and is the legal consequence of the judgment. But where it is merely subsidiary to enforcing payment of the fine, the Magistrate cannot legally commit, till he has ascertained the want of sufficient goods to answer the penalty. This should regularly be certified by the officer's return to the warrant of distress *(d)*.—An action of trespass and false imprisonment was held to lie against a Justice of Peace, who, upon a Conviction for destroying game, had committed the party forthwith without endeavouring to levy the penalty on his goods, though it was proved that they were sufficient to answer the amount *(e)*.

For want of distress.

There seems no authority to detain the party in custody in the mean time, unless such a power be specially provided by statute; as it is, in several *(f)*, and some statutes expressly direct the conviction to be after due proof upon oath of the want of distress *(g)*.

Upon the return of the warrant or other sufficient proof of the want of effects to distrain upon, the Justice

(d) R. v. Hawkins, Fort. 272. *Per* Parker, C. J.

(e) Hill v. Bateman, 1 Str. 710.

(f) See 13 Geo. 3. c. 80. Under a provision in the Deer-stealing Act, 3 & 4 Will. & Mary, c. 10, since adopted into 16 Geo. 3. c. 30. s. 4. and now in force, empowering the constable or the prosecutor, after the conviction, in case the penalty is not forthwith paid, to detain the offender in custody for a reasonable time till a return can be made to the warrant of commitment, not exceeding two days: Lord Holt said the proceeding ought to be this: "the prisoner, if present, may be detained in custody two days, in which time the Justice may make what enquiry he can if the penalty may be levied by distress, and if he finds there is nothing to distrain, then he must make a record of it by way of adjudication, that it appearing to him the party hath not any goods by which the penalty may be levied, therefore in pursuance of the statute, he doth award him to prison, which must not be before the end of two days. If the person is absent when convicted, the Justice is to make a warrant to distrain, and if there be nothing upon which a distress may be made, after two days he must make a record thereof as above, and then issue his warrant of commitment." Rex v. Chandler, Holt, 214. Carth. 508.

(g) See 17 Geo. 2. c. 36. 50 Geo. 3. c. 108. s. 7.

ought

ought to make a record with an adjudication of the fact of want of distress, and not merely of the return, and issue his warrant of commitment thereupon *(h)*.

If a corporal punishment be inflicted by statute in failure of sufficient distress, and it so happen that the offender being convicted of *one* penalty, has effects sufficient only to satisfy part, it has been held *(i)* that the goods ought not to be taken but the corporal punishment resorted to. But if the same person be separately convicted in *two* penalties, and his goods are sufficient to satisfy one only, they ought to be levied under one conviction and the corporal punishment should be inflicted for the other *(k)*. Where goods sufficient to answer part.

But the law never intended that a man should suffer both punishments for one conviction *(l)*.

2. The Commitment may be either to the county gaol or to the House of correction at the discretion of the Justice, by the provisions of the statute 24 Geo. 3. sess. 2. s. 12. To what place.

By 15 Geo. 2. c. 24, Justices of a Liberty or Corporation may commit to the gaol of the County.

3. The warrant of commitment is a precept in writing under the hand and seal of the Justice, directed to the keeper of the prison to which the party is to be committed. Form of warrant o commitment.

An order of Commitment to prison must be in *writing* (*m*). But if the Magistrate be empowered to Commitment must be in *writing*.

(*h*) R. *v.* Chandler, 1 Lord Raymond, 545. R. *v.* Wyatt, 2 Lord Raymond, 1196.

(*i*) *Per* Holt, C. J. Powell, J. and the Court, 4 Ann. R. *v.* Wyatt, 2 Lord Raymond, 1195. Fortesc. 132. 11 Mod. 54.

(*k*) *Id. ib.*

(*l*) 2 Lord Raymond, 1196. Note, In the report of the case of R. *v.* Speed, 12 Mod. 331, where the question related to the power of the King's Bench to award process of *levari facias* for a penalty on a conviction affirmed in that Court, it is represented (note l), to have been said by the Court, that if the whole sum was levied to a small matter, yet the party for default thereof shall undergo the corporal punishment. As no notice however is taken of any such point in the report of the same case in 1 Lord Raymond, 584, the accuracy of the former note may be doubted.

(*m*) 2 Hawk. c. 16. s. 13.

detain

detain the party in custody till the return of the warrant of distress (*n*); such order of detention may be by *parol* (*o*).

The warrant must be directed to some gaoler in particular, and is bad, if it only directs in general terms that the defendant be carried to prison (*p*).

Under hand and seal.

It seems also to be agreed that the warrant must be under the hand and seal of the Justice (*q*). For, according to Dalton (*r*), the seal of the Justice is the authority of the officer, who ought to give credence thereto. It is laid down by Lord Hale, that without this the commitment is unlawful and the gaoler is liable to false imprisonment (*s*).

If the jurisdiction is given by statute to two Justices, a commitment cannot legally be made by one only (*t*).

Style of Magistrate.

2. According to *Hawkins*, the warrant ought to express not only the name of the Justice, but his office or authority (*u*). It is said indeed to have been laid down by Lord Holt, on a commitment returned by *habeas corpus*, that the authority need not appear in the warrant; and that it is sufficient if it be stated in the return (*v*). This is in some measure confirmed by Lord Hale, who says, "the mention of the name and authority of the Justice in the beginning of the *mittimus* is not always necessary; the seal and subscription of the Justice to the *mittimus* is a sufficient warrant to the gaoler, for it may be supplied by averment that it was done by the Justice" (*w*).

But however this may be in Commitments for breach of the peace, or for safe custody only, it is most regular in commitments on summary Convictions, when they are by way of punishment, to insert the name and authority of the committing Magistrate.

(*n*) *Ante*, p. 184.
(*o*) Still *v.* Walls, 7 East. 534.
(*p*) R. *v.* Smith, 2 Str. 934.
(*q*) 2 Hawk. P. C. c. 16. s. 13.
(*r*) C. 196, cites 14 Hen. 8. 16.
(*s*) 1 H. H. 583.
(*t*) Franklyn's case, 1 Mod. 68.
(*u*) 2 Hawk. c. 16. s. 13.
(*v*) 2 Lord Raymond, 980. 3 Salk. 284.
(*w*) 2 H. H. 122.

Thus,

Thus, the return to a *habeas corpus* by a gaoler was as follows: viz. that the persons named in the writ were committed to his custody by Sir John Fielding, knight, one of his Majesty's Justices of the Peace for the city and liberty of Westminster, by the warrant which was set out in the return to the following purport, "Westminster, to wit, Receive into your custody F. G. and I. F. brought before me and convicted upon the oath of, &c. for being loose disorderly persons, &c." Given under my hand and seal this 23d day of November, 1770. No name was subscribed to the warrant, but the name *S. Fielding* was set in the margin over the seal:

The Commitment thus returned was objected to, because the warrant did not shew that Sir John Fielding, who made it, was a Justice of Peace, or had power to commit the parties: in answer to which it was contended, that it was supplied by the averment in the return. Lord *Mansfield*, "this is upon a Conviction, and it ought to be shewn that the person had authority to convict.—It is a commitment in Execution, and the authority of the person committing ought to be shewn; whereas here it does not even appear by whom they were convicted; it is only said in the warrant, 'brought before me and convicted.' The not shewing before whom they were convicted is a gross defect." The defendants were accordingly discharged *(x)*.

Must specify the cause.

Every warrant of Commitment must specify the *cause*; and where it is in execution, (which it is in all cases of commitment *after* conviction) it must alledge the party to have been *convicted* of the offence. Therefore where one was brought up by *habeas corpus*, and the warrant was returned in the following form: viz. "Receive into your custody the body of Francis Rhodes herewith, &c. brought before me I. S. one of his Majesty's Justices of the Peace, by I. A. Constable, and *charged* before me

(*x*) R. v. York, 5 Burr. 2684.

on

on the oath of M. G. for being a rogue and vagabond within the intent and meaning of an Act, &c. (17 Geo. 2.) for that the said Francis Rhodes, on, &c. at, &c. did unlawfully use a certain craft to deceive (setting out the offence of acting as a fortune teller) contrary to the statute: him the said Francis Rhodes therefore safely keep in your custody," &c.—The Court, considering this as a commitment by way of punishment and not for safe custody only, were unanimously of opinion that the commitment was bad, because it only stated that the party had been charged with, not that he had been convicted of the offence imputed to him *(y)*.

That the rule laid down in that case is general, and not confined to commitments on the particular Act there mentioned, is established by the following: which was on a Commitment under 6 Geo. 3. c. 25. s. 3, in these terms, viz. " Receive into your custody the body of T. Cooper, brought before me, W. H. &c. *charged* before me the said Justice on the oath of, &c. for running away before the expiration of the season for which he was hired, contrary to his contract, as well as against the statute, &c. and him safely keep for one month, &c."—It was attempted to distinguish this from the last case upon the peculiar provisions of the Statute upon which that case turned: but the Court said it could not be distinguished from it, and the defendant was discharged *(z)*.

Alternative statement of *cause*, bad.

It is moreover necessary that the offence for which the commitment is made be described with certainty. It was held, that a commitment of one as an apprentice *or* servant for disobeying his indentures *or* articles, was bad for uncertainty *(a)*.

(*y*) R. *v.* Rhodes, 4 T. R. 220. In Hilary Term, 37 Geo. 3. the Court of King's Bench quashed a warrant of commitment drawn up in the same words as that above mentioned, which was intended to have effect as a conviction and commitment in execution, and ordered the party to be discharged. 12 East. 78. note (*a*).

(*z*) R. *v.* Cooper, 6 T. R. 509.

(*a*) R. *v.* Everett, Cald. Cas. 26.

It

It is not however necessary in the Warrant to state the Conviction in a precise or technical form; but only so as to shew that the party has been convicted of some specific offence, and by a person having authority for that purpose. It is not required therefore to set forth the Evidence, or the facts in detail (*b*). Nor is it necessary to mention the name of the witness; for if by mistake a wrong name is mentioned as that of the witness upon whose oath the Conviction was made, it is surplusage, and may be disregarded (*c*).

Precise form of Conviction not necessary.

On a return to an *habeas corpus*, signifying that the Defendant had been convicted of carrying away deer in a forest, it was objected, that it should have been said, "*of unlawfully* carrying, &c." Parker, C. J. there is a difference in the return of a *habeas corpus*, where it is before conviction and after; for where it is after, you need not be so particular. It ought to be alledged unlawfully if before Conviction; but in this case it may be in the Conviction, so that will be well enough (*d*).

Where imprisonment is only inflicted by the Statute, as an alternative punishment for want of sufficient distress, the Commitment ought to notice that as the fact. In one case a Commitment was quashed because it only stated that the officer had returned to the warrant of distress, that the Defendant had no goods, instead of expressly alledging the fact to be so (*e*). But in a later case, it was held to be sufficient to state in the warrant of Commitment, that the constable had certified that there was no distress (*f*).

Where must alledge want of distress.

It must be distinctly expressed in the Warrant, whether the commitment be for a time certain, or only till the payment of a fine. The Defendant ought to know for what

Time of imprisonment, and condition of discharge &c.

(*b*) R. *v.* Walter, 8 Mod. 5.
(*c*) Massey *v.* Johnson, 12 East. 67. 82.
(*d*) R. *v.* Hawkins, Fortesc. 272.
(*e*) R. *v.* Chandler, 1 Lord Raymond, 545.
(*f*) R. *v.* Whitelock, 1 Str. 263.

he

he is in custody, and how he may regain his liberty *(g)*. Therefore if he be committed for the fine, it ought to be till he pay the fine; if the intent be to punish him not only by fine but by imprisonment, it ought to order imprisonment for such a time, and from thence also till he have paid the fine. A Warrant reciting that the party had been convicted by the College of Physicians, and fined £20, and was thereby committed to gaol till *he should be delivered by the said College*, or otherwise by due course of law, was held to be bad, as being too general, and not sufficiently ascertaining whether the commitment was a distinct punishment, or merely for enforcing the fine *(h)*.

The *time* of commitment, and the condition upon which the party is to be discharged must strictly conform to the directions of the statute from which the authority is derived.

Where the time and manner of punishment are not expressly limited and directed by statute, it is enacted by 17 Geo. 2. c. 5. s. 32, that the offender may be committed to the house of correction, there to be kept to hard labour till the next Quarter Sessions, or until discharged by due course of law. And any two Justices (of which the Justice who committed the offender must be one) may discharge him before the Sessions if they see cause; and if not discharged, the Sessions may either discharge him or continue him in custody for such time as they shall see fit, not exceeding three months.

Must specify condition of discharge.

If the imprisonment be not for any certain period, but generally till the payment of a fine, or the performance of some other act, the condition must be distinctly expressed, and such as is authorized by statute. If it be till payment, the sum must be fixed. Thus, a conviction and commitment for a forcible entry, "there to remain till they shall

(*g*) Dr. Groenvelt's Case, 1 Lord Raymond, 213.

(*h*) *Id. ib.*

have

have paid a fine to the King;" the Justices not having assessed any fine, was held to be irregular *(i)*.

So, under the statute 5 Geo. 1. c. 48. s. 1, which empowers the Magistrate to commit till the penalty and charges are paid, a commitment for nine months, or until the sum of £15, "together with the charges previous to and attending the Conviction shall be paid," was held to be bad for want of ascertaining the exact sum, by the payment of which the Defendant might be released *(k)*. The same point was determined on a commitment by Justices of the Defendant, a toll-gate keeper, for refusing to account, "and until he do account and pay what shall be due to the proprietors of the toll." This was decided to be an illegal commitment, because no certain sum was thereby appointed to be paid, so that the Defendant might remain in prison for life *(l)*. Till payment, &c. of indefinite sum, bad.

Under the act of 35 Eliz. c. 2, which empowers the Justice to examine into certain matters, and commit such persons as refuse to answer, a commitment "till discharged by due course of law," was held to be bad *(m)*. So under the Vagrant Act, 17 Geo. 2, c. 5. s. 7, which directs the offender to be imprisoned till the next Sessions, or for any less time as the Justice shall think proper, a Commitment ordering the party to be detained not for any limited time, but *until he shall be discharged according to the laws and customs of this realm*, was deemed invalid *(n)*. By *due course of law*.

A Commitment by the Vice-Chancellor of Oxford, stating the offence to be carrying goods without a licence, and ordering the party to remain in custody till he should give security to carry no more, and to observe the statutes of the University for life, was adjudged to be an illegal commitment (*o*).

(*i*) R. *v.* Elwell, 2 Lord Raymond, 1575. Str. 794.
(*k*) R. *v.* Hall, Cowp. 60.
(*l*) R. *v.* Catherall, Fitz-Gib. 266.
(*m*) Yoxley's Case, 1 Salk. 351.
(*n*) R. *v.* Hall, 3 Burr. 1636.
(*o*) R. *v.* Barnes, 2 Str. 917.

If

Hard labour.

If the statute orders a commitment for hard labour, it must be so signified in the Warrant. Where the statute, besides ordering a commitment to prison, adds also, "there to remain and be corrected and kept to hard labour," the *correction* understood is by whipping (*p*).

Commitment for *Costs.*

The form of a commitment for *Costs*, in default of sufficient distress, is settled by the statute 18 Geo. 3. c. 19, and will be found in the Appendix (*q*).

Execution of Warrant of Commitment.

3. The Warrant is generally directed to A. B. constable of C., and to all other constables and peace officers in the county of D., and may be executed any where within the jurisdiction of the convicting Magistrate. But except the constable who is specifically named, the others can only execute it each within his own precinct (*r*).

In certain cases it is provided by statute that the Warrant may be executed beyond the jurisdiction of the convicting Magistrate, being backed by a Magistrate duly authorized of the jurisdiction wherein it is executed. Such a provision is made in regard to all offences against the Excise Laws, by 5 Geo. 3. c. 43. s. 26, and 32 Geo. 3. c. 10.

Cannot be on *Sunday.*

It has been held, that by the construction of the statute 29 Car. 2. c. 7. s. 7, a Warrant of commitment for a penalty cannot be executed on a *Sunday*, and that the apprehension on that day is wholly void, and the Defendant entitled to be discharged out of custody (*s*).

Where offender already in custody.

If the offender be already in execution in the King's Bench, he may be there charged criminally by a Justice's Warrant, but cannot be taken out of the custody of that Court and sent to the county gaol (*t*).

(*p*) R. *v.* Hoseason, 14 East. 607.

(*q*) See Appendix, tit. *Costs.*

(*r*) Blatcher *v.* Kemp. Maidstone Summer Assizes, 1782. 1 H. Bl. 15. n. In ——— *v.* Norman, 1698, it was ruled by Holt, C. J. that a constable may execute the Warrant of a Justice of Peace, &c. out of his liberty, but he is not compellable to do so. This, it may be supposed, is upon the presumption that he is mentioned *by name* in the Warrant. See *ante*, p. 177, relative to the execution of the Warrant of Distress.

(*s*) R. *v.* Myers, 1 T. R. 265, on the Lottery Act.

(*t*) R. *v.* Woodham, 2 Str. 828.

4. By

Charges of Commitment.

4. By 3 Jac. 1. c. 10, it is enacted, "That any person who shall be committed to the common gaol by any Justice for any offence, having means or ability thereunto, shall bear their own reasonable charges for so conveying or sending them, and the charges of such as shall be appointed to guard and shall guard them thither; and on refusal the Justice may levy the amount by appraisement and distress of his goods."—And by 27 Geo. 2. c. 3, in any county except in Middlesex, the person committed not having sufficient goods or money within the county to bear the charges of himself and attendants, any Justice for the same county may, upon application of the constable who conveyed the prisoner, and examination upon oath, allow the reasonable charges, and order them to be paid by the Treasurer of the county.

Discharge.

5. A Commitment after a Conviction for a time certain, is a Commitment in execution, and does not admit of bail (*u*). And although a right of appeal be given by the statute to the next Sessions, which may not be till after the term of imprisonment is expired (as is the case with the Vagrant Act 17 Geo. 2. c. 5. s. 7 & 26.), yet, after a Commitment by one Justice, it is not competent for others to discharge the Defendant upon his appealing to the next Sessions and giving bail to prosecute that appeal (*v*).

But if the Commitment be till payment of a certain fine, it follows of course, that the party is entitled to be set at liberty upon payment thereof (*w*).

Warrant in force till return-day.

The warrant of commitment, unless it be expressly made returnable at a particular time, remains in force till it be fully executed, whatever length of time that may be, as long as the Magistrate is living. If the offender be ap-

(*u*) Anon. 11 Mod. 45. *Ib.* 52. But on a Commitment to Sessions for hard labour under 17 Geo. 2. c. 5. *Sec.* 32, two Magistrates, of whom the committing Magistrate must be one, may discharge the prisoner before the Sessions. *Vid.* the Act, R. *v.* Rhodes, 4 T. R. 220.

(*v*) R. *v.* Brooke, 2 T. R. 190.

(*w*) Or, according to Dalton, upon his finding sureties to pay it. Dalt. c. 170. s. 12.

Liberation on condition not fulfilled.

prehended and suffered to go at large upon an offer to find security, which is not fulfilled, it seems he may be apprehended again upon the same warrant *(x)*.

Tender of penalty.

Where the Commitment is until payment of a certain penalty, the Defendant ought to be released upon tendering the same to the officer entrusted with the execution of it. And where an officer, after a tender of the penalty, persisted in conveying a person to gaol, insisting also upon the payment of a further sum indorsed by the Justice on the warrant, under the name of costs, he was held liable to an action of false imprisonment *(y)*. This was in a case where the Magistrate had no special power by the Act to commit for costs.

Defendant's right to copy of Conviction.

6. The Defendant is entitled upon application to a copy of his Conviction from the convicting Magistrate. Where a party was placed under the necessity of suing out a *certiorari* merely for the purpose of obtaining a copy of a Conviction which was necessary for his defence to an action brought for the same fact, and had been denied by the Magistrate, the latter was refused his costs, which he would otherwise have been entitled to on the affirmance of the Conviction. Upon that occasion it was said by Mr. Justice Yates:—"The Justice ought to have given the Defendant a copy of the Conviction: for it was a record, and the Defendant was entitled to it *(z)*.

But if by mistake, and without any fraud or intention to mislead, a copy be delivered to the party, mis-stating the name of the informer, and a more correct one be returned to the Sessions, that Court can only take notice of the latter *(a)*."

(x) Dickenson v. Brown, Peak. Ni. Pri. Cas. 234. That was the case of a Warrant to apprehend the putative father of a bastard child.

(y) Smith v. Sibson, 1 Wils. 153.

(z) R. v. Midlam, 3 Burr. 1720.

(a) R. v. Allen, 15 East. 333. 346.

PART

PART III.

CHAPTER II.

Of Appeal to the Sessions.

Conviction to be filed at Sessions.

1. THE Justice ought regularly in every instance, but more particularly where any part of the penalty is given to the King, to return a record of his Conviction to the Sessions, whether the party appeals or not, or whether any Appeal be given by the statute or not (*a*). This is sometimes further enforced by the Acts themselves, which impose the penalties (*b*).

If the Magistrate, after receiving due notice of Appeal, neglects to return the Conviction, whereby the party is prevented from prosecuting his Appeal, he is liable in an action on the case for the special damage (*c*).

(*a*) R. v. Eaton, 2 T. R. 285. The reason given by Mr. Justice Buller is, that the Crown may not be deprived of its share of the forfeitures. Since the statute 41 Geo. 3. c. 85, *ante*, p. 183, this reason is in some measure dispensed with.

(*b*) As by 6 & 7 Will. 3. c. 12. s. 7. 39 & 40 Geo. 3. c. 89. s. 22. By 42 Geo. 3. c. 107, to prevent the killing of deer, the second offence after a prior conviction is declared felony; and it is directed that in order to facilitate the proof of the first conviction, the Justice shall transmit the record of Conviction under his hand and seal to the next Quarter Sessions, to be filed by the Clerk of the Peace, which record, or a true copy thereof, is declared to be evidence to prove the fact of the first conviction.

(*c*) Prosser v. Hyde, 1 T. R. 414.

Section 2. Of Appeal to the Sessions, where it lies.

An Appeal from the Conviction of Justices to the Sessions is not a matter of common right, but of special provision (*d*).

How authorized.

The privilege of Appeal, which now usually accompanies the power of summary Conviction given by statute, does not seem to have been introduced till after that mode of judicature had been in use for some time. The first mention of an Appeal is found in the statute 12 Car. 2. c. 23. s. 31, imposing duties on beer, ale, and other liquors, which in case of the refusal of two Justices to proceed upon complaint, authorizes the Sub-commissioners of Excise for the district to take cognizance of it, and gives an Appeal from *their* judgment to the next Quarter Sessions. The same provision is repeated in the Excise Act, 12 Car. 2. c. 24. s. 45.

The next statute which allows an Appeal in the case of a summary conviction is the Conventicle Act, 22 Car. 2. c. 1. s. 6. It is worthy of remark, that the Appeal provided by that statute is not to the Justices in Sessions, as is usual, but to a jury to be there summoned to try the facts. This is the only instance of an Appeal of that nature in regard to summary Convictions. In the Game Act, 22 & 23 Car. 2. c. 25, which immediately followed, and in all the other acts since that time which give an Appeal from the Convictions of Justices out of Sessions, it is to the judgment of the Justices in Quarter Sessions without the intervention of a Jury.

Must be expressly given.

A right of Appeal must be given by express enactment, and cannot be extended by an equitable construction to cases not distinctly enumerated.

(*d*) 1 M. & S. 448, and 6 East. 514. 2 T. R. 509, 510.

With

With reference to this part of the subject, it may be proper to notice, that on occasion of any new Act relating to the duties of Excise, it is usual to insert a clause declaring that all the powers, &c. given by 12 Car. 2. c. 23. and c. 24. (called the hereditary Excise Acts)(e), or by any other law in force relating to the revenue of Excise, shall be applied to the Act in question (f). A doubt has sometimes arisen upon the effect of such a clause, as it regards the right of Appeal which is found in some of those statutes and not in others. Two decisions upon the point as it arose out of different Acts have taken place, which may afford a guide for the construction of similar clauses in other Acts of Parliament:

Question as to Appeal under Excise Acts.

The first related to the question, whether any Appeal lay against a Conviction on the 25th Geo. 3. c. 72. By the 34th section of which, it is enacted,—"that all powers, authorities, rules, penalties, forfeitures, clauses, matters, and things which in and by 12 Car. 2. c. 24, or by any other law now in force relating to the revenue of Excise, are provided or established for securing, enforcing, managing, &c. mitigating or recovering, adjudging or ascertaining the duties or penalties thereby granted, shall be applied in and for the managing, mitigating, adjudging, ascertaining, recovering, and paying the several duties hereby granted, as fully and effectually as if they were particularly repeated and enacted in this Act." Upon reference to the 12 Car. 2. c. 24, the Appeal-clause, (s. 45), is as follows, viz. after empowering two Justices to hear and determine matters on complaint, and, on their neglect, giving the same authority to the Sub-commissioners, it goes on to allow the party grieved by *any Judgment of such Sub-commissioners*, to appeal to the Justices in Sessions; but makes no mention of any appeal from a Judgment of the *two Justices*, if they should act, as empowered to do in the first instance.—The

Decisions upon.

(e) 2 T. R. 509.
(f) See for example 25 Geo. 3. c. 72. 42 Geo. 3. c. 38. s. 30.

question

question came before the Court, on a rule for a *mandamus* to the Justices of Surrey in Sessions, to receive an appeal against a Conviction made by *two Justices* on the 25 Geo. 3. c. 72. s. 9. It was contended in support of the application, that an appeal was virtually given by the 34th clause above-mentioned, which by reference incorporates all the remedies given by any Excise Laws, and that the power of Appeal and of mitigating penalties are given by some of the Excise Laws. On the other hand, it was contended, that no appeal lies but where it is given by express words. With this latter opinion the Court agreed, and accordingly gave Judgment against the existence of the right of appeal.

No Appeal on 25 Geo. 3. c. 72.

The fair construction of the clause in question in 25 Geo. 3. c. 72, was pronounced to be, that all the general powers and provisions given in acts made in *pari materiâ* should be virtually incorporated into that Act; but that such provisions as are always considered as special provisions should not: and the power of appealing from the Judgment of the Justices being of the latter description, did not attach without being expressly given *(g)*.

It seems therefore to be established by this case, that when in any of the Excise Laws there is a general clause of reference to the 12 Car. 2. c. 24 *and all other Excise Laws*, with respect to the mode of collecting the duties or penalties, such general clause alone does not give an Appeal.

"Forfeitures and offences" in Appeal-cause not equivalent to "Penalties."

Another question upon a similar clause of general reference to the Excise Acts 12 Car. 2. c. 23 and c. 24, has arisen upon an ambiguity in the wording of the sections therein mentioning the appeal, viz. of s. 31 & 32 of 12 Car. 2. c. 23, and s. 45, 46 of 12 Car. 2. c. 24. These clauses refer only to "forfeitures and offences," omitting any mention of "penalties." On which account it has been decided, that a general reference to the powers &c. of those acts such as is above alluded to, does not

(g) R. *v.* Justices of Surrey, 2 T. R. 504. 510.

give

give an appeal from a Conviction for penalties under an Act containing such reference:

This was decided in the following Case, upon the Act of 42 Geo. 3. c. 38, relating to the duties on Malt. By the 36th section of which, it is enacted, 'that the forfeiture may be recovered by any law or laws of Excise;' and the 37th section incorporates all the powers and authorities, penalties, forfeitures, clauses, matters, and things of the Act of 12 Car. 2. c. 24, or any other law of Excise. The Acts of 12 Car. 2, as explained in the last case *(h)*, give an appeal only from the Judgment of the Sub-commissioners, but are silent as to an appeal from the Judgment of the Justices. That however was supplied as to the Malt duties, by 12 Ann. c. 2. s. 37, (the first Malt-duty Act) which gives an appeal from certain proceedings of Justices, expressly including those for "*penalties.*" The statute 6 Geo. 1. c. 21. s. 22, having in general terms enacted 'that every forfeiture made by virtue of any Act relating to duties of Excise shall be proceeded upon in manner there described, and that such proceedings should not be liable to any *appeal* or to be removed by *certiorari*,' gave rise to a doubt whether the appeal in cases of forfeitures in respect of Malt duties, was not taken away. And the statute 1 Geo. 2. st. 2. c. 16. s. 3, reciting such doubt, declares, 'that the appeal shall not be taken away by the last-mentioned Act in causes and prosecutions before Justices for or on account of *forfeitures and offences* relating to duties on Malt. Upon the construction of all these acts, it was contended, that the effect of the clause of reference in 42 Geo. 3. c. 38 above-mentioned, in conjunction with the foregoing acts, established a right of Appeal in cases of Convictions for *penalties* under that Act. In opposition to which, it was argued that the 42 Geo. 3. c. 38 could not be shewn to contain competent words of reference to any clause of appeal including proceedings for a *penalty*, in-

(*h*) *Vide supra*, p. 197.

asmuch

asmuch as that word is omitted both in the Appeal-clauses of 12 Car. 2. c. 24, and in the explanatory Act of 1 Geo. 2. st. 2. c. 16. The Court finally determined against the right of Appeal. Lord *Ellenborough* said, "It is no question for us, whether it would be expedient that there should be an Appeal to the Sessions in this case of a Conviction before two Justices of the Peace for a *penalty* in respect of the Malt duty. If there be no words of reference to any act giving such Appeal, we cannot supply the want of them. Now the clauses in the statutes of Car. 2, and Geo. 2, have not the word *penalties* in those parts giving the Appeal; and when that word occurs in other clauses in other respects fac-similes, it seems as if the omission were intentional. But if it were not intended, we can only say of the Legislature *quod voluit non dixit.*"(*i*).

The omission is now supplied by 48 Geo. 3. c. 74, which in express terms gives the Appeal in cases of *penalties*. The case, however, of which an abstract is here given, serves as a useful precedent for the solution of similar questions that may arise on the construction of clauses of the same import in other Acts.

Acts excluding Appeal.

Some Acts expressly exclude an Appeal (*k*); and it appears from the following case, that if an order of commitment be excepted out of the appeal clause, a conviction and commitment comprised in one instrument, cannot be made the subject of Appeal:

Exception of *order of Commitment* includes Conviction.

The Defendant had been committed by virtue of an instrument, which was thus set out: viz. "To the constables, &c. and to the keeper of the House of Correction at, &c. Whereas I. Thompson, a hired servant to E. S. of &c. collier, is this day before us two of his Majesty's Justices of the

(*i*) R. *v.* Skone, 6 East. 514, 518. It may however be remarked, that in the case of R. *v.* Whitbread, Doug. 533, it was expressly held, that the word *forfeitures* in 6 Geo. 1. c. 21, and in 1 Geo. 2. st. 2. c. 16, refers not merely to specific forfeitures of the goods, but to pecuniary forfeitures also.

(*k*) As 42 Geo. 3. c. 119. s. 5.

Peace

Peace for the said county, and is lawfully convicted as well by the oath of the said E. S. as otherwise, of being his lawful hired servant, and of having absented himself from his service in the parish of &c. without his consent, before the expiration of the term of his contract to serve. These are therefore in his Majesty's name, to charge and command you the said constable to take and convey the said I. T. to the House of Correction aforesaid, and deliver him to the keeper, and you the said keeper to receive the said I. T. into your custody, and safely him there keep two months from the date hereof. Dated, &c."—The Defendant gave notice of his intention to appeal against the Conviction and duly gave a recognizance, and entered his Appeal at the Sessions; but no Conviction being returned by the Magistrate, the Appeal was dismissed without trial.

By 6 Geo. 3. c. 25. s. 5, (an extension of the statute 20 Geo. 2. c. 19) upon which the proceeding was founded, it is provided, "that if any person shall think himself aggrieved by such determination, order, or warrant of any Justice as aforesaid, *except an order of Commitment*, every such person may appeal to the next Sessions, &c." On a rule for a *mandamus*, it was contended for the Appeal, that a Conviction and Commitment being distinct things, could not in legal contemplation be united by being blended in one instrument, and that the latter only being excepted out of the Appeal-clause by the designation of an order of Commitment, an appeal ought to lie against the *Conviction* under the general terms of that clause: and that unless an Appeal lay to get rid of the Conviction, the party grieved would be without redress; for so long as the Conviction remains in force, it is an answer to any action of trespass. But by Lord *Ellenborough*, C. J., "It is not for us to say whether it may be convenient and proper to provide a remedy by appeal for a party grieved by a commitment in execution under this Act: we can only declare what the Legislature have said in this case: and when by excepting an order of commitment

mitment out of the Appeal-clause, they have said that there shall be no appeal against such an order, and when the Commitment must for this purpose be taken to be one and the same thing with the Conviction, we have no discretion left to exercise upon the subject: and it does not become us to scan the wisdom of the provision, which the Legislature has enacted *(l)*." The Rule for a *mandamus* was discharged.

Convicting Magistrate to give *notice* of right.

That the party may have the full benefit of the right of Appeal, some statutes contain a provision requiring the convicting Magistrate, at the time of the Conviction, to make known to the party his right to appeal *(m)*.

Section 3. *Of Notice, Recognizance, &c.*

When an Appeal is allowed by statute, it is usually upon certain conditions, viz. that a Notice be given to the Magistrate whose act is appealed from, and a Recognizance *(n)* entered into to prosecute the Appeal.

Notice.

The Notice required is either a reasonable Notice without specifying any length of time, or it is directed to be given a certain number of days after the Conviction and before the Sessions. The Notice, where the statute requires any, should be in *writing*.

Under a Clause directing the convicting Magistrate to apprise the party of his right to appeal, it has been held that the Magistrate is bound to inform him, not only of his right to appeal generally, but of the necessary steps to be taken by him in pursuance of that right. Thus, where an Appeal was given by statute (17 Geo. 3. c. 56.) on giving Notice *in writing* of the party's intention so to do, and entering

(*l*) R. v. Justices of Staffordshire, 12 East. 572.

(*m*) See 14 Geo. 3. c. 25. 17 Geo. 3. c. 56. s. 20, &c.

(*n*) See the Form, Appendix, tit. *Certiorari*.

into

into a Recognizance, and by the same statute the Justices required to make known to such person, at the time of Conviction, his right to appeal; the Justices having informed a party of his right, but said nothing about the Notice, the Sessions, it was held, were bound to receive the Appeal, though no Notice in writing had been given *(o)*.

Section 4. To what Sessions the Appeal must be.

1. An Appeal from a Conviction by Magistrates of a particular Franchise, must be to the Sessions held for that Franchise, and not to the general Sessions for the county. In the case of a Conviction under 22 Car. 2. c. 1. s. 6, which directs an Appeal "to the judgment of the Justices of Peace in their next Quarter Sessions;" it was held that an Appeal from the Conviction of Corporation Magistrates must be to the Sessions of the Borough *(p)*. As to place.

2. If no limits are fixed by the Act for the *time* within which an Appeal must be brought, it is nevertheless understood that it must be within a reasonable time *(q)*. As to time.

The Appeal is most frequently limited to the *next* Sessions after the Conviction; or to the Sessions which shall be held next after so many days from the Conviction. If there be no such limitation, it must still be understood that the Appeal must be within a reasonable time, of which the Sessions seem to be the proper judges *(r)*. Next Sessions.

Where a statute provides, that a party finding himself aggrieved by the *Judgment*, may appeal to the next Quarter Sessions, this is construed to mean the Sessions next after the Conviction, and not the Sessions after the Exe- After *Judgment*.

(*o*) R. *v.* Justices of Leeds, 4 T. R. 583.

(*p*) Case of South Molton, Skin. 122.

(*q*) *Per* Lord Ellenborough, 1 M. & S. 448, R. *v.* Justices of Oxfordshire.

(*r*) *Semb.* R. *v.* Justices of Oxfordshire, 1 M. & S. 448.

cution

cution or levying the penalty.—Thus, a party had been convicted on the 24 Geo. 3. c. 31, for not entering horses liable to duty. The Appeal-clause enacts, 'that if any person shall find himself aggrieved by the *Judgment* of any Justice, he may upon giving security, &c. appeal to the Justices of the Peace at the next General Quarter Sessions for the county, &c. who are finally to hear and determine.' The Conviction was the 23d of June; the Sessions next following were the 27*th of June*. On the 23d of July the Defendant's goods were seized, and sold for the penalty: and on the 25th of July he gave Notice of intention to appeal, and offered a Recognizance, which the Magistrate refused to take:

In an action against the Magistrate for such refusal, and also for neglecting to return the Conviction, the Question was, whether at the time of giving Notice and applying to enter into a Recognizance, the party was in time to appeal. The Court were clearly of opinion that he was too late; the first Sessions after the Conviction having been suffered to pass before he gave Notice of appealing. *Ashhurst*, J., "the words of the Act are decisive, for it says, 'if any person shall find himself aggrieved by the *judgment* of any such Justice, &c. he may appeal to the Justices at the *next* general Quarter Sessions.' Therefore the Plaintiff should have appealed to the Sessions next after the *judgment*."—*Buller*, J., "The cases relative to appeals against orders of removal are very distinguishable from the present. All orders of removal are *ex parte* proceedings, and the other party cannot know any thing of them till the actual *removal:* but this Conviction is more like a Judgment of this Court than an order of removal. The grievance to the party is the *judgment*, and not the *execution*. A writ of error will lie before execution, and an Appeal is in the nature of a writ of error: it complains of the judgment. If a contrary construction prevailed, it would be such a snare to the Magistrates, that they would never be safe: for the Justices do not issue their warrants of execution till they know whether

whether an Appeal will be brought or not; and they could never know when the party found himself aggrieved, if he were not to appeal to the next Sessions after the Conviction *(s)*."

Where the Appeal is given to the next Sessions, and upon certain conditions, such as giving Notice, entering into Recognizance, or the like; in such case, if an Appeal be lodged at the proper Sessions, but dismissed for want of compliance with some of the prescribed forms, the right of Appeal is gone, and cannot be renewed at any other Sessions.

Appeal dismissed for informality, conclusive.

Thus, a Statute gave an Appeal from a Conviction by a Justice to any Quarter Sessions to be holden within six months from such Conviction: on condition that the Appellant should give ten day's Notice of his intention to appeal, and enter into a Recognizance within four days after such Notice. An Appeal was lodged at the first Sessions after a Conviction, the Sessions discharged it without entering into the merits, for want of proof, that the Recognizance was entered into within four days of the Notice given. At the following Sessions, and within the six months of the Conviction, a second Appeal was lodged, which that Court refused to hear. Upon a motion for a *mandamus* to compel the Sessions to receive such second Appeal, it was held, that the first Judgment was conclusive, and that no second Appeal could be brought against the same Conviction *(t)*. For it was held that after the Appeal was lodged, and adjudged by the Justices at Sessions to be informal, they were *funti officio*, and could not take cognizance of the second Appeal. And Mr. J. *Buller* said, "The Act certainly only gives a right of appealing *once:* and the parties having had one Appeal, are bound by that. If the question had rested solely on the *Notice* of Appeal for the first Sessions which happened, and nothing

(*s*) Prosser *v.* Hyde, 1 T. R. 414.

(*t*) R. *v.* Justices of W. R. of Yorkshire, 3 T. R. 776. The Conviction was on a local Act, 17 Geo. 3. c. 106.

further

further had been done, I should not have thought the parties bound by it; for the Act gives the power of appealing within a certain time, with these two requisites, viz. that the Appellant must give ten days Notice, and within four days after entering into a Recognizance. When the party therefore found out his mistake, he might have stopped there, but he persisted in going on with his Appeal, and brought it before the Court, and took their judgment upon it. The Appellant's jurisdiction was therefore fully exercised: and though it was originally in the option of the parties, whether they would appeal to the first or second Sessions which took place within the six months, yet having made their election to appeal to the first, they must abide by the Judgment there given."—Agreeably, therefore, to what is here laid down, the party who has given notice of Appeal but neglected to enter into the Recognizance, may set himself right by giving a fresh Notice of Appeal, and entering into a Recognizance to prosecute *that* appeal, provided it be to a Sessions within the time limited.

Second notice, where proper.

Appellant relying on objection of form, concluded.

In Appeals limited to the *next* Sessions, where the Appellant relies on an objection independent of the merits, and procures an order of the Sessions quashing the Conviction on that ground, which order is afterwards set aside by the Court of King's Bench, and consequently the Conviction set up again; the Appellant cannot afterwards go to the Sessions again to hear the Appeal discussed upon the merits, by entering continuances from the first appeal (*u*).

Adjournment.

3. But if an Appellant be surprised at the Sessions by the production of an Appeal different from the copy which had been delivered to him, he may apply for time, and the Appeal may be adjourned (*v*).

The sessions at which an Appeal is properly lodged, and all due requisites complied with, being regularly pos-

(*u*) R. v. Allen, 15 East. 346. (*v*) *Id. ib.*

sessed

sessed of the cause, may in all cases *adjourn* it to a subsequent Sessions. This power is incident to the authority of the Court, and is not prevented by the words of the Statute, directing the Justices at the *said* Sessions to *determine* the matter (*w*).

Adjournment only proper on *regular* appeal.

The Sessions are to judge of the proper occasions for adjourning the hearing. But though the power of adjournment is inherent in the Sessions for their own convenience in hearing the Appeal, or for any other good cause, as the absence of a witness, &c. that power can only be exercised on Appeals regularly brought before them, that is to say, where all the conditions as to notice, &c. which are the acts of the party appealing, have been observed.—A Conviction on 16 Geo. 3. c. 30, made the 13th of July, was appealed against to the next *Michaelmas* Sessions, and the party entered into a proper recognizance, but neglected to give any notice of Appeal conformably to the Appeal-clause, which gave an appeal to the Sessions next after twenty-one days from the Conviction, "the Appellant giving six days notice," which last words were considered as imperative, and not merely directory. The Justices at the first Sessions adjourned the Appeal; and at the following Sessions it was dismissed on the objection of want of notice. Upon a rule for a *mandamus* to the Justices to enter continuances and hear the Appeal, it was held, that the want of notice was a decisive objection to the first Appeal, and that the Sessions had not even authority to adjourn it, on account of its never having been properly entered; for the Court said, the Sessions, having no jurisdiction for want of notice, could not acquire to themselves a jurisdiction by an act of their own. The power of adjournment is only where the Sessions cannot conveniently hear the Appeal after it has been duly entered (*x*).

(*w*) R. *v.* Justices of Wiltshire, 13 East. 352.

(*x*) R. *v.* Justices of Oxfordshire, 1 M. & S. 448.

4. On

Sessions can only notice Conviction returned by Justice.

4. On the hearing of the Appeal the Sessions can only take notice of the record of Conviction returned by the Magistrate. This was so held, though the Conviction so filed differed in the name of the informer from the copy delivered to the Appellant at the time of the Conviction by the Justice's clerk; the Case was as follows:—

A Conviction on 48 Geo. 3. c. 74. s. 13, having been appealed against, the Magistrate returned to the Sessions a record of Conviction, signed and sealed the 5th June 1811, setting forth that the Appellant on such a day was, on the complaint of *Isaac Mann*, convicted, &c. It appeared on the trial of the Appeal, that at the time of the Conviction, an instrument bearing the same date was regularly signed and sealed by the Magistrates, stating that the Defendant, on the same day, was, on the complaint of *W. Bourne* and *Isaac Ottley*, convicted, &c. A copy of this latter instrument had been delivered by the Justice's clerk to the Defendant, written on the back of the Information, which Information thereby appeared to be that of *Isaac Mann*, and not of *W. Bourne* and I. Ottley, who were in fact the witnesses and not the informers.

This copy was produced by the Appellant at the Sessions; but the Court refused to let it be filed. They however took notice of it as a memorandum or *minute* of the Conviction, and ordered that, which was returned on parchment by the Magistrate and filed, to be quashed, because of its variance from the above *minute*. This order of the Sessions having been removed by *certiorari*, a rule was obtained for quashing it, which in effect was to set up again the Conviction returned by the Magistrates:

Upon argument, that rule was made absolute, and the order of Sessions quashed: the Court of King's Bench considering the Conviction returned to the Sessions by the Magistrate as the only one of which the Sessions could take notice, and that consequently they had done wrong in quashing it on account of the manifest mistake in the copy or memorandum

randum produced by the appellant (*y*). It was said by the Court upon that occasion, that if the Justice had done wrong in returning an improper Conviction to the Sessions, he would be punishable; but it clearly appeared that the copy delivered to the appellant was drawn up in the form he received it by mere mistake, for it was drawn up on the back of the information of the very person who was the true informer (*z*). The Court moreover refused to send the case down again to be heard upon the merits, for the Defendant having chosen to rely upon the formal objection, was concluded by that election.

Awarding costs on appeal.

The power of the Sessions to award *costs* on determining the appeal must depend upon the Statutes by which the appeal is directed; many of which expressly confer that power (*a*). But otherwise it is not incidental to the jurisdiction.

(*y*) R. v. Allen, 15 East. 333. 346.
(*z*) *Id. ib.*
(*a*) See 10 Ann. c. 16. s. 9.—c. 19. s. 120.—11 Geo. 2. c. 19. s. 5. See Appendix, tit. Rent; Order on 11 Geo. 2. c. 19, confirmed with costs.

PART III.

CHAPTER III.

Of the Removal of Commitment or Conviction by Habeas Corpus *and* Certiorari.

Section 1. *Of Removal by* Habeas Corpus.

Where the proper remedy.

IF there be any fault or illegality in the commitment alone, the defendant may obtain his discharge by suing out a writ of *habeas corpus*, which may be granted by any of the superior Courts of Westminster in Term-time, or by a Judge of any of those Courts in vacation, directed to the gaoler, &c. in whose custody the defendant is detained.

Though the King's Courts at Westminster have power to issue this writ, it is seldom sued out of any other than the Court of King's Bench by persons committed upon convictions by Justices, because the other Courts can only remove the body and the warrant of commitment, but cannot send for and examine and set aside the conviction itself, which is the prerogative of the King's Bench.

Proceedings on.

Upon the delivery of the writ to the gaoler or other officer who holds the party in custody, the warrant of Commitment is returned along with the body of the prisoner;

soner *(a)*; and if it appears to be illegal or insufficient upon the face of it, the Court before whom the writ is returnable, quashes the Commitment, and orders the defendant to be discharged *(b)*.

The Court upon the return to a writ of *habeas corpus* can only look at the warrant of Commitment itself. And therefore where a commitment was "until the party should pay a fine to the King," without specifying any sum to be paid, the Court nevertheless refused to discharge him upon the Commitment alone, till the Conviction itself was brought before them by *certiorari*. Though when that was done, and it appeared that no precise sum was there awarded, the defendant was discharged *(c)*.

Return to.

The *return* should set forth the description and authority of the persons by whom the Commitment was made by describing them as Justices of the Peace, &c. *(d)*

After the return is filed, the Commitment cannot be amended *(e)*.

But if the defect be not on the face of the commitment, but in the Conviction, the defendant, besides a writ of *habeas corpus* to bring up the warrant, must likewise sue out a *certiorari* directed to the convicting Magistrate, or to the Sessions if the Conviction has been filed there, to return the Conviction into the Court above.

This is also the only proceeding to be adopted where the Defendant is not in custody, but wishes to obtain an examination of the Conviction by the superior Court; which leads us in the next place to point out succinctly the mode of obtaining and proceeding upon that writ.

(a) Carth. 508.
(b) See Bac. Ab. tit. *Habeas Corpus*, 3.
(c) R. v. Elwell, Str. 794. 2 Lord Raymond, 1514.
(d) 2 Lord Raymond, 980.
(e) R. v. Catherall, Fitz.-Gib. 266.

Section 2. Of the Removal of the Conviction by Certiorari.

Where grantable.

The *Certiorari* is a writ issuing out of the Crown Office in the name of the King, and teste'd by the Chief Justice *(f)*, which the Court of King's Bench, by virtue of its superintending authority over all Courts of inferior criminal jurisdiction in the kingdom, has power to award for the purpose of procuring an inspection of their proceedings.

No writ of Error.

No writ of error lies on summary Convictions *(g)*, and therefore the writ of *certiorari* is the only mode by which a revision of these proceedings by the superior Court can be obtained.

Of common right.

It requires no special law to authorise this writ, for it is a consequence of all inferior jurisdictions of record to have their proceedings removable for the purpose of being examined by the Court of King's Bench *(h)*. In this respect the proceeding by *Certiorari* differs from a right of *appeal*; for whereas the latter does not exist unless created by express provision, the other lies of course unless expressly taken away by Statute.

The practice of taking away the *Certiorari* by statute, which Lord Kenyon thought had become too frequent, did not begin to prevail till the beginning of the reign of William the Third, not long after the introduction of appeals to the Sessions, which we have before observed, came into general use towards the latter end of Charles the Second's reign.

Not taken away by implication.

The power of granting a *Certiorari* is considered as so beneficial to the subject, that it is not allowed to be abridged by any thing short of an express statutory prohibition *(i)*. It is not therefore prevented by the words of

(*f*) See Appendix.

(*g*) R. *v.* Leighton, Fortesc. 177. R. *v.* Lomas, Comb. 297. Dalt. c. 195.

(*h*) *Per* Holt, C. J. 1 Lord Raymond, 469.

(*i*) A strong instance of the maxim that the authority of the Court

of the statute empowering the Justices to hear and finally determine *(k)*. The effect of that expression being only to make the Justice's determination final as to matter of fact *(l)*.

Cannot be taken away but by express words.

The principle that the *Certiorari* cannot be taken away virtually or by inference, but by express words alone, is clearly evinced by the construction that has been put upon the statute 22 Car. 2. c. 1. s. 6. the first Act which directs an appeal from the Conviction of Justices of Peace out of Sessions. By that Act the defendant is empowered to appeal to the judgment of the Justices of Peace in their Sessions, and may have his trial by a Jury there; then follow these words, "and no other Court whatsoever shall intermeddle with any cause or causes of Appeal upon this Act, but they shall be finally determined in the Quarter Sessions only." Notwithstanding this clause, it has been resolved, that after an Appeal to the Sessions, a trial, verdict and judgment there, a *Certiorari* might issue at the suit of the defendant. For, the Court said, a *Certiorari* does not go to try the merits of the question, but to see whether the limited jurisdiction has exceeded its bounds. The jurisdiction of the King's Bench is not taken away unless there be express words to take it away. This is a settled point *(m)*. Again, it has been held, that the clause in the Act of 2 Car. 2. c. 23. s. 36, that "no writ or writs of *Certiorari* shall supersede execution upon any order of Justices made in pursuance of that Act, but that Execution may be had thereon notwithstanding such writ;" does not prevent the removal of such proceedings by *Certiorari*, though the execution of them is not thereby suspended *(n)*.

Court of King's Bench to issue a *Certiorari* for the removal of inferior proceedings, can only be retrenched by very positive and express words in an Act of Parliament, occurs in a case cited by Lord Holt, 1 Lord Raymond, 469, upon the construction of 13 Eliz. c. 9, relating to the power of Commissioners of Sewers. The case is reported in 1 Mod. 44.

(*k*) 2 Hawk. P. C. c. 27. s. 23.

(*l*) 3 Mod. 95. *post*, p. 214.

(*m*) R. v. Morely and Others, 2 Burr. 1040.

(*n*) Anon. 1 Barnard. 245.

The

The statute 36 Geo. 3. c. 60. s. 9, giving an Appeal to the Sessions from the Convictions of Justices under that Act, declares that the determination of the Justices there shall be *final*. But this was held not to prevent the defendant, after an Appeal tried and determined at the Sessions, from suing forth a *Certiorari* to remove the proceedings. Lord *Kenyon* upon that occasion said, "that it would be against all authority to hold that the *Certiorari* is virtually taken away: for that, being a beneficial writ for the subject, cannot be taken away without express words, and it was much to be lamented in a variety of cases that it was taken away at all *(o)*".

Not by general reference to former act.

Neither is a general reference to offences created by a former Act in which the *Certiorari* is taken away sufficient to take it away in the subsequent one: but for that purpose the prohibitory clause must be either repealed specially or understood by necessary intendment.—Thus, the Statute 13 Geo. 1. c. 23, for regulating the woollen manufacture creates several penalties for offences therein specified, and gives an Appeal to the Sessions, but takes away the *Certiorari* both as to the order of the Justices out of Sessions, and also as to the order of Sessions upon Appeal. Afterwards the Vagrant Act 17 Geo. 2. c. 5. s. 5, enacted, "that all persons convicted of offences under the above-mentioned Act of 13 Geo. 1. c. 23. shall be deemed incorrigible rogues, and s. 7 & 9, empower the Justice to commit to the next Court of Quarter Sessions, which may inflict a term of imprisonment not exceeding two years. The latter statute has no provision relative to the *Certiorari*. Upon a motion for a writ of *Certiorari* at the suit of a defendant to remove *two* several instruments, viz. a Conviction by a Justice for an offence against the Act 13 Geo. 1, and likewise an order of Sessions made on commitment of the defendant to the Sessions

(o) R. v. Jukes, 8 T. R. 542, Cowp. 523. R. v. Hube, 5 T. R. 544. See also Hartley v. Hooke, 542.

pursuant

pursuant to 17 Geo. 2. for *another* offence under the same Act of 13 Geo. 1, the Court held, that though the *Certiorari* could not issue as to the first, being wholly under 13 Geo. 1. by which the *Certiorari* was taken away, yet that the second was removable, being a proceeding under 17 Geo. 2. which contained no express exclusion of the *Certiorari*. And to that extent the writ was granted (*p*).

Not taken away from prosecutor.

But even where a Statute in express terms declares that the proceedings shall not be removed by *Certiorari*, this does not prevent its issuing at the suit of the prosecutor. For, to restrain the prerogative of the Crown in this particular, there must either be express words for that purpose, or an intention manifestly appearing upon the Act, that the Crown as well as the subject should be prohibited from removing the proceedings (*q*). This is a reasonable construction of a provision whose object is only to prevent delay, which cannot be the motive of the prosecutor. And it is in fact beneficial to the subject that this privilege should exist on the part of the Crown; for in several instances where the *Certiorari* is taken away from the defendant, the Attorney-General has assisted defendants, where a doubtful judgment has been given below, to have their cases re-considered, by applying for the *Certiorari* on the part of the Crown (*r*).

Manner of obtaining at the suit of the Crown.

2. When a writ of *Certiorari* is applied for, it is either at the instance of the Crown, or of the Defendant.

First, where the application is at the suit of the Crown, it is either by the Attorney-General *ex officio*, or by the private prosecutor. In both these cases alike, it issues of course, and without assigning any grounds (*s*). Neither are the restrictions and limitations as to the time of suing out the *Certiorari*, nor other regulations, as to notice, re-

(*p*) R. *v.* Terret, 2 T. R. 734.
(*q*) R. *v.* Allen, 15 East. 341, 342.
(*r*) By the Attorney-General, 15 East. 337.
(*s*) 2 T. R. 89. 2 Hawk. P. C. c. 27. s. 27.

cognizances,

cognizances, and the like, attached to an application by the Crown or the prosecutor (*t*). Besides the authority of practice, it has been solemnly decided by the Court upon a review of the subject, that the general words of the Statutes restraining the issuing of writs of *Certiorari*, do not apply to Prosecutors (*u*).

By *Attorney-General ex officio.*

There is this distinction between an application by the *Attorney-General* officially, and that by a private prosecutor, viz. that in the former, the writ is of absolute right, but in the case of an individual prosecutor, though the writ issues of course, yet upon cause shewn, it may be suspended (*w*).

The right of the *Attorney-General* to have the writ as of course, is not confined to cases where it is sued out on behalf of the prosecution; but it is the established practice of the Crown-office, that the *Attorney-General* is entitled to it absolutely in all cases. And though a Statute expressly take away the *Certiorari* from the Defendant, or he cannot have it without laying a special ground by affidavit, yet the Crown, if the Defendant be one of its officers, or if for any reason, it take up his defence, may have a *Certiorari* in the name of the Defendant, without laying any special ground (*x*): and without regard to any restrictions imposed in ordinary cases, as to the time of applying for it (*y*). Where this is done, the Attorney-General by his signature authorizes the Defendant's clerk in Court to apply to the Court, or to a Judge in vacation, and a rule is thereupon drawn up of course. And no recognizance is necessary upon a writ so obtained.

By private prosecutor.

The writ for the private prosecutor is obtained, if in Term-time, by counsel's signature to a motion, which being handed to the officers of the Crown-office, a rule is

(*t*) 1 East. 298. 303. note (*d*). R. *v.* Farewell, 2 Str. 1209; and S. C. 1 East. 305, from a MS. note.

(*u*) *Per* Lord Kenyon, 1 East. 305.

(*w*) 2 Hawk. P. C. c. 27. s. 27. n. 2. 4 Burr. 2458.

(*x*) 1 East. 303. note (*d*). 4 Burr. 2458. R. *v.* Stannard, 4 T. R. 161.

(*y*) R. *v.* James, M. 26 Geo. 3. 1 East. 303, note (*d*).

drawn

drawn up for issuing the writ, which is thereupon given out from the Crown-office. In vacation application is made to a Judge of the Court of King's Bench at chambers, and the rule drawn up upon his *fiat*.

At the suit of the Defendant.

But though the *Certiorari* is demandable of right by the prosecutor, it is discretionary in the Court either to grant or refuse it at the prayer of the Defendant (*z*). The first application therefore is for a rule *nisi*, if in *Term*-time. Some special ground must be laid before the Court by affidavit on moving for the rule (*a*). A slight ground will, it has been said, be sufficient, but there must be some (*b*). In Vacation, it may be obtained by a Judge's order, upon special application and cause shewn by affidavit.

Where suspended by Appeal.

By a rule of Court, Pasc. 1 Ann. B. R. (*c*), no *Certiorari* shall be granted to remove orders of Justices from which the law has given an Appeal to the Sessions, before the matter be determined on the Appeal, or the time for appealing be expired, because it hinders the privilege of appealing.

This rule must be taken advantage of upon the motion to file the order; for, after it is filed, it is too late (*d*).

By the interpretation put upon this rule however, if a right of Appeal to the Sessions is given to the *Defendant* alone, to be brought within a certain time, he may waive his right, and apply for a *Certiorari* before the time of appealing is expired (*e*); unless expressly restricted by the Statute (*f*).

The

(*z*) 2 Hawk. P. C. c. 27. s. 27.

(*a*) 2 T. R. 90.

(*b*) *Per* Buller, J. *ibid.* The rule is said to have obtained ever since the time of Charles the Second, *ib.* and see R. *v.* Abbott, Doug. 550. n. It appears, says Mr. J. Buller, 2 T. R. 90. from a case preserved in Sir E. Northey's notes, M. 25 Car. 2. that it was then held as clear law that a *Certiorari* ought not to be granted in vacation, but in open Court, and upon a ground shewn. It is now however the practice to let the writ be sued out for the defendants in vacation, by a Judge's order upon affidavit.

(*c*) 1 Salk. 146.

(*d*) *Per* Holt, C. J. 1 Salk. 136.

(*e*) R. *v.* Harman, Andr. 343.

(*f*) An instance of such partial restriction of the *Certiorari* though not usual, is found in the statute 12 Geo. 2. c. 28. s. 5, 6, against excessive gaming; which, after giving the party grieved an Appeal to the Sessions, enacts (s. 6.) "that no conviction or judgment shall be removeable into any Court

The only cases where the issuing of the *Certiorari* is suspended by the privilege of Appeal, are those in which both parties have that privilege; and then only if a certain time is fixed for bringing the Appeal (*g*). For if only the party applying for the *Certiorari* has the right of appealing, he may waive it: and where both are entitled to it, yet if no time be fixed for bringing the Appeal, it is no objection to the writ of *Certiorari* issuing, for if it were, the writ might never issue at all: and the rule of Court above-mentioned is to be understood in that sense (*h*).

No *Certiorari* during Appeal *depending*.

But while an Appeal is depending at the Sessions there can be no *Certiorari*:—

A person had been committed by two Justices to the Sessions under the Vagrant Act, against which Commitment he had appealed. While that Appeal was depending a *Certiorari* had been granted to remove the proceedings, and afterwards a rule was obtained to shew cause why it should not be quashed. The Court were all of opinion that no *Certiorari* could issue then, and therefore that it must be quashed; for the Magistrate had committed to the Sessions, and the vagrant had appealed: so that both parties had agreed that there should be an Appeal to the Sessions, and therefore the *Certiorari* ought not to issue till the Sessions had determined the case (*i*).

Refused.

But even where there is no objection to the *Certiorari* issuing before the time of appealing is expired, yet the Court, in the exercise of its discretion, will refuse to grant it, if upon the affidavits in support of the application it appears that the ground alledged for it, is more properly the subject of Appeal (*k*).

Section

Court of Record at Westminster by *Certiorari*, or any other writ or process, *until* such order or other proceeding shall have been first removed to, and judgment and determination made thereon by the Court of Quarter Sessions."

(*g*) Andr. 343.

(*h*) *Id. ib.* and see 2 Str. 991.

(*i*) R. *v.* Sparrow and Another, 2 T. R. 196, note (*a*).

(*k*) *Per* Lord Mansfield, R. *v.* Whitbread, Doug. 550. In R. *v.* Eaton, 2 T. R. 90. where the Court

Section 3. Of the Time of issuing Certiorari, *Notice, and Recognizance.*

There are several statutory regulations concerning the issuing of the writ of *certiorari*, in regard to time, notice, and security for costs. Regulation as to time of issuing.

With regard to the *time*, and also the *notice* necessary, it is enacted, by 13 Geo. 2. c. 18. s. 5, "That for the better preventing vexatious delays and expence occasioned by the suing forth writs of *certiorari* for the removal of Convictions, &c. before Justices of the Peace, no writ of *certiorari* shall thenceforth be granted, issued forth, or allowed, to remove any conviction, order, &c. made by or before any Justice or Justices of the Peace, or the General Quarter Sessions, unless such *certiorari* shall be moved or applied for within *six* calendar months next after such conviction, order, &c., and unless it be duly proved upon oath, that the party suing out the same hath given *six* days *notice* thereof in writing to the Justice or Justices, or any two of them (if so many there be), by and before whom such conviction, &c. shall be so made, to the end that such Justice, or the parties therein concerned, may shew cause against the issuing or granting the said *certiorari*." In six months. Notice.

The six days *notice* must be given to the Magistrates previous to the application for the rule to shew cause. The service of that rule, though more than six days be given upon it, is not a sufficient compliance with the

Court at first refused to grant a *Certiorari* without some cause shewn, it is said that the defendant's counsel then offered an affidavit of the *merits*, which being read, the *Certiorari* was granted. This expression however, it is presumed, must apply to such facts as appeared upon the face of the Conviction, otherwise they could not furnish a reason for granting the *Certiorari*, as they could not be taken notice of upon the Conviction being brought up.

Act.

Act *(l)*. The want of such previous notice is therefore a good cause to be shewn against making the rule absolute *(m)*: or even if the rule has been made absolute, and the writ issued, the Court will supersede it on the ground that no notice was given previous to the moving for the rule *nisi (n)*.

These restrictions however, it is to be remembered, do not attach upon applications on behalf of prosecutors, nor upon those made by the Attorney-General officially on account of a Defendant *(o)*.

Recognizance.

A further condition to be observed before a *certiorari* can be obtained by the Defendant, is that of giving security for costs, &c. This is in some instances regulated by particular statutes, as by 5 Ann. c. 14. s. 2, and 16 Geo. 3. c. 30. s. 19, in cases relating to Game and to Deer: In other cases the Defendant is obliged, before he can have a *certiorari*, to enter into a Recognizance to pay the prosecutor his costs and charges *(p)*.

This practice is founded upon an extension of the following clause in the stat. 5 Geo. 2. c. 19. s. 1.—"Whereas in many cases where his Majesty's Justices of the Peace by law are empowered to give or make judgments or orders: And whereas (s. 2.) divers writs of *certiorari* have been procured to remove such judgments or orders into his Majesty's court of King's Bench at Westminster, in hopes thereby to discourage and weary out the parties concerned in such judgments or orders by great delays or expence: It is therefore enacted, that no *certiorari* shall be allowed to remove any *such* judgment or order, unless the party prosecuting such *certiorari*, before the allowance thereof, shall enter into a recognizance with sufficient sureties before one or more Justices of the Peace of the

(*l*) R. *v.* Justices of Glamorganshire, 5 T. R. 279.
(*m*) *Id. ib.*
(*n*) R. *v.* Nichols, 5 T. R. 281.
(*o*) *Ante*, p. 215.
(*p*) See the Form of a Recognizance, in the Appendix.

county

county or place, or before the Justices at their Quarter Sessions where such judgment or order shall have been made, or before any Judge of the King's Bench, in the sum of £50, with condition to prosecute the same at his own costs and charges with effect, without wilful or affected delay, and to pay the party in whose favour such judgment was given within one month after such judgment or order shall be confirmed, his full taxed costs; and in case the party shall not enter into such recognizance, or shall not fulfil the conditions, the Justices may proceed upon such judgments or orders as if no such *certiorari* had been granted." The third section directs the recognizance to be certified into the Court of King's Bench, and filed with the *certiorari*, and order or judgment removed; and gives a power of enforcing it by attachment, upon affidavit of non-payment within ten days after demand. Attachment.

This statute, it will be observed, mentions only *judgments* and *orders*, and on that account seems at one time not to have been understood to apply to Convictions. For it appears by a case which occurred in Michaelmas Term 26 Geo. 3. *(q)*, that it was not the practice to require a recognizance on removing Convictions *(q)*: but, as by the practice of the Court no attachment can issue for the costs where there is no recognizance, the Court in the case alluded to declared, that for the future they would not grant a *certiorari* to remove a Conviction, without compelling the party first to enter into a recognizance *(r)*.

(*q*) R. v. Jenkinson, 1 T. R. 82. As an argument that the words of the statute would not in strictness comprehend Convictions, it may be observed, that in 13 Geo. 2. c. 18. s. 5, which relates to the time of suing out the *Certiorari*, the Act expressly enumerates Convictions, as well as judgments and orders.

(*r*) According to the report (1 T. R. 82.) the act referred to at the bar as an authority for granting the attachment was 13 Geo. 2. c. 18.: but that act, of which the 5th section alone relates to the subject, is confined to the *time* of suing out the *Certiorari*, without any allusion to *costs*. This is therefore probably a mistake for 5 Geo. 2. c. 3, upon which the recognizance and attachment are founded.

Accordingly,

Accordingly, since that time the practice has uniformly been to require a recognizance before the allowance of a *certiorari*, in all cases of the removal of summary Convictions from before Magistrates; except in the case of Game Convictions before noticed, which are regulated by the statute 5 Ann. c. 14.

The *title* of this Act, 5 Geo. 2. c. 19, it is observable, relates only to orders and judgments made *on appeal*, from which a doubt has been suggested, whether its provisions are applicable to Convictions on those statutes which do not give any appeal to the Sessions *(s)*. However, the first section of the statute refers generally to orders and judgments made by Justices of the Peace, and there seems no sufficient reason for confining the words "*such* judgment or order," in the section above recited, to orders made on appeal. Accordingly, in a case arising upon the statute 5 Ann. c. 14, which gives no appeal to the Sessions, it was taken for granted that the regulations of 5 Geo. 2. c. 19, were necessary to be complied with *(t)*. And in practice a recognizance is required, without any distinction whether there has been an appeal or not.

Sureties. According to the construction put upon this and the similar provisions in 5 Ann. c. 14, there must be a recognizance by two sureties in £50 each, and the statute is not satisfied by a recognizance of the Defendant and two sureties each in £25; and the recognizances are now accordingly so taken.

Though the words of the Act seem to require the party himself to enter into the recognizance as well as the sureties, yet in practice the words "with sureties" are construed "by sureties," and the recognizance is acknowledged only by the sureties *(u)*.

The

(*s*) See 8 T. R. 218, note (*b*).
(*t*) R. *v.* Dunn, 8 T. R. 217. See the Form of a Recognizance, in the Appendix.

(*u*) This is sanctioned by the construction put upon the stat. 3 Jac. 1. c. 8, which provides, "that no execution shall be stayed on writ

The recognizances are returned by the Justices along with the *certiorari* to the Crown Office, and filed.

Regulations on *Game* Convictions.

The special regulations as to security for costs appointed by 5 Ann. c. 14, in cases relative to the Game, are not repealed by the general Act, but remain in force and must be observed *(v)*. That Act requires (s. 2.) that the party against whom the Conviction shall be made, shall, before the allowance of the *Certiorari*, become bound to the person prosecuting the same in £50, with such sufficient securities as the convicting Justice shall think fit, with condition to pay to the prosecutors within fifteen days after such Conviction (confirmed) or *procedendo* granted, their full costs and charges.

There seems to be no reason, if the necessity of a recognizance be considered as founded upon the peremptory provisions of 5 Geo. 2. c. 19, why it should not be requisite in Convictions on the Game Act, 5 Ann. c. 14.; for though that act requires a bond to be given to the prosecutor as a security for the costs, yet the 5 Geo. 2. c. 19 makes no exceptions, and should therefore seem to be cumulative in those cases, and to add the security of a recognizance to that already required by bond. But, however that may be, in practice, a recognizance is never required on the removal of convictions under the 5 Ann. c. 14, the bond being considered as supplying the place of a recognizance *(w)*.

writ of error on judgment, unless the person in whose name such writ of error is brought, with two sufficient sureties such as the Court shall allow, shall first be bound to the other party by recognizance in double the sum adjudged to be recovered by such judgment, with costs, &c." A recognizance of bail in error upon this statute, by two sureties without the Defendant himself, has been held sufficient, the words "with sureties" being construed as if it were "by sureties." Dixon *v.* Dixon, 2 B. & P. 444.

(*v*) 8 T. R. 218, note (*b*).

(*w*) In consequence of this construction the prosecutor in these cases is in a worse condition than in others, for he cannot have an attachment for the costs, that being granted only where there is a recognizance. See *post*, Costs.

The

The security in these cases is by bond (*x*) returned with the *Certiorari*, instead of the recognizances, as in other cases under the 5 Geo. 2.

That bond is not returned with the *Certiorari*, as the recognizance is, but remains with the prosecutor to whom it is given.

It does not seem to be settled whether this bond must be given before moving for the rule *nisi* (*y*).

The conditions as to recognizances, like the others that have been mentioned, do not attach upon applications by the prosecutor, or the Attorney-General *ex officio*.

Section 4. *Of the Direction, Effect, and Return of* Certiorari.

Direction of the writ.

1. The writ is directed to the Justices by whom the Conviction was made; or, if it has been returned to the Sessions, is directed generally to the "Justices assigned to keep the peace in and for the county of, &c."

According to Mr. Serjeant Hawkins, if a person who ought to certify a record die having such record in his custody, a *Certiorari* may be directed to his executor or administrator to certify it (*z*).

It seems however, that upon a Conviction which ought to be returned to the Sessions, the *Certiorari* may be directed to, and the return made by, the Sessions. For the Justices out of Sessions are supposed to return their proceedings there (*a*).

(*x*) See the Form of the Bond, in the Appendix.

(*y*) See 8 T. R. 218, note.

(*z*) 2 Hawk. P. C. c. 27. s. 42.

(*a*) *Semb.* 1 Str. 470.

2. The

2. The writ is of no effect, unless delivered before the time for its return is expired (*b*). Delivery.

3. The writ of *Certiorari* from the time of its delivery supersedes the authority of the Magistrates below; and all subsequent proceedings are void (*c*): besides being a contempt of the Court of King's Bench, for which the Magistrate is liable to attachment and fine (*d*). Its having that operation however is only on condition that the proper recognizance required by 5 Geo. 2. c. 19. s. 2, has been entered into (*e*): for by the express provisions of that statute, if the conditions there required have not been observed, the Justice below may proceed. And till this has been done, the Court will not compel them to return the writ (*f*). The delivery however of a *Certiorari*, with these necessary conditions duly performed, operates as a *supersedeas* for ever, though nothing further be done upon it (*g*). Effects of.

It is the duty of the Magistrate therefore, upon receiving the *Certiorari*, to yield obedience to it by returning all the proceedings comprehended in its mandate, not only previous to the date of the *teste*, but such also, if any, as originated after the *teste* (*h*).

But though the Magistrate has no further power after the delivery of the writ regularly sued out, to do any fresh act, yet, it has been said, that if a *Certiorari* come after an adjudication made, but before the convicting Justices have agreed upon the amount of the fine, it is no contempt in them to fix the amount in order to return their judgment complete (*i*).

(*b*) 2 Hawk. P. C. c. 27. s. 64.
(*c*) 1 Salk. 148. 2 Hawk. P. C. c. 27. s. 64.
(*d*) 1 Mod. 44. 1 Lord Raymond, 469.
(*e*) 2 Hawk. P. C. c. 27. s. 64.
(*f*) 3 T. R. 218.
(*g*) *Semb.* 3 Dy. 244, pl. 63. 2 Hawk. P. C. c. 27. s. 64.
(*h*) 2 Lord Raymond, 836. *Ib.* 1305. 1 Salk. 149. 1 East. 298.
(*i*) R *v.* Elwell, 2 Lord Raymond, 1514. 2 Str. 795; but see *contra*, Yelv. 32. Dalt. c. 195.

No stay of execution begun.

If before any *Certiorari* awarded, a warrant of distress has been made and delivered to the constable who has distrained the goods, he may proceed to sell; for the *Certiorari* under such circumstances has no operation upon the execution which was begun before it issued: nor has the Court of King's Bench any power over the warrant so previously granted, so as to make a rule upon the constable to return it (*k*).

Return how enforced.

4. If the person to whom the *Certiorari* is directed neglects to return it, an *alias*, and after that a *pluries* lies, and lastly an attachment (*l*). But in practice the mode is to take out a rule upon the Magistrate or person whose duty it is, to return the writ. This is a side-bar rule (*m*), and the party to whom it is directed is thereby ordered to return the writ within so many days after notice of that rule. But the Court will not compel the Magistrate below to return the writ, unless the conditions of the 5 Geo. 2. c. 19, as to a recognizance, be properly fulfilled (*n*).

Making the return.

The manner of making the return is as follows: viz. on the back of the *Certiorari* should be inscribed "The answer of, &c. ——." The style and authority of the person making the return should be here specified (*o*): below which is inscribed, "The return of this writ appears by a certain schedule annexed thereto." This is usually signed by the Justice or person making the return; but it is sufficient if the name and style appear in the return, though not subscribed (*p*). If the *Certiorari* be directed generally to the Justices assigned to keep the peace in the county of, &c. ——, as is the case where it is directed to the Sessions, the return is in these words, "The answer of A. B. (the chairman) and the Justices assigned to keep the

(*k*) R. *v.* Nash, 2 Lord Raymond, 990. 1 Salk. 147. S. C.
(*l*) Dalt. 195.
(*m*) 1 East. 299.
(*n*) 8 T. R. 215.
(*o*) 2 Lord Raymond, 980.
(*p*) Anon. 6 Mod. 43.

peace

peace in and for the county of ——," and signed by the chairman, or only sealed.

The return must certify the record itself, and will be bad if it only certifies the tenor thereof *(q)*.

The return should regularly be under seal *(r)*, as the writ enjoins, but in practice it seems not to be considered indispensable. It is made, as every record ought to be, upon parchment: and a return is said to have been quashed, because it was upon paper instead of parchment *(s)*. Under seal.

The instruments to be returned are inclosed with the writ and certificate, and sent up together to be remitted to the Crown Office, where they are filed with other criminal proceedings in a bundle of the term in which the writ is returnable. Filing.

It is not usual for the convicting Justices to draw up a formal Conviction, in the first instance, in every case in which a penalty is inflicted; but to make minutes of the proceedings (without attending to the precise form) at the time of pronouncing the judgment, from which they may afterwards, if occasion require, make out a regular Conviction to be returned to a writ of *Certiorari*. And it is by no means unusual to draw it up in form after the penalty has been levied, nor is there any objection to this mode, provided the facts warrant them in stating what they do *(t)*. For where it appeared, that a warrant of distress issued against one *S. Simmons*, on the 20th of October, under the hand and seal of the Magistrate, in consequence of which he applied to the Magistrate's clerk, who furnished him with what purported to be a copy of a Conviction, dated the 3d of October, and taken from an original, signed by the Magistrate: and that *Simmons* having afterwards obtained a *Certiorari* to remove the Conviction, the Magistrate Practice as to drawing up Convictions.

(q) 1 Salk. 147.
(r) 2 Hawk. P. C. c. 27. s. 70. For forms of Returns, see Appendix, tit. *Certiorari*.
(s) 1 Barnard. 113.
(t) *Per* Lord Kenyon, 1 East. 188. R. *v.* Barker.

returned thereto a record in a different form from that furnished to *Simmons;* both bearing date the 3d of October, though it was sworn that no formal Conviction had been signed by the Magistrate till a fortnight afterwards. The Conviction returned to the *Certiorari* was drawn out more at length, and in a more formal shape, than the one of which the Defendant had received a copy. A motion was made for a criminal Information against the Magistrate, grounded on these facts, and on the allegation that *Simmons* had been misled, and induced to incur an unnecessary expence by receiving a copy pretended to be authentic of a Conviction which appeared to be faulty. The Court refused to grant the Information, saying, that if the Magistrate had done no more than return the Conviction in a more formal shape, instead of sending it up in the informal shape in which it was first drawn, and supposing that the facts, as they really happened, would warrant him in the return he had made, it was not only legal, but laudable in him to do as he had done, and he would have done wrong if he had acted otherwise *(u)*. The Court there also recognized the practice as alluded to above, and observed, that it is no objection to say, that a party may be thereby induced to incur unnecessary expence, in suing out a *Certiorari* to get rid of an informal Conviction; for a mere informality in the manner of drawing up the Conviction ought not to be the inducement for removing it, but some substantial defect in the justice or legality of the proceeding before the Magistrate.

Examinations, &c. need not be returned.

It is sufficient to return the Conviction in due form, without returning also the examinations and affidavits taken in the proceeding *(v)*.

Impertinent matter.

All matters introduced into the return by way of explanation or otherwise, except those expressly ordered to be certified, are impertinent, and will be altogether disregarded

(u) R. v. Barker, 1 East. 186. (v) Anon. Loft. 348.

by

by the Court *(w)*: and can neither affect the Conviction nor supply any defect in it.

Return quashed.

If the *tenor* only of the record be returned instead of the record itself *(x)*, or if instead of sending up a formal Conviction, the affidavits only, and warrant to distrain, be returned *(y)*, the return is imperfect. In such case, the return is quashed and a new *Certiorari* granted upon motion *(z)*.

Variance between the writ and return.

As a writ of error can remove no record which materially varies from the description of that set forth in the writ, so neither can a *Certiorari*. Thus, a *Certiorari* was to remove an order concerning *foreign* salt, the order returned appeared to be concerning *salt* only; the return was held ill *(a)*. So, if the record of a Conviction returned vary from the description in the writ, as to the names of the Justices by whom it is said to be made *(b)*: or in the name of the party convicted *(c)*, it is a bad return.

Likewise, if the mandate of the writ be to remove all proceedings against A. and B., it will not remove a proceeding against A. alone *(d)*. But conversely, a writ to remove all proceedings against A. will remove those in which A. is included jointly with others *(e)*.

Quashing the return.

When the record returned is for any of the foregoing reasons not well removed, nothing is before the Court upon which it can proceed *(f)*. In that case therefore the Court will quash the return, and award a new writ *(g)*.

Procedendo.

If upon examination it appears that the *Certiorari* issued improperly, it may be superseded even after the return has

(*w*) 2 Hawk. P. C. c. 27. s. 75, *post*, p. 231.
(*x*) 1 Salk. 147.
(*y*) R. *v.* Leverman, 1 Salk. 148.
(*z*) 3 Salk. 80.
(*a*) 1 Salk. 145. 3 Salk. 79.
(*b*) 1 Sid. 448. 1 Keb. 102. 129. 282.
(*c*) 2 Hawk. P. C. c. 27. s. 86. 2 Salk. 452.
(*d*) R. *v.* Baines, 2 Lord Raym. 1199. 1 Salk. 157. S. C.
(*e*) 2 Hawk. P. C. c. 27. s. 85, it is so laid down in regard to indictments.
(*f*) Anon. 3 Salk. 80.
(*g*) R. *v.* Baines, 2 Lord Raym. 1203. 3 Salk. 79, 80. Ashley's case, 2 Salk. 479.

been

been filed; and the return may be taken off the file *(h)*. After that has been done, a *procedendo* may be awarded, and the record remanded. But no *procedendo* can issue, till the *Certiorari* and return be taken off the file *(i)*: therefore, till the motion is made and granted for that purpose, the motion for a *procedendo* is premature *(k)*.

Bail. If the Defendant, at the time of removing the Conviction, be under commitment, the Court, upon the return being filed, may bail him till the validity of the Conviction be determined. This was done in the following case:—The Defendant was convicted of keeping an ale-house without licence, and was thereupon committed for a month, as the Act directs. After he had lain a fortnight, he brought a *Certiorari*, and upon the return of it he was admitted to bail; the Court being of opinion that if the Conviction was confirmed, they could commit him in execution, for the residue of the time *(l)*. But in a case of commitment under the Vagrant Act, 17 Geo. 2. c. 5, the Court having refused a *Certiorari* on the ground of an appeal depending at the Sessions, rejected the Defendant's application to be out on bail till the appeal should be decided *(m)*.

Section 5. Proceedings in King's Bench after Return of the Conviction.

We are in the next place to consider the proceedings in the Court above, upon the Conviction after it has been properly removed into that Court.

No plea to the Conviction. 1. It seems to have been thought regular at one time to allow the Defendant to plead to the Conviction matter impeaching the jurisdiction of the Magistrate. This is reported to have been done in one of the earliest cases in

(*h*) 1 Burr. 418.
(*i*) 4 Burr. 2459. 6 Mod. 43.
(*k*) 4 Burr. 2459.
(*l*) R. *v.* Reader, 1 Str. 531.
(*m*) 2 T. R. 196, note.

which

which a summary Conviction by a Justice was brought before the Court; viz. in *Gardner*'s Case, in which, according to the report, a person had been committed by a Justice for going armed, on the statute 33 Hen. 8. c. 6; and he being removed by *habeas corpus*, and such facts disclosed by affidavit as shewed the case to be no offence against the statute, the Court commanded a plea to be drawn, comprising the whole matter, which was done, and when it was confessed, the party was discharged *(n)*.

This was in the 43d of Elizabeth. But at a later period, (3d Anne) when a party who had been convicted before a Justice upon the 27th Eliz. c. 7, of cutting down trees, offered to *plead* a title to the trees, the majority of the Court, consisting of three Judges, against the opinion of Lord C. J. *Holt*, refused the plea. The Chief Justice was for allowing it on the authority of *Gardner*'s Case: and *Powell*, J. admitted, that if the record of that case could have been found, he should have consented to receive the plea, but no such record being discovered, he thought there was not sufficient precedent to warrant the Court in admitting a plea to a summary Conviction; and that if the Justice had not jurisdiction the proper remedy was by action *(o)*.

No attempt appears to have been since made to renew this practice; and according to modern usage, no plea is admissible to a Conviction, nor does the Court, in examining the Conviction, take notice of any thing but what appears upon the face of it. They will not therefore receive affidavits that the fact was done in assertion of a right, though that, if true, would oust the jurisdiction of the Magistrates *(p)*. Nor will the Court notice any facts in the *return* to impeach the Conviction *(q)*. So neither will it advert to any thing stated in the return to supply

(n) Gardner's case, Cro. Eliz. 822. 5 Co. 72. S. C. by the name of St. John's case.

(o) R. v. Burnaby, 2 Lord Raym. 900. 3 Salk. 217.

(p) R. v. Bullen, 1 Salk. 368.

(q) R. v. Liston, 5 T. R. 341.

what

what is defective or omitted in the Conviction, but every thing necessary to support it must appear in the Conviction itself *(r)*.

Reserving special case.

This however must not be understood as applying to a *special case* reserved by the Sessions, and returned with the Conviction for the consideration of the Court of King's Bench. Such cases have frequently been reserved upon Convictions which have been brought by appeal before the Sessions, and removed from thence into the King's Bench *(s)*. And the practice has been recently ratified by the Court of King's Bench, on a question directly raised concerning its regularity *(t)*.

False return.

The only remedy for a false return is by action on the case at the suit of the party grieved; or by Information. But the Court of King's Bench will not stop the filing of the return upon affidavits of its falsity, as it is laid down, 2 Hawk. P. C. c. 27. s. 74, with the exception of the case of orders by Commissioners of Sewers.

Filing returns.

When the Conviction is returned, it is filed in the Crown Office with the Indictments and other criminal proceedings returned the same Term, and it does not require any motion for that purpose, as in the case of orders.

Appearance.

The Defendant then, by his Clerk in Court, enters an Appearance to the Conviction, called a *comparentia*, in the Crown Office. This must be done before the next issuable term, (when the recognizances not discharged or respited are estreated) otherwise his recognizance, which he would not be allowed to respite till he had appeared, would then be estreated.

In what time.

(See further, Appendix, tit. Recognizance.)

Argument.

The case must be set down for argument in the Crown

(r) *Per* Holt, C. J. 2 Salk. 493. On a return to a *habeas corpus* however, the style and authority of the Justice by whom the commitment was made, may be supplied by the return, 2 Lord Raym. 980, *ante*, p. 226.

(s) R. v. Cook, 3 T. R. 519. 4 T. R. 273. 3 T. R. 69, 72.

(t) R. v. Allen, 15 East. 346.

paper,

paper *(u)*, without which it cannot be heard. For this purpose either party may, after appearance entered, move by counsel for a *concilium*, upon which it is so set down of course; and *paper*-books delivered as in other cases. One counsel only is heard on each side; the junior counsel for the Defendant begins and is heard in reply.

Upon cause being shewn, the Conviction is either quashed or confirmed. But if the Court be equally divided, the Conviction can neither be quashed, nor the rule for quashing it discharged, but it must remain in that state *(v)*.

It seems to be understood that a Conviction cannot be quashed in part, and stand good as to the rest *(w)*, but must be quashed generally. This follows from what has before been said concerning the entirety of the judgment, which it is unnecessary here to do more than refer to *(x)*. There is an instance however, in which it was allowed by the consent of the parties to quash a Conviction as to the penalty, and confirm it as to a condemnation of goods *(y)*.

If the party who sues the *Certiorari* die after the return, and before the argument, the Court will nevertheless proceed, and confirm the Conviction *(z)*. Confirmed after death.

3. As to the *costs* on affirmance of the Conviction, the practice is, for the Prosecutor, as soon as the Conviction is confirmed, to take out a side-bar rule for the taxation of costs; which are thereupon taxed by the Master of the Crown Office. Costs on Affirmance. Rule for taxing.

According to the construction that has been put upon similar provisions in other statutes, the costs to be taxed Amount of.

(u) R. *v.* Nelson, 2 Barnard. 44. 2 Nol. 373.

(v) R. *v.* Green, Cald. 391.

(w) R. *v.* Hall, Cowp. 729. 2 Str. 900, *ante*, p. 167.

(x) *Vide ante*, p. 167.

(y) R. *v.* Hall, Cowp. 729. The reporter subjoins to the case an observation, that it seemed to be the opinion of Mr. Davenport, counsel for the Defendant, that a Conviction could not be adjudged bad in part, and good for the rest, but for the benefit of his client, he consented to this mode of accommodating the dispute, and a rule was accordingly made as above.

(z) R. *v.* Roberts, 2 Str. 937.

by

by the Master are only those in the King's Bench, upon and subsequent to the *Certiorari* (*a*).

It should seem from the construction that has been put upon the statute 5 Will. & Mar. c. 11. s. 2, 3, relative to costs on the removal of *indictments*, the provisions of which precisely accord with those of 5 Geo. 2. c. 19, now under consideration, that the amount of the costs is not limited to the sum in the recognizance, which is deemed only a further security for them, but not as restrictive (*b*).

Not liable for costs where *Certiorari* quashed.

The party suing out the *Certiorari* is not liable to costs, where it is superseded *quia improvidé emavarit* (*c*).

Proceeding on Recognizance.

We have before seen that (*d*), conformably with the regulations of 5 Geo. 2. c. 19. s. 3, the Defendant, before the *Certiorari* issues, is obliged to enter into a recognizance for the payment, *within ten days* after demand (*d*), of the costs to be taxed according to the course of the Court, which we have above explained. The recognizance may be taken either before the Justices below, or before a Judge of the Court (*e*).

(*a*) R. *v.* Summers, 1 Salk. 54. The report does not mention the title of the act authorizing the assessment of costs in that case; but since it was on a *Certiorari* to remove an indictment found at the Sessions, it most probably was on the 5 Will. & Mar. c. 11. s. 2, 3, the regulations of which precisely coincide with those of the 5 Geo. 2. c. 19. s. 3. Where a statute (3 Will. & Mar. c. 10) directed that the prosecutor should have his *full* costs and damages, it was said that the bill should be taxed as between *attorney and client*, R. *v.* Dore, Andr. 302.

(*b*) R. *v.* Teed, 13 East. 4; by sec. 3 of 5 Will. & Mar. c. 11, upon which the question in this case turned, it was provided that the prosecutor, within ten days after demand and refusal of the taxed costs, may have an attachment against the Defendant as for a contempt on his recognizance, "*and that the said recognizance shall not be discharged till the said costs be paid:*" which provision is verbally the same as that of 5 Geo 2. c. 19, which regulates the costs on orders and convictions. But a different construction prevails upon the statute 4 and 5 Will. & Mar. c. 18. s. 2, relative to costs on *informations:* for by the directions of that statute, if the costs be not paid by the Defendant, are, "then the prosecutor" *shall have the benefit of the said recognizance to compel him thereto*; and the effect of these words, it has been held, is to limit the amount of costs to the extent of the sums in the recognizance. See 2 T. R. 145, and the cases cited 13 East. 5.

(*c*) Say. Law of Costs, 306.

(*d*) *Ante*, p. 220, the words, *within* ten days, are construed at the end of ten days, 3 T. R. 512.

(*e*) R. *v.* Midlam, 3 Burr. 1721.

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The recognizance, which if taken before the Justices below, is returned upon the *Certiorari* along with the Conviction, remains filed in the Crown-Office; and after the Conviction is affirmed, becomes liable to be estreated, if not discharged or respited. A discharge is obtained of course by producing at the Crown Office a receipt for the payment of the taxed costs.

But if this be not done, the recognizances which remain liable to estreat, are in each of the issuable terms, Hilary and Trinity, entered upon the estreat-roll, which is transmitted into the Exchequer. The Defendant, therefore, must, in case the costs be not paid, on the first day of each issuable term, until the expiration of four terms, respite his recognizance. Formerly this was done by motion made on those days by the Solicitors at the side-bar of the Court, but since that practice has been discontinued, it is done by application at the Crown Office, where the rule is drawn up of course; unless resisted by the prosecutor, in which case it must be determined in open Court. During the four first terms after affirmance, the recognizance is respited from term to term, and the application must therefore be renewed in each issuable term; but afterwards, the rule is drawn up to respite it till further order. After which it remains without further proceeding, unless the *prosecutor* moves to have it estreated. A motion for this purpose may be made, and a rule obtained by the Prosecutor, on affidavit, of the Master's *allocatur*, and of demand and non-payment.

But this proceeding affords no direct remedy to the prosecutor for the recovering of the costs, though he may indirectly by petition in the Exchequer have the aid of it, out of the levy at the suit of the Crown.

Scire facias on recognizance.

The prosecutor may also, after the recognizance is forfeited, and while it remains in the King's Bench, sue out a *scire facias* upon it; and upon the return by the sheriff to the *levari facias*, the Court on motion will grant a rule for the taxation of the prosecutor's costs by the Master, and that

that they be paid out of the sum levied, rendering the overplus to the bail; the Defendant and bail having had notice to shew cause. This was said in one case *(f)* to be the best and easiest method, the King having no interest in the money, but being only a royal trustee for the party.

Attachment for costs.

It is more usual therefore to proceed by attachment upon section 3 of the statute 5 Geo. 2. c. 19, which provides, 'that the party entitled to the costs within ten days after demand made of the person or persons who ought to pay the costs, upon oath made of the making such demand, and refusal of payment thereof, shall have an attachment granted against him or them for the contempt; and the recognizance given upon the allowing the *Certiorari* shall not be discharged until the costs shall be paid, and the order shall be complied with and obeyed.' Upon the Master's *allocatur*, therefore, and affidavit of the service thereof, and of demand and non-payment as above, an attachment issues on motion for that purpose.

On bond in Game Convictions.

No attachment can issue for the costs, except where there has been a recognizance *(g)*. Hence it follows, that in Game-Convictions, in which, as we have seen *(h)*, there is no recognizance on issuing the *Certiorari*, but a bond under 5 Ann. c. 14, the prosecutor cannot have a summary remedy by attachment for the costs, but must have recourse to his remedy upon the bond.

Case where no costs allowed on affirmance.

The intention of the Acts requiring security for costs being to prevent vexatious removals, it was held, in a case which occurred upon one of those statutes, viz. 5 Ann. c. 14. s. 2, where the Defendant was compelled to sue out a *Certiorari* merely to obtain a copy of it for the purpose of defending himself in an action brought for the same fact, the Magistrate having improperly refused to grant a copy, that the Defendant, under these circumstances, was not

(f) R. v. Eyres and Bond, mainucaptors, 4 Burr. 2118.

(g) R. v. Jenkinson, 1 T. R. 82; see note *(w)*, *ante*, p. 223.

(h) *Ante*, p. 223.

liable

liable to pay the costs of the *Certiorari* on the affirmance of the Conviction *(i)*.

Section 6. Execution after Affirmance in the Court of King's Bench.

Process. Upon the Affirmance of the Conviction in the Court above, the process for the recovery of the penalty must issue out of that Court; for the record being there, the Justices below have no further authority, and cannot award any process upon it.

In one case, on the statute 13 Car. 2. c. 10, the Court refused to issue an attachment on Affirmance of the Conviction; because the proper process, which it was admitted the Court ought to execute upon their judgment of Affirmance, was by *levari facias (k)*. In another case, upon the same statute, it was expressly held that the Court might award a *fieri facias* against the goods, and in default thereof a *capias ad satisfaciendum* against the person; and a *fieri facias* was awarded accordingly *(l)*. On a still later occasion a *levari facias* having been awarded to the sheriff after affirmance of a Conviction for deer stealing, no doubt was made that the Court must award execution, for the record could not be sent back to the Justices, and as the Court have a power to affirm the Conviction, they have by necessary consequence a power to award execution *(m)*. But an expression attributed to Lord Holt, in one case, seems

(*i*) Where a recognizance is taken pursuant to a particular statute, as 12 Geo. 2. c. 28. s. 1, before a Judge, the *Certiorari* is indorsed "at the instance of the within named Defendant, who hath found two manucaptors according to the statute before."
(Signed by the Judge.)

(*k*) R. *v.* Pullen, 1 Salk. 369. 3 Will. & Mary.

(*l*) R. *v.* Rogers, 4 Will. & Mary, 1 Salk. 369. Carth. 231.

(*m*) R. *v.* Speed, 1 Salk. 379, and S. P. 2 Lord Raymond, 768.

to

to convey a doubt whether in default of goods to levy upon, the Court of King's Bench could award a commitment (*n*).

If the person entitled to the penalty die after Affirmance and before execution, his personal representative may suggest the death upon the roll, and have execution by *scire facias*; but cannot sue out a *levari facias* for that purpose without a *scire facias* (*o*).

The process issuing out of the superior Court is not directed to the constable, as the warrant of the Justices would be, but to the sheriff; for he is the proper officer of the Court (*p*).

Quære, if remitted by pardon.

A question has been made whether a summary Conviction can be remitted by pardon. Where the forfeiture is given to the party grieved, it seems to be the better opinion, that a summary Conviction for a penalty is not within the terms of a general pardon; but the point does not appear to have received a final decision (*q*).

(*n*) R. *v.* Speed, 1 Lord Raymond, 584. According to the report of the case in 12 Mod. 329, 330, the objection suggested against process being awarded by the Court of King's Bench, was, that by that means the penalty might be levied in another county: and according to Holt, C. J. it seems doubtful if upon a return of *nulla bona* by the sheriff of the county where the Conviction was made a *testatum* could issue into another county.

(*o*) R. *v.* Ford, 2 Lord Raymond, 768.

(*p*) *Id. ib.*

(*q*) R. *v.* Barrett, 1 Salk. 383.

PART

PART IV.

OF THE RESPONSIBILITY AND INDEMNITY OF MAGISTRATES AND THEIR OFFICERS.

CHAPTER I.

Proceedings against Justices.

HAVING in the foregoing pages defined the powers and duties of Justices of Peace and their Officers, in the exercise of a summary penal jurisdiction, we are now, in conclusion, to describe the nature and extent of responsibility to which they are subject in the execution of those duties, and the modes of redress allowed by law for any irregularity or excess in their proceedings.

Section 1. *Of the Action against Justices for Acts in pursuance of Conviction.*

By the common law the regularity of the proceedings under a summary jurisdiction may be questioned in a collateral action. The following case, in which the subject was solemnly examined, affords a rule by which to determine

Where it lies.

mine what acts done under a limited jurisdiction can be made the subject of a civil action:

For what acts.

In an action of Trover for goods levied by warrant of the Commissioners of Excise, the Question was, if they adjudge low wines to be strong wines perfectly made, upon the statute 12 Car. 2. c. 23, whether it may be drawn in question again by an action, so as to make the officer chargeable. For the affirmative, the case of a Justice of Peace was relied upon, in which it was held that an officer was liable to an action for taking a distress pursuant to his warrant, in case of a rate made upon one who was not liable *(a)*. On the contrary, it was insisted that the statute having given an appeal, the party had no other remedy; and that the Commissioners being made Judges by the statute, no action lay against them, if they had erred in a matter of fact. The Court decided unanimously, that the action was maintainable. *Hale*, Ch. B.—"First, the matter is not within their jurisdiction, which is a stinted limited jurisdiction; and that implies a negative, viz. that they shall not proceed at all in other cases. But if they should commit a mistake in a thing that were within their power, that would not be examinable here. It is to be considered that special jurisdictions may be circumscribed, 1st, with respect to place, as a leet or corporation; 2d, with respect to persons; 3d, with respect to the subject matter of their jurisdiction; and here the statute limits their jurisdiction in all these three respects: and therefore if they give judgment in a cause arising in another place, or in other matters, all is void and *coram non judice;* as if they should adjudge rose water to be strong water, and here low wines are waters of the first extraction. And though the information before them supposes the matter to be within their power and jurisdiction, yet the party is not thereby concluded, but he may aver the contrary." And

(a) *Vide* Cro. Car. 395, and Dyer, 135.

the

the Chief Baron held, against the opinion of Baron Rainsford, "that it would have been against the Defendants, even though they had pleaded specially. But it would be otherwise in the case of a brewer or retailer, who are expressly comprised in the Act; as if the Commissioners should adjudge small beer to be strong, for they have a jurisdiction there, and an appeal lies from their sentence. But where they have no power over the thing, as here they have not, the case is altered." Judgment was given for the Plaintiff *(b)*.

This doctrine is recognized with the same distinction by Lord *Holt (c)*; and is confirmed by subsequent authorities *(d)*.

How far subsisting Conviction protects.

It is however established, that in an action of trespass brought against a Magistrate, a subsisting Conviction good upon the face of it in a case to which his jurisdiction extends, being produced at the trial, is a bar to the action, provided the act for which the execution also has been regular; although the Magistrate may have formed an erroneous judgment upon the facts. For that is properly the subject of appeal, and therefore in cases where an appeal lies, no action can be maintained till the merits have been heard and the Conviction quashed thereupon *(e)*.

(*b*) Terry *v.* Huntington, Hardr. 480.

(*c*) Fullers *v.* Fotch, Holt, 287. Carth. 346, *post*, p. 242.

(*d*) Cowp. 240. 8 East. 404. 1 Burr. 595. 2 Bl. Rep. 1146.

(*e*) Fullers *v.* Fotch, Holt, 287, and Strickland *v.* Ward, 7 T. R. 631, *infra*; and see 2 B. & P. 391. Massey *v.* Johnson, 12 East. 81, 82. See also 16 East. 21, *per* Lord Ellenborough. In one case indeed, of Hill *v.* Bateman, Str. 710, it is said to have been agreed that where actions of this kind are brought against Justices of the Peace, they are obliged to shew the regularity of their proceedings, and the informations, &c. laid before them upon which their Convictions are grounded must be produced and proved in Court. Though the practice seems to be settled otherwise by the more recent authorities referred to above, yet it should be observed, that before the statute 21 Jac. 1. c. 12, the mode of pleading, as appears by the Entries, was to set out all the proceedings before the Justices; and that Act only enabled the Justice to give in evidence under the general issue those facts which must before have been pleaded specially. Cowp. 647.

This appears to have been the doctrine of Lord C. J. *Holt*, and acted upon by him in a case at *Nisi Prius*, which is reported as follows:

Trespass against Commissioners of Excise and their officers, for taking plaintiff's money by virtue of a warrant from the Commissioners on an information against him on 3 & 4 Will. & Mary, for using a wash-vat without giving notice. The case was tried before Holt, C. J. in London, on the plea of Not Guilty. The information, judgment, and warrant, were offered in evidence. It was objected, 1st, That the copy (*f*) of this Conviction was no evidence, but that the original book of entry of the Commissioners ought to be produced; *sed per* Holt, This copy may be given in evidence. 2dly, That it ought to be proved that the Commissioners gave the judgment recited in the Conviction; which Holt, C. J. denied, because it proves itself. 3dly, It was objected (which is the objection material to the present point), that this judgment is not peremptory; for the plaintiff in this action is at liberty to disprove the truth of the fact upon which they grounded their judgment. *Sed per curiam*, that was denied upon this diversity, viz. that if the Commissioners had intermeddled with a thing which was not within their jurisdiction, then all is *coram non judice*, and that may be given in evidence in an action, but otherwise if only mistaken in their judgment in a matter within their cognizance; for that is not inquirable otherwise than on appeal (*g*).

Again, this doctrine was ratified in a more recent instance, where, in an action of trespass and false imprison-

(*f*) What is here called a copy must undoubtedly have been a Conviction under the hand and seal of the Commissioners, but it is so called in the language of the objection, as distinguished from the entry of the judgment in the book kept by the Commissioners; unless indeed that book being considered of a public nature, like the books of the Bank of England, was allowed to be proved by copy, in the same manner as other public records.

(*g*) Fullers v. Fotch, Holt, 287. Carth. 346, and see Hardres, 478, *ante*, p. 240. Cro. Car. 395. 1 Vent. 275.

ment

ment tried before Mr. J. Yates, the Defendant produced in evidence a warrant signed by him as a Justice of Peace, reciting a Conviction of the Plaintiff for unlawfully returning to the parish of A. after removal, and requiring the keeper of the house of correction to keep him to hard labour for twenty-six days; he also produced the Conviction referred to in the warrant regularly drawn up: upon which the learned Judge gave his opinion, that this Conviction could not be controverted in evidence; that the Justice having a competent jurisdiction of the matter, his judgment was conclusive till reversed or quashed; and that it could not be set aside at *Nisi Prius*. The plaintiff was accordingly nonsuited *(h)*.

Date of conviction, when traversable.

If a valid subsisting Conviction be proved at the trial, which appears by the date to warrant the act done under it, the Court will not in that collateral proceeding, as it would in a proceeding in which the Conviction is directly impeached, inquire into the time when it was actually drawn up, nor receive evidence to prove that it was not in fact drawn up till after the action commenced *(i)*, provided the date is warranted in fact by the time when the Conviction actually took place.

To have the effect of protecting the Magistrate in an action, it is necessary to shew a subsisting Conviction valid upon the face of it, and applying to a case within his cognizance.

Action lies before Conviction quashed.

It is admitted also in the cases where the question has occurred, that if the want of jurisdiction appears by the Conviction itself, an action may be supported before the Conviction is quashed *(k)*.

In an action of trespass against a Justice for goods taken under a warrant of distress, four several Convic-

(*h*) Strickland r. Ward, 7 T. R. 633, note (*a*) from the original Note book of Mr. J. Yates.

(*i*) Massey r. Johnson, 12 East. 82. 16 East. 20, 21.

(*k*) *Per* Lord Ellenborough, 16 East. 23.

tions were given in evidence on the part of the Magistrate, by which the Plaintiff had been convicted in four several penalties, as a baker, for exercising his calling on a Sunday, contrary to 29 Car. 2. c. 7, by selling bread. The Court being of opinion that according to the true construction of the Act, only one penalty could be incurred on the same day, and consequently the levy made under the three last Convictions could not be justified: and it was held, that as those Convictions, if pleaded, could not have been a legal justification, it was not necessary that they should be quashed in order to support the action, but the plaintiff upon the trial might take advantage of their illegality (*l*).

In the above case, it has been observed, the objection appeared upon the face of the four Convictions given in evidence: for by collating and bringing together the four Convictions, it appeared that the Justice had exercised a jurisdiction in respect of three of the Convictions, which was not given him by law, for after the first Conviction he was *functus officio* (*m*).

How far Conviction conclusive as to *jurisdiction.*

But in these actions a question may arise whether a good subsisting Conviction, which upon the face of it imports an adequate jurisdiction over the matter in judgment, be conclusive as to that circumstance, or whether the want of jurisdiction may be inquired into by evidence exterior to the Conviction. Upon reference to the cases cited at the beginning of this chapter (*n*), it might be concluded that the fact of jurisdiction is controvertible in evidence. In the former case particularly, where the Commissioners of Excise had adjudged low wines to be strong wines, it does not appear that the fact of their being low wines was shewn in their judgment; and it must have been by evi-

(*l*) Crepps v. Durden, Cowp. 240.

(*m*) See the observations of Lord Ellenborough and Mr. Justice Bayley on this case, in Gray v. Cookson, 16 East. 21.

(*n*) Hardr. 480. Holt, 287, *ante*, p. 240, 242.

dence

dence therefore that it it was so ascertained. This position however, that the jurisdiction is controvertible notwithstanding the Conviction, should perhaps be confined to the cases where the Justice has assumed a jurisdiction over a subject matter which in fact was altogether out of his cognizance, such as the case above referred to of meddling with liquors not exciseable: and in such cases it seems reasonable to apply to Convictions what has been said in regard to an Order, that the Magistrates cannot give themselves jurisdiction in a particular case by finding that as a fact, which is not the fact *(o)*.

But it may be collected from the discussion on a recent case, that if the subject matter be one over which the Magistrate had a general jurisdiction, evidence exterior to the Conviction is not admissible to prove that in the particular case the Magistrate drew an erroneous conclusion. The Case was as follows:

In an action of trespass the Defendants, who were Justices, gave in evidence a Conviction by them of the Plaintiff, as an apprentice, for a misdemeanor in his service, on the statute 6 Geo. 3. c. 25. s. 1. In the course of the trial, evidence was given on the part of the Plaintiff to establish an avoidance of the indenture (which was admitted on the face of the Conviction to be in its nature voidable), by the apprentice refusing, when asked by the Magistrate, to return to his master; but that refusal did not appear upon the Conviction. A verdict having passed for the Plaintiff subject to the opinion of the Court, the case was argued upon a rule for setting aside the verdict and entering a non-suit. Upon that argument, the Plaintiff's counsel insisted upon the fact of avoidance above mentioned, in order to shew that the Magistrate had no jurisdiction over the case. But the Court refused to take notice of that fact, which did not appear upon the face

(o) *Per* Lawrence, J. Welsh *v.* Nash, 8 East. 394. 403.

of

of the Conviction. It was admitted that the Plaintiff might shew that the Magistrates had no jurisdiction by any thing which appeared upon the face of the Conviction: but that the case of *Crepps* v. *Durden (p)* was only an authority for noticing what so appeared *(q)*: and the Court therefore desired the Plaintiff's counsel to confine himself upon the point of jurisdiction to such objections as appeared upon the Conviction itself *(r)*.

Where Conviction quashed.

2. Before the statute 43 Geo. 3. c. 141, although a regular Conviction was deemed to be a protection to the Magistrate while it remained in force (*s*), yet if a Magistrate in the course of his duty had erred in judgment, or had committed any informality in his proceedings, so that the Conviction were afterwards quashed, he was left without any defence to an action at the suit of the party convicted. That statute was meant to protect Magistrates to a certain extent where they were before left unprotected by the quashing of the Conviction (*s*). It is therefore enacted, "That in all actions brought against any Justice for or on account of any conviction made by him, under any Act of Parliament, or for any act done or commanded by him for the levying any penalty, apprehending any party, or about carrying such Conviction into effect, *in case such Conviction shall have been quashed*, the Plaintiff, besides the value of the penalty which may have been levied, shall not recover any more damages than two-pence, nor any costs of suit, unless it shall be expressly alledged in the declaration in such action, which shall be an action on the Case only, that such acts were done maliciously, and without any reasonable or probable cause."

43 Geo. 3. c. 141.

Action on the Case only.

And by section 2. of the same statute, the Plaintiff shall not recover back the penalty levied, nor any damages or costs, if the Justice proves at the trial that the Plaintiff was guilty of the offence.

(*p*) Cowp. 240, *ante*, p. 244.
(*q*) 16 East. 23.
(*r*) *Ib.* 22.
(*s*) *Per* Ellenborough, 10 East. 21.

Before

Before this statute, it had been determined, that an action for a commitment under a warrant must be an action of Trespass, and not an action on the Case. And that rule will still govern such cases as do not fall within the statute (*t*).

To what cases that statute applies.

This Act applies only to cases where there has been a Conviction: and therefore does not extend to one in which the Magistrate, without any information sufficient to warrant a Conviction, but proceeding *ex mero motu*, commits a person as a vagrant (*u*).

The operation of the statute is also confined by the express wording of it to cases where there has been a Conviction quashed. Thus, in an action of *Trespass*, the circumstances were, that the Plaintiff having been convicted and committed by the Defendants as an apprentice for quitting his master's service, had been brought up by *habeas corpus*, and discharged by the King's Bench on account of the commitment having issued without any information on oath as required by the statute; but there had been no Conviction quashed. Under these circumstances the action of Trespass was held to lie, notwithstanding the statute 43 Geo. 3. c. 141, which in cases within its provision requires the action to be in *case* only: for the statute was determined to apply only to cases where there has been a Conviction quashed (*v*).

For what cause Trespass lies.

3. An action of Trespass has been held to lie against a Justice who committed an offender to prison in the first

(*t*) Morgan *v.* Hughes, 2 T. R. 225.

(*u*) Massey *v.* Johnson, 12 East. 67.

(*v*) Gray *v.* Cookson, 16 East. 15. 21. This seems to be the only construction admitted by the express words of the Act; but it is exposed to this inconsistency, viz. that wherever there has been a defective Conviction, the party who seeks to support an action against the Magistrate for any thing done under it, is in a better situation by the Conviction not being quashed, than if it were. For while it has not been quashed he is not affected by the restrictions of the statute; and the Conviction, being by the supposition defective upon the face of it, will not protect the Magistrate, although it has not been quashed.

instance,

instance, without first endeavouring to levy the penalty by distress, under a statute which only authorizes the commitment as an alternative punishment in default of distress(*w*). And this decision is not affected by the statute 43 Geo. 3. c. 141, as it does not concern the regularity of the Conviction; nor require that the Conviction should be quashed in order to support the action.

Section 2. Of the Formalities in Actions against Justices.

In what county.

1. By the statute 21 Jac. 1. c. 12. s. 5, actions against Magistrates for any thing done in the execution of their office, can only be brought in the county in which the fact complained of was done.

Limitation as to Time.

2. There are other provisions made by the Legislature for the security of Magistrates in the execution of their duty, among which is the limitation of Time within which Actions can be brought against them.

By 24 Geo. 2. c. 44. s. 8. no action shall be brought against any Justice *for any thing done in the execution of his office*, unless such action be commenced within *six* calendar months after the act complained of.

Upon this clause it has been held, that the Justice is answerable for such part of an imprisonment under his warrant, as was within six calendar months of the commencement of the action, though the first commitment was beyond that time (*x*).

The suing out of the writ may be considered by the plaintiff, as the commencement of the action. But where

(*w*) Hill *v.* Bateman, 1 Str. 710.

(*x*) Massey *v.* Johnson, 12 East, 75, 76. Bull. Ni. Pri. 24.

a writ

a writ had been sued out in time, but not served or returned, an *alias* writ out of time, could not, it was held, be connected with the first by continuances, so as to support the action *(y)*.

3. For the further security of the Justices, it is provided by 24 Geo. 2. c. 44. s. 1. 3. 5. "That no writ shall be sued out against, nor any copy of process at the suit of a subject shall be served on any Justice, for any thing done by him in the execution of his office, until *notice in writing* of such intended writ or process shall have been delivered to him, or left at the usual place of his abode, by the attorney or agent for the party who intends to sue, at least one calendar month before the suing out or serving the same: in which notice shall be clearly and explicitly contained the cause of action which such party hath or claimeth to have against such Justice: on the back of which notice shall be indorsed the name of such attorney or agent, together with the place of his abode." Notice of action.

By section 4. This notice must be proved on the trial; and in default of proof, the defendant is entitled to a verdict and costs.

And by section 2. The Justice at any time within one calendar month after such notice given, may *tender amends* to the plaintiff or his agent or attorney, and in case the same is not accepted may plead the tender in bar to any action grounded upon such writ or process, along with the general issue: and if the Jury find the amends tendered to have been sufficient, they shall give a verdict for the Defendant.

By section 4. The Justice is allowed to pay money into Court, if he has neglected to tender amends, or has tendered insufficient.

The *month* required for the notice begins to reckon on the day on which it is served *(z)*. Notice, how reckoned.

(y) Weston v. Fournier, 14 East. 492. *(z)* 3 T. R. 623.

Wherever

When necessary.

Wherever the act complained of is one which has been done by a Magistrate intending to act as such, however mistaken, upon a subject matter within his jurisdiction, he is entitled to a notice under this Act (*a*). And although the privilege of a Justice of Peace cannot be claimed where the act is altogether *alio intuitu*, yet if it be upon a matter within the general jurisdiction of Justices of Peace, one who is in fact such will be presumed to have acted in that character, so as to entitle him to the privileges of the statute. Thus, a lord of a manor, who was also a Justice of Peace, was held to be entitled to notice previous of an action brought against him for taking a gun in the house of an unqualified person; for it was intended that he acted as a Justice of the Peace according to the powers given by 5 Ann. c. 14. (*b*).

Form of the Notice.

The notice must be precise in complying with the directions of the Act (*c*). The statute, it has been declared, was made to introduce a strictness of form in favor of Magistrates: it must therefore be observed literally and admits of no equivalent (*d*).

The Act requires that it contain two things, viz. the writ or process, and the cause of action (*e*). It is not enough therefore after stating the cause of complaint to give notice of bringing an action "for your said misconduct" (*f*).

It is sufficient however to give notice of the plaintiff's intention to sue out a *bill of Middlesex*, without specifying

(*a*) In an action against a Justice for committing the mother of a bastard child by his *single* warrant, the statute 18 Eliz. c. 3. requiring it to be by *two*, it was held that he was entitled to notice within the 24 Geo. 2. c. 44. Weller v. Toke, 9 East. 364.

In Styles v. Cox, Vaughan, 111, Justices and Officers of Peace, however wrong, were held to be within the privilege of 21 Jac. 1. c. 12.

(*b*) Briggs v. Evelyn, 2 H. Bl. 114.

(*c*) *Per* Lord Kenyon, 7 T. R. 835.

(*d*) *Per curiam* Taylor v. Fenwick, cited 7 T. R. 635.

(*e*) 7 T. R. 634.

(*f*) Lovelace v. Corry, 7 T. R. 631.

cifying the form of the action whether in Case or Trespass *(g)*. But notice of an action on the *Case*, will not support an action of *Trespass*:—In an action of Trespass brought against a Justice, the notice proved was of "an action on the case for false imprisonment and assault." It was ruled by Mr. J. *Yates*, at the trial, that such a notice was not conformable to the words of the Statute *(h)*; and that opinion has since been ratified and acted upon in a subsequent case *(i)*.

The notice according to the Act *(k)*, must be given by the attorney or agent for the plaintiff; and the name of such attorney or agent, together with his place of abode, is required to be endorsed on the notice. Under this regulation it is sufficient for the attorney giving the notice to describe himself of the town where he resides, as "of Birmingham" *(l)*. By whom given.

However, the place from which the notice is dated must be so mentioned, as to intimate that it is the place of the attorney's residence. Therefore, a notice signed by the attorney in this manner, "given under my hand at Durham," was held to be defective, in not expressing sufficiently that Durham was the place of the attorney's residence, as the statute requires *(m)*.

So, where the attorney described himself in the notice, of a certain place as "in London," which was in fact in Westminster, this was deemed a fatal objection *(n)*.

As the Action is confined by the Act to the cause of action contained in the notice, it must necessarily be

(g) Sabine v. De Bourgh, 2 Camp. 196.
(h) Strickland v. Ward, 7 T. R. 631, note.
(i) Lovelace v. Corry, 7 T. R. 631.
(k) *Ante*, p. 249.
(l) 3 B. & P. 551. In actions against officers of Excise, 23 Geo. 3. c. 70. s. 30, requires the name and place of abode of the attorney to be specified in the notice: under this act a notice signed, "Downe and Cox, Furnival's Inn, attorney for the plaintiffs," was held to contain a sufficient designation of their residence. Wood v. Folliott, 3 B. & P. 552, note.
(m) Taylor v. Fenwick, cited 7 T. R. 635.
(n) 6 Esp. Cas. 138.

brought

brought within six months of the notice, according to s. 8. of the statute. Therefore, where the writ upon which the action was founded was more than six months after the notice, the action failed; though there had been a prior writ issued in time, but never served so as to be capable of being continued; and though there had been a continuing cause of action to the time of suing out the second writ *(o)*: for in that case, the first writ which was in time would not support the declaration, and the subsequent cause of action to which the second writ might apply was not included in the notice.

Tender of amends.

The reason of requiring notice of action was to give the defendant an opportunity of tendering amends; which he is enabled to do by the second section of the Act *(p)*.

Pleading general Issue.

By the statute 21 Jac. 1. c. 12, s. 5. in any action against Justices of Peace for or concerning any matter done by virtue or reason of their office, they may plead the general issue, and give the special matter in evidence.

The plea of tender of amends however, under 24 Geo. 2. c. 44, must be pleaded specially, and the defendant may plead it by leave of the Court with the general issue.

Paying Money into Court.

By s. 4, of 24 Geo. 2. c. 44, in case the Justice shall have neglected to tender amends, or has tendered insufficient, before the action brought, he may by leave of the Court, at any time before issue joined, pay money into Court; in the same manner as in other actions where money is allowed to be paid into Court.

Before the Court will grant that leave it must appear that the defendant is sued as a Justice. An application for that purpose was at first refused, because it did not appear that the action was brought against the defendant as a Justice for any thing done in the execution of his office: the Court therefore only granted a week's

(o) Weston v. Fournier, 14 East. 491.

(p) *Ante*, p. 249.

time

time to plead: but before the expiration of that time, the plaintiff's notice of action being produced and proved by affidavit, whereby the action appeared to be brought against the defendant for a supposed misconduct in his office, the rule for payment of money into Court was granted (*q*).

Section 3. *Of Costs in Actions against Magistrates.*

The statute 24 Geo. 2. c. 44. s. 7. further provides, that if the plaintiff in such action against a Justice shall obtain a verdict, and the Judge shall, in open Court, certify the injury to have been wilfully and maliciously committed, he shall be entitled to double costs. For the plaintiff, by 24 Geo. 2. c. 44.

That statute also having by sec. 6, enacted, that the constable or officer executing the warrant shall not be sued but in conjunction with the Justice, provides with regard to the costs in such joint action, that if the Jury find a verdict for the constable as they are bound to do on production of the warrant, and shall find a verdict against the Justice, in such case the plaintiff shall recover his costs against the Justice, to be taxed in such manner as to include the costs that the plaintiff is liable to pay to the defendant for whom a verdict has been found.

But the plaintiff's right to costs under the above statute is further restricted in cases coming within 43 Geo. 3. c. 141, which enacts, "that in those actions to which it extends, the plaintiff shall not be allowed any costs whatever, unless it shall be expressly alledged in the declaration that the cause of action was malicious, and without any reasonable or probable cause." By 43 Geo. 3. c. 141.

By the 21 Jac. 1. c. 12. s. 5. "If a verdict shall pass with the defendant in any such action as is therein mentioned, or if the plaintiff be non-suited or suffer any discontinuance, the defendant is entitled to double costs." For defendant.

(*q*) Casberd v. Ball, 2 Bl. Rep. 859.

Section

Section 4. Information against Magistrate for wrongful Conviction.

If the misconduct of the Magistrate, besides being productive of private injury, be such as to call for punishment upon public grounds, as where it proceeds, not from error, but from private interest or resentment, the Court of King's Bench will direct an Information to be filed by the officer of the Court against the offender, upon a proper application supported by affidavits.

An Information is never granted for an irregularity arising merely from ignorance or mistake (*r*).

An Information has been granted for convicting without any previous summons (*s*).

On a motion for an Information (*t*), against a Justice for not having stated the Defendant's evidence in a Conviction for killing game without being qualified, the Court indeed refused the rule, upon the ground that the Magistrate might have been misled by the authority of a former decision upon a similar Conviction, but at the same time expressed so strong an opinion upon its being clearly the duty of a Magistrate to set out all the Evidence fairly, as to induce a conclusion that, but for that ground of palliation, the Information would have been granted.

The grounds upon which the Court may think it proper to interfere are too indefinite to admit of any fixed rule, but in general it may be stated, that wherever the powers vested in Justices for the summary execution of penal laws are exerted from corrupt or personal motives, this mode of punishment will be extended. But an irre-

(*r*) See Lord Mansfield's judgment, R. v. Cozens, Doug. 410. and R. v. Fielding, 2 Burr. 719.

(*s*) R. v. Allington, 1 Str. 678. See the circumstances stated R. v. Venables, 2 Lord Raymond, 1405. 1 Str. 640. See also R. v. Harwood, 2 Str. 1088.

(*t*) R. v. Lovet, 7 T. R. 152.

gularity,

gularity, however great, unless it partakes of those motives will not be visited in this way (*u*).

When moved for.

An Information may be moved for in the second Term after the cause of complaint, provided it be in sufficient time before the end to allow the Magistrate to shew cause that Term (*v*).

The Court will not hear a motion against a Justice for convicting without a summons, until the Conviction is brought up by *certiorari* (*w*).

Costs on motion.

The Costs of the motion for an Information are entirely in the discretion of the Court. And in some cases although the Court refuse the rule, yet if the conduct of the Magistrate has been irregular, they will discharge it, without ordering the complainant to pay the Magistrate his Costs (*x*). And in a case where a motion was made against a convicting Magistrate, on the ground of his being himself a party, the Court, in discharging the Rule, ordered him to pay all the Costs of the application (*y*).

Exculpatory affidavit by complainant.

It is an established rule that the Court will not interfere by Information against a Magistrate for misconduct in convicting a party of an offence, unless the complainant accompanies the motion with an affidavit negativing his being guilty of the offence. Thus a rule *nisi* having been obtained, supported by affidavits of gross miscon-

(*u*) *Ante*, p. 10. R. v. Palmer and Baine, 2 Burr. 1162. On an Information being moved for against two Justices of Peace and others, for a misdemeanor, relating to the Conviction of a poacher. The Court, upon consideration of the circumstances attending it, discharged the Rule with costs, to be paid to *the Justices*, but without costs to the others, and they were upon this occasion most explicit in their Declaration, "that even where a Justice of Peace acts *illegally*, yet, if he has acted honestly and candidly, without oppression, malice, revenge, or any bad view or illegal intention whatsoever, the Court will not punish him in this extraordinary course of an Information, but leave the party complaining to the ordinary legal remedy or method of prosecution by action, or by indictment." 2 Burr. 1162. See also 1 T. R. 653. 692. 6 Mod. 228.

(*v*) R. *v.* Marshall and Another, 13 East. 322. R. *v.* Herries, *ib.* 270.

(*w*) R. *v.* Heber, 2 Str. 915. 2 Barnard. 24. S. C.

(*x*) R. *v.* Fielding, 2 Burr. 719.

(*y*) R. *v.* Hoseason, 14 East. 606, *ante*, p. 10.

duct

duct by a Justice in improperly convicting the complainant of killing a hare, the Court discharged it on the preliminary objection that the complainant had not made any affidavit of his being a qualified person and of his having taken out a certificate (*z*).

In some special cases also the Court will require the party making the application to relinquish his civil action for the same cause (*a*).

Defendant must appear to receive judgment.

After verdict upon the Information the Defendant must appear in Court to receive judgment, unless some special reason be assigned by affidavit for dispensing with his appearance (*b*).

Nor is that sufficient, unless it be clear that the punishment will be only pecuniary; where that is the case the personal attendance may be dispensed with upon the Clerk in Court undertaking for the fines (*c*).

(*z*) R. *v.* Webster, 3 T. R. 388.
(*a*) R. *v.* Fielding, 2 Burr. 719.
(*b*) R. *v.* Harwood, 2 Str. 1088.
(*c*) R. *v.* Hann and Another, 3 Burr. 1786.

PART IV.

CHAPTER II.

Of Actions against Constables, &c. for Acts done in Execution of Convictions.

THE Constable or other officer executing the warrant of the convicting Justice, is, by 21 Jac. 1. c. 12 *(a)*, entitled to the same privilege as the Justice as to giving the special matter in evidence under the general issue, and also as to the right to double costs if a verdict be found for him.

May plead general issue.

Double costs.

Also, by 24 Geo. 2. c. 44, the *time* of bringing an action is limited to six calendar months.

Limitation of *time*.

Before the provisions made for the security and protection of inferior officers by the Act of 24 Geo. 2. c. 44, they were placed in the hazardous predicament of being liable to indictment if they refused to execute the warrants of Justices of Peace, and to vexatious actions if they did *(b)*. It was the object of that Act to relieve them from this difficulty, and to substitute the Magistrate by whom the warrant was granted, and who was supposed to be cognizant of the legality of it, in lieu of the officer, who was merely the instrument to execute it, and who was probably ignorant of the grounds on which it issued.

Protected by warrant.

(a) *Ante*, p. 252.
(b) See the observations of Mr. J. Lawrence, 5 East. 448.

As the law stood before, the distinction was, that if the Justice had no authority in the matter, so that the Conviction was *coram non judice*, and void, his warrant afforded no protection to the officer; but if the Justice had jurisdiction in the matter, the officer was protected, provided the manner of the Execution was legal, however erroneous the judgment might have been; and though the Magistrate himself might be liable *(c)*.

Demand of warrant.

But now by the Statute 24 Geo. 2. c. 44, "no action shall be brought against any constable, head-borough, or other officer, or against any person acting by his order, or in his aid, for any thing done in obedience to any warrant under the hand and seal of any Justice, until demand has been made or left at the usual place of his abode by the party intending to bring such action, or by his attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand:"

"And in case after such demand and compliance therewith by shewing the said warrant to, and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against such Constable, &c. or against such person acting in his aid for any such cause as aforesaid, without making the Justice or Justices who signed or sealed the said warrant defendant or defendants, that on producing or proving such warrant on the trial of such action, the Jury shall give their verdict for the defendant or defendants, *notwithstanding any defect of jurisdiction in such Justice or Justices:*"

"And if such action be brought jointly against such Justice or Justices, and also against such Constable, &c. then on proof of such warrant the Jury shall find for such

(c) Terry *v.* Huntington, Hard. 484, *ante*, p. 240. 1 Bac. Ab. tit. Constable, D. Hill *v.* Bateman, 1 Str. 710.

Constable,

Constable, &c. notwithstanding such defect of jurisdiction as aforesaid."

Sufficient if furnished before action.

In the construction of this Act, it is held, that although the plaintiff is restrained from bringing the action till after a neglect of six days to furnish a copy of the warrant, yet the defendant the Constable, is entitled to the benefit of the Act, if at any time *before* the action commenced a copy of the warrant was furnished, though not till after six days from its being demanded *(d)*.

Duplicate evidence.

If the plaintiff's attorney, previous to bringing the action, make out two papers precisely similar, purporting to demand a copy of the warrant pursuant to the Statute, and sign both for his client, and then deliver one to the defendant, the other will be evidence at the trial to prove the demand *(e)*.

To what kind of actions the Statute applies.

The Act is confined to actions of Tort, and therefore it was held not to extend to an action for money had and received, brought against an officer who had levied and sold a distress under a Conviction, which was afterwards quashed *(f)*.

The Act extends only to cases in which a warrant has been actually granted *(g)*. But where there has been a warrant, in the execution of which the act complained of was done, it is a justification to the officers; and whether the warrant itself be legal or not, a demand of it is necessary under 24 Geo. 2. c. 44. Since that act the jurisdiction of the Magistrates cannot be tried in an action against the officers *(h)*.

What acts protected by the Statute.

2. The condition of being entitled to the benefit of the Statute is, that the officer in what he did was acting in obedience to it *(i)*. The object of the Statute, as has been before observed *(k)*, being to protect inferior ministers in

(*d*) Jones *v.* Vaughan, 5 East. 448.
(*e*) Joy *v.* Orchard, 2 B. & P. 39.
(*f*) Feltham *v.* Terry, Bull. Ni. Pri. 24.
(*g*) 3 Esp. Cas. 226.
(*h*) Price *v.* Messenger, 2 B. & P. 158. 3 Esp. Cas. 96.
(*i*) 2 Burr. 1766.
(*k*) *Ante*, p. 257.

those acts, which their office obliged them to execute at the risk of being answerable for the Magistrate's want of authority, it follows that the privilege attaches to no act but what is expressly within the exigency of the warrant. For this reason, it has been said, that wherever the Magistrate could not be liable, the Act does not apply (*l*).

It was ruled by Lord *Mansfield* in the case of an officer executing a warrant under the Vagrant Act, that the officer was bound to shew not only the warrant, but also that he had acted in obedience to it (*m*). The same point had before been ruled by his Lordship in another case tried before him (*n*). And in the celebrated question upon the Execution of general warrants which was agitated in the case of *Money* v. *Leach* (*o*), it was insisted, besides the illegality of the warrants themselves, that the officers were not protected, because they had not acted in obedience and conformably to the exigency of the warrants. The cases and doctrine above mentioned being appealed to in confirmation of that argument, the Attorney-General, York, gave up the case of the defendant upon that point, and admitted that the objection was a difficulty too great for him to encounter (*p*). Lord *Mansfield* upon that occasion confirmed his former direction, and added, that where the Justice cannot be liable the officer is not within the protection of the Statute (*p*).

Where Con- not protect- ed.

For this reason, if the Constable execute a warrant of seizure out of the Magistrate's jurisdiction, he is not indemnified by the Act: thus,

A warrant was granted by a Justice of the county of Kent, directed to the Constables of the lower half hundred of *Chatham and Gillingham*, in the said county, and to the borsholders there. The defendants, who were borsholders of the district mentioned, having executed the warrant in a certain part of the parish of *Gillingham, in the manor*

(*l*) Bull. Ni. Pri. 24.
(*m*) Dawson *v.* Clark, cited 3 Burr. 1767.
(*n*) *Id. ib.*
(*o*) 3 Burr. 1742, 1767.
(*p*) 3 Burr. 1767, 8.

of

of Grange, lying within the liberties of the Cinque Ports, (which for this purpose is a separate jurisdiction,) were held to be liable to an action of Trespass, without joining the Magistrate *(q)*. But it was at the same time declared, that if the Magistrate had directed the Constable to execute his warrant within the manor of *Grange*, no doubt the Constable would have been protected, though it had turned out that the manor of *Grange* was not within his jurisdiction *(r)*. But the warrant being directed merely "to the Constables of the *lower half hundred of C. and G. in the county of Kent*," if the officer took a distress in that part of the lower half hundred of *C. and G.* which does not lie within the *county of Kent*, but in another jurisdiction, the warrant could no more justify going there to execute it, than if they had gone into the county of Suffolk *(s)*.

Who protected by the warrant.

5. A warrant directed to Constables generally by their name of office only, is understood as an authority to each in his own district only *(t)*. And therefore a Constable acting under such general direction is not protected by the warrant in any act done out of the limits of his own division *(u)*. But if the warrant be directed to a Constable by

(*q*) Milton *v.* Green, 5 East. 233.

(*r*) 5 East. 237, *per* Lord Ellenborough.

(*s*) *Ib.* 236, Note. Lord Kenyon, in an action of assault and imprisonment against a defendant who justified as a Constable, is said to have over-ruled an objection to the action not being brought within six months, according to 24 Geo. 2. c. 44. s. 8, on this distinction, viz. "that the defendant acted *colore officii*, and not *virtute officii*;" he said, "that a Constable acting *colore officii* was not protected by the Statute; where the act committed is of such a nature, that the office gives him no authority to do it, in the doing of that act he is not to be considered as an officer." This is agreeable to the construction of the act laid down in the text; but some mistake may be suspected in the subsequent expression attributed to his lordship, viz. "that where a man doing an act within the limits of his official authority exercises that authority improperly, or abuses the discretion placed in him, to such cases the statute extends." Alcock *v.* Andrews, 2 Esp. Cas. 541. This position at least requires a further explanation to render it consistent with the doctrines elsewhere delivered.

(*t*) R. *v.* Chandler, 1 Lord Raymond, 545.

(*u*) Blatcher *v.* Kemp, 1 H. Bl. 15, *n.*

name,

name, and not merely by his office, it may legally be executed by him at any place within the jurisdiction of the Magistrate (*v*).

Costs.

By the Statute 7 Jac. 1. c. 5, made perpetual by 21 Jac. 1. c. 12. "a Constable or other officer sued for any thing done by virtue of his office, is entitled to double costs, if he obtains a verdict, or if the plaintiff be nonsuitor suffer a discontinuance."

Section 2. For what Purposes a Conviction is Evidence in a collateral Proceeding.

Conviction not Evidence for the person on whose Evidence it was founded.

How far a regular Conviction unappealed from is Evidence in an action for any thing done *under* it, has been treated of already, in considering the proceedings against Magistrates and Officers (*w*). With regard to its effect in any collateral proceeding, it has been laid down, that the person upon whose Evidence another has been convicted, cannot make use of the Conviction in a civil proceeding between him and the same person, as Evidence of that person's being guilty of the offence, though it may be admissible in mitigation of damages.

Though not appearing on the Conviction.

Thus, in the trial of an action of assault and false imprisonment, on a plea of not guilty; the justification set up by the Defendant was under a local act, 12 Geo. 3. c. 69, for paving and lighting, by which 'any person offending against that act, by driving a wheel-barrow, &c. upon the foot-pavement, may be apprehended by any person whatsoever, and conveyed before a Justice of Peace, who is required to examine the matter, and impose a penalty on Conviction.' The act is declared to be public, and any person sued for any thing done by its authority is em-

(*v*) 1 Lord Raymond, 545, 1 H. Bl. 15, *n.*

(*w*) *Ante*, p. 241, 244.

powered

powered to plead the general issue, and give the special matter in Evidence.

To prove the fact of the Plaintiff having been guilty of the offence above described, the Defendant offered in Evidence the record of a Conviction before a Justice. But the Justice's clerk proving that the Conviction was founded on the Evidence of the Defendant himself, though his name did not appear upon the face of it, Lord *Ellenborough* refused to receive it as an adjudication of the Plaintiff's guilt; because, by the admission of it for that purpose, the Defendant would be allowed to swear in his own cause. But his Lordship admitted it to be read, to shew that the Defendant was acting in the course of his duty, and not from malice to the Plaintiff *(x)*.

Upon another occasion a record of Conviction for having smuggled spirits, in which was set out the deposition of a witness, was refused, as Evidence to contradict the same witness upon the trial of an Information for assaulting revenue Officers in making the seizure, and to prove that, contrary to his assertion, he had given a different account before the Magistrates. Lord *Ellenborough* said, "he should admit the record to prove the purpose for which by law it is effectual, but to contradict the witnesses. For that purpose he should require the Evidence on oath of persons present before the Magistrates, who heard all that was sworn *(y)*."

(*x*) Smith v. Rummers, 1 Campbell, 9; and see Bower v. Browning, 1 Taunt. 520.

(*y*) R. v. Howe, 1 Campbell, 461.

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APPENDIX.

APPENDIX.

NOTICES, &c.

No. I. Precept *to Constable to summon a Party accused.*

———, *to wit.* To the Constable of ———.

WHEREAS information and complaint *(and if the statute so requires,* upon oath, *or* in writing) hath been made before me G. T. Esq. one of his Majesty's Justices of the Peace in and for the said county, that A. B. of ———, in the aforesaid county, labourer, on the —— day of —— now last past, at ———, in the county aforesaid, did (here set forth the charge): these are therefore to require you forthwith to summon the said A. B. to be and appear before me at ———, in the said county, on ———, the —— day of ———, at the hour of ———, in the —— noon of the same day, to answer to the said information and complaint, and to be further dealt with according to law: and be you then there to certify what you shall have done in the premises. Herein fail you not, at your peril. Given under my hand and seal, the ——— day of ———, in the year of our Lord ———.

II. Summons *to the Party accused.*

———, *to wit.* To A. B. of ———.

Whereas complaint and information *(if the statute so requires,* upon oath, *or* in writing) hath been made before me G. T. Esq. one of his Majesty's Justices of the Peace for the said county, by C. D. of ——— That *(state the offence charged*

charged conformably to the Act of Parliament, taking care to make it sufficiently specific.) (a). These are therefore to require you personally to appear before me at ———, in the said county, on the ——— day of —— next (*b*), at the hour of ———, in the ——— noon, to answer to the said complaint and information made by the said C. D. who is likewise ordered to be then and there present to make good the same. Herein fail not you at your peril. Given under my hand and seal, this ——— day of ———, in the year ———.

(*a*) *See* Treatise, p. 78.

(*b*) Allowing a sufficient time. *See* p. 18 of Treatise.

III. Precept *to Constable to summon a Witness.*

———, *to wit.* To the Constable of ———.

Whereas information and complaint (upon oath, *or* in writing, *if the statute so requires)* hath been made before me G. T. Esq. one of his Majesty's Justices of the Peace for the said county, against A. B. of ———, labourer, That *(set forth the substance of the charge,)* and that L. M. of ——, in the said county, yeoman, is a material witness to be examined touching the matters alledged in or concerning the said information, or some of them; these are therefore to require you to summon the said L. M. to be and appear before me at ———, in the said county, on ———, the ——— day of ———, at the hour of ———, in the ——— noon of the same day, to be examined, and to testify his knowledge concerning the premises, and be you then there to certify what you have done in the premises. Herein fail you not. Given under my hand and seal, the ——— day of ———, in the year ———.

IV. Summons *to a Witness.*

———, *to wit.* To L. M. of ———.

Whereas information and complaint (upon oath, *or* in writing, *if so required by the statute)* hath been made before me

me G. T. Esq. one of his Majesty's Justices of the Peace for the said county, against A. B. of ———, labourer, That *(set out the substance of the charge)* and whereas also it appears to me, that you are a material witness to be examined touching the said information. These are therefore to require you, personally to be and appear before me at ———, in the said county, on ———, the ——— day of ———, at the hour of ———, in the ——— noon, to be examined, and to testify your knowledge of and concerning the matters alledged in, or relating to the said information. Herein fail you not. Given under my hand and seal, this ——— day of ———, in the year ———.

(Signed) *G. T.*

If the summons be preparatory to compulsory process by warrant, &c. authorized by statute in any particular case, it must be *personally* served *(c)*. (c) See 4 T. R. 465.

COSTS.

I. Form *of awarding by* 18 Geo. 3. c. 19.

———, *to wit.*

(*a*) The same Justice or Justices who determined the complaint; Sec. I.

I, A. B. one *(or*, we A. B. and C. D. being two) *(a)* of his Majesty's Justices of the Peace in and for the county (or borough, &c.) aforesaid, in pursuance of an act made in the eighteenth year of his Majesty King George the Third, intituled, "*An Act for the payment of Costs to parties, on complaints determined before Justices of the Peace out of Sessions; for the payment of the charges of Constables, in certain cases; and for the more effectual payment of charges to witnesses and prosecutors of any larceny or other felony;*" on the complaint of ——— against ———, for, &c. *(here state the names of the parties, and the offence generally, and the date,)* which said complaint was heard and determined by ———, on the ——— day of ———, do award the following Costs to be paid by ———; to wit, *(here state the Costs.)* Given under my hand and seal, *(or*, our hands and seals,) this ——— day of ———, in the year of our Lord ———.

For Warrants of Distress or Commitment for Costs, see *post*, Distress.

DISTRESS.

Note. Stat. 27 Geo. 2. c. 20, enacts, "That in all cases where any Justice or Justices of the Peace is, or are, or shall be required, or empowered by any Act or Acts of Parliament now in force, or hereafter to be made, to issue a warrant of distress for levying any penalty inflicted, or any sum of money directed to be paid by or in consequence of such act or acts; it shall and may be lawful for the Justice or Justices granting such warrant therein, to order and direct the goods and chattels so to be distrained, to be sold and disposed of within a certain time, to be limited in such warrant, so as such time be not less than four days, nor more than eight days, unless the penalty or sum of money for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, be sooner paid." Sec. 2. "The officer making such Distress shall, and is impowered to deduct the reasonable charges of *taking, keeping, and selling* such Distress, out of the money arising by such sale; and the overplus (if any,) after such charges, and also the penalty, shall be fully satisfied, shall be returned on demand to the owner of the goods so distrained."

Time of sale. And charges of distress.

No. I. *Warrant to levy* Penalty and Charges of Distress, *where Part goes to the Informer and Part to the Poor of the Parish.*

———, To the Constable of ———, in the county of ———, and to all other Constables in and for the said county.

Whereas A. B. of ——, in the county of ——, *(describing him)* is duly convicted before me G. T. Esq. one of his Majesty's Justices assigned to keep the peace in and for the said

 county,

county, and also to hear and determine divers felonies, trespasses, and other misdemeanours in the said county committed, for that he the said A. B. on the ——— day of ———, in the ——— year of the reign of our Sovereign Lord King George the Third, did, &c. *(describing the offence according to the Act of Parliament)* contrary to the form of the statute in that case made and provided, whereby he hath forfeited the sum of ———, of lawful money of Great Britain; these are therefore to command you forthwith to levy the said sum of £———, by distraining the goods and chattels of him the said A. B. And if within the space of ——— *(a)* days next after such Distress by you taken, the said sum shall not be paid, together with the reasonable costs and charges of taking and keeping the same *(b)*, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale, that you do pay the sum of £———, part of the said sum of £———, to C. D. of ———, yeoman, who informed me of the said offence, and the sum of £———, the remainder of the said sum of £——— so forfeited, that you pay to the churchwardens and overseers of the parish of ———, within which the said offence was committed, for the use of the poor of the said parish, returning to him the said A. B. the overplus on demand, the reasonable charges of taking, keeping, and selling the said Distress, being first deducted. And you are to certify to me, with the return of this precept, what you shall have done in the execution thereof. Herein fail you not. Given under my hand and seal at ———, in the said county, the ——— day of ———.

(*a*) Not less than four, nor more than eight, by stat. 27 Geo. 2. c. 20, unless otherwise directed by the particular Act.

(*b*) 27 Geo. 2. c. 20. s. 1.

II. The like, *where Part of the Penalty goes to the King.*

The same as above, till the words directing the payment, instead of which, after the words, "arising by such sale," insert, "that you do pay the sum of £———, being one moiety *(or as the Act directs)* of the said sum of £———, so forfeited, to me the said Justice *(c)* *(or,* to ———, Esq. one

(*c*) 41 Geo. 3. c. 85. *ante*, p. 183.

one of his said Majesty's Justices of the Peace for the said county) for the use of his said Majesty, his heirs and successors, and that £——— being the other moiety of (or being the remainder of) the said sum of £——— so forfeited as aforesaid, that you pay to, &c. (*according to the directions of the act*, or, *if the remainder is to be distributed in several shares, specify each*, and, *instead of the words above*, "and the sum of £———, being the remainder, &c." say, "and out of the sum of £———, being the remainder, &c.")

Warrant to levy the *Penalty* and *Costs* on a preceding Conviction, where the Penalty had been *mitigated*, and Costs allowed above the Mitigation, according to the Statute.

To ———.

City of London, to wit. Whereas by a certain conviction, under our hands and seals, bearing date the ——— day of ———, in the year of our Lord 1785, one Joseph Wells, of, &c., was duly convicted before us Richard Clark, Mayor of the said city, and Sir W. Lewes, Knt. one of the Aldermen of the said city, two of the Justices, &c. &c., upon the information of John French, of, &c., and upon the oath of J. Williams, a credible witness, in that behalf, of a certain offence committed by the said Joseph Wells: For that (*here state the charge as in the conviction to the words*, "contrary to the statute,") &c., whereby, and by force of the statute in that case made and provided, the said Joseph Wells was for his said offence by us adjudged to forfeit, &c. (*as in the Conviction;*) and whereas we the said Justices seeing cause to mitigate, &c. (*as in the Conviction, post*, p. [29.]) These are therefore to command you to levy the said sum of £25, of lawful money of Great Britain, and also the said sum of £——— (*d*), the costs and charges above mentioned, of the said J. F. the said informer, making together the sum of £———, by distress and sale of the goods of the said J. Wells; and we do hereby order and direct that the said goods, which shall be so distrained, be sold and disposed

(*d*) This sum must be fixed.

posed of within six days, unless the said sum of £———, for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, shall be sooner paid; and you are hereby commanded to certify to us the said Justices, what you shall do by virtue of this our warrant. Given under our hands and seals, at the Guildhall of the said city, this ——— day of ——— 1785.

III. *Constable's Return of Want of Distress, indorsed on Warrant.*

L. M. Constable of ———, within mentioned, maketh oath this ——— day of ———, in the year within mentioned, that he hath made diligent search for, but doth not know of, nor can find sufficient goods and chattels of A. B. within mentioned, whereon to levy the within-mentioned sum of £———.

Before me ———, the Justice within-mentioned. (Signed.) *L. M.*

IV. *Warrant of Distress for* Costs.

To be issued by the same Justice or Justices who determined the complaint, and awarded the costs, 18 Geo. 3. c. 19.

———, *to wit.* To the Constable of ———, and to all other his Majesty's Constables in and for ———, in the county aforesaid.

Whereas ———, one (or, ——— and ——— two) of his Majesty's Justices of the Peace in and for the ——— aforesaid, in pursuance of an Act made in the 18th year of his Majesty King George the Third, intituled, "*An Act for the payment of Costs to parties, on complaints determined before Justices of the Peace out of Sessions; for the payment of the charges*

charges of Constables, in certain cases, and for the more effectual payment of charges to witnesses and prosecutors of any larceny or other felony;" have awarded, on the ——— of ———, now last past, on the complaint of ——— against ———, for ———, *(state the names of the parties and the offence generally, and the date)* the following costs to be paid by ———, *videlicet, (here state the sum:)* and whereas the said ——— being ordered by the said Justice or Justices to pay such sum *(or* sums) as aforesaid, hath not paid down or given security for the same, to the satisfaction of ———, the said Justice or Justices. These are therefore to command you, and each and every of you, to levy the said sum of ——— by distress and sale of the goods and chattels of the said ———; and I, *(or*, we) ———, do hereby order and direct the goods and chattels so to be distrained, to be sold and disposed of within ——— days, unless the said sum of £———, for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, shall be sooner paid; and you are hereby also commanded to certify unto ——— what you shall have done by virtue of this, my *(or*, our) warrant. Given under my *(or*, our) hand and seal *(or*, hands and seals,) at ———, the ——— day of ———, in the year of our Lord ———.

V. *Constable's Return to the above, for Want of Distress.*

———, *to wit.* I, ———, Constable of ———, do hereby certify to ——— Justice *(or*, Justices) of the Peace of ———, that I have made diligent search for, but do not know, nor can find any goods and chattels of ———, by distress and sale whereof I may levy the sum of ———, pursuant to his *(or*, their) warrant for that purpose. Dated the ——— day of ———. Given under my hand, this ——— day of ——— in ———.

COMMITMENT.

COMMITMENT.

I. Commitment *to the House of Correction* for Costs.

———, *to wit.* To the Constable of ———, and also to the Keeper of the House of Correction, at ———.

Whereas in pursuance of an Act made in the 18th year of the reign of his Majesty King George the Third, intituled, "*An Act for the payment of Costs to parties, on complaints determined before Justices of the Peace out of Sessions; for the payment of the charges of Constables, in certain cases, and for the more effectual payment of charges to witnesses and prosecutors of any larceny or other felony;*"——— (*or*, ——— and ———) ——— of his Majesty's Justices of the Peace in and for the said ———, did issue his (*or*, their) warrant of distress and sale, directed to ——— of ———, Constable of the said ——— of ———, ordering the said constable to levy the said sum of ———, of the goods and chattels of the said ———, in manner and form as therein is mentioned: and whereas it appears to me (*or*, us) ———, by the return of ———, Constable of ———, dated the ——— day of ———, that he hath made diligent search, but doth not know of, nor can find any goods and chattels of the said ——— by distress and sale whereof the said sum of ——— may be levied pursuant to the said warrant. These are therefore to command you the said Constable of ———, to apprehend the said ———, and convey the said ——— to the said House of Correction, at ———, and to deliver the said ——— there to the said keeper of the said House of Correction: and these are also to command you the said keeper of the said House of Correction to receive the said ———, into the said House of Correction, and there to keep to hard labour for the space of ———, from the date hereof, or until such sum of ———, together with the expences attending the

the commitment of the said ——— to the said House of Correction, be first paid, or until the said ——— be discharged by due course of law. Given under my (*or*, our) hand and seal, (*or*, hands and seals,) at ———, the ——— day of ———.

II. Commitment *on a preceding Conviction, on 5 Geo. 3. c. 14. s. 3, for want of immediate Payment of the Penalty.* *See* the Conviction, *post, tit.* Fish.

West-Riding of Yorkshire, to wit. The Reverend Thomas Collins, D. D. one of the Justices of our Lord the King, assigned to keep the peace within the West-Riding of the county of York. To the Constable of the township of Waddington, in the said Riding, and to the keeper of the house of correction at Wakefield, in the said West-Riding of the said county of York.

James Winckley, of Great Mitton, in the said Riding, labourer, having been this day convicted before me of having, on Sunday, the 1st day of November instant, at the township of Waddington aforesaid, in the Riding aforesaid, attempted to take, kill, and destroy the fish in that part of the river Ribble, which runneth in the lands of Jane Clark, widow, in the township of Waddington aforesaid, in the Riding aforesaid, without her authority, and against her consent, contrary to the form of the statute in such case made and provided, she the said Jane Clark being then and there owner of the said part of the said river, and of the fishery of the same, and the said James Winckley not then and there having any just right, or any just, reasonable, or probable claim, or cause, to take, kill, carry away, or destroy any of the fish in that part of the said river, or to attempt to take, kill, or destroy any fish in the said river, the said part of the said river, wherein the said fish were so attempted to be taken, killed, and destroyed by the said James Winckley as aforesaid, not then being in any park or paddock, or in any garden, orchard, or yard adjoining, or belonging to any dwelling-house,

ing-house, but then being in other inclosed ground, then being the private property of the said Jane Clark, at the township of Waddington aforesaid, in the West-Riding aforesaid; and he the said James Winckley having for such offence been adjudged by me the said Justice to have forfeited the sum of £5 to the said Jane Clark, the owner of the fishery of the said part of the said river, so running as aforesaid, to be paid as the statute aforesaid doth direct; and the said James Winckley being so convicted as aforesaid, and not having paid on such his conviction the said pecuniary penalty or forfeiture so adjudged by me to be therefore forfeited, I, the said Justice, do hereby commit (*a*) and send the said James Winckley to the house of correction, at Wakefield, in the said West-Riding of the said county of York, there to remain for the space of five months, unless the said forfeiture shall be sooner paid; and I do hereby command the constable of the township of Waddington aforesaid, to convey and deliver the body of the said James Winckley to the keeper of the said house of correction; and the said keeper of the said house of correction is hereby by me the said Justice required to receive the said James Winckley into his custody, in the said house of correction, and him there safely to keep in execution of the judgment and conviction aforesaid. Given under my hand and seal, at Gisburn, in the said Riding, the 18th day of November, in the year of our Lord 1812.

III. Commitment, *for want of Distress, for Penalty, after Constable's Return, certifying on Oath, that no sufficient Goods are to be found on which to levy.*

———, *to wit.* To the Constable of ———, in the said county, and to the keeper of the common gaol (*or*, house of correction,) at ——, in the said county.

Whereas A. B. of ———, in the said county, labourer, was,

(*a*) The statute 5 Geo. 3. c. 14, s. 3, directs the commitment upon failure of immediate payment, without any mention of *distress*. Therefore it is not necessary to state in the warrant the return of want

was, on the ——— day of ———, duly convicted before me (*or*, before me) G. T. Esq. one of his Majesty's Justices assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanours in the said county committed, for that he the said A. B. on the ——— day of ———, in the year ———, at ———, in the said county, did, &c. (*specify the offence conformably to the Act of Parliament; for instance, if it be for keeping and using a greyhound not being qualified, it may be*, 'keep and use a certain dog called a greyhound, to kill and destroy game,' he the said A. B. not being a person qualified by the laws of this realm so to do,) against the form of the statute in that case made and provided, by reason whereof he the said A. B. hath forfeited the sum of ———; and whereas on the ——— day of ———, in the year aforesaid, I did issue my warrant to the constable of ———, in the said county, to levy the sum of ——— by distress and sale of the goods and chattels of him the said A. B.; and whereas it appears to me, on the oath of the said constable of ———, that he the said constable hath used his utmost endeavours to levy the said sum of ——— on the goods and chattels of him the said A. B.; and that no sufficient distress can be found whereon to levy the same; therefore, in pursuance of the statute aforesaid, I do hereby command you the said constable of ———, safely to convey him the said A. B. to the said common gaol (*or*, to the said house of correction) at ——— aforesaid, and him deliver to the keeper thereof aforesaid, together with this precept. And I do hereby command you the said keeper of the gaol (*or*, house of correction aforesaid, to receive into your custody in the said gaol (*or*, house of correction,) him the said A. B., and him there safely to keep for the space of ———, unless the said penalty shall be sooner paid (*or*, *if the statute authorizes hard labour, so specify;*) herein fail you not respectively at your peril. Given under my hand and seal, the ——— day of ———, in the year ———.

want of effects to distrain, which must precede the commitment in cases where the penalty is first directed to be levied by distress, and in default thereof, the Magistrate empowered to commit, *ante*, p. 189.

IV. Commitment

IV. Commitment *to hard Labour and Whipping, in a Case where the corporal Punishment is inflicted in the first Instance.*

——, *to wit.* To the Constable of ——, and to the Keeper of the House of Correction at ——, in the said County.

Whereas A. B. of ——, in the county of ——, labourer, is this day duly convicted before us —— and ——, Esqrs. two of his Majesty's Justices of the Peace for the said county, for that he the said A. B. on the —— day of ——, now last past, at ——, in the county aforesaid, did *(set out the offence conformably to the Act of Parliament:)* These are thereby to require and command you the said constable, to convey the said A. B. to the said house of correction at —— aforesaid, in the county aforesaid, and to deliver him to the keeper thereof, with this precept. And we do also hereby require you the said keeper of the said house of correction, to receive him the said A. B. into your custody in the said house of correction, and him there keep to hard labour for the space of —— next ensuing, *(and if the statute so authorizes,* and until he shall find sufficient securities for his good behaviour for —— years.) And we do likewise hereby order you the said keeper of the said house of correction to whip him the said A. B., once *(or oftener, according as the statute directs)* during the said three months, in the market town of ——, in the said county, on the market day there, between the hours of eleven and two. And for so doing this shall be your sufficient warrant. Given under our hands and seals, in the said county, the —— day of ——, in the year of our Lord ——.

CERTIORARI.

I. *Certiorari—Recognizance.*

Liverpool, Lancashire. } Be it remembered, that on the seventh day of May, in the fifty-fourth year of the reign of our Sovereign Lord George the Third, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, defender of the faith, C. H. of Liverpool, in the county of Lancashire, merchant, and M. W. of the same place, merchant, came before me, James Gerard, Esq. one of the keepers of the peace, and Justices of our Lord the King, in and for the borough of Liverpool, and acknowledged to owe to our Sovereign Lord the King the sum of fifty pounds, of lawful money of Great Britain, to be levied upon their goods and chattels, lands and tenements, to his Majesty's use, upon condition, that if Isaac Eiserman shall prosecute with effect, without *any wilful or affected delay (a)*, at his own proper costs and charges, a writ of *Certiorari* issued out of the Court of our said Lord the King, before the King himself, at Westminster, to remove into the said Court all and singular the records of conviction, of whatever trespasses and contempts, against the form of the statute made and passed in the forty-third year of his present Majesty's reign, intituled, "An Act to repeal an Act passed in the last session of Parliament, for establishing regulations respecting aliens arriving in this kingdom, or resident therein, and for esta- 8 T. R. 217.

(a) There is no certain time within which the Defendant is bound to proceed to argument; all that he is bound to do is to enter an *Appearance*, (*see* Treatise, p. 232,) after which the Prosecutor may move for a *Concilium*, and bring on the case in the Crown-paper. The appearance or *comparentia* must be entered before the next issuable term (when the recognizances, not respited, are estreated) for, till he has appeared, he cannot move to respite his recognizance.

blishing,

custom of England, we shall see fit. Witness, Edward Lord Ellenborough, at Westminster, this ——— day of ———, in the ——— year of our reign.

By the Court,
Lushington.

IV. WRIT OF CERTIORARI,

To the Sessions.

To return a Conviction made by two Justices at one of the public Offices in Westminster, and confirmed at the Sessions on Appeal.

George the Third, &c. (as in the last): To the keepers of our peace, and to our Justices assigned to hear and determine divers felonies, trespasses, and other misdemeanours committed within our county of ———, and to every of them, greeting, We being willing, for certain reasons, that a certain record of Conviction under the hands and seals of N. C. and P. N. Esqrs. two of the keepers of our peace, and Justices for the county of Middlesex, duly appointed to execute the said office of a Justice of Peace, at the public Office in Great Marlborough-street, in the parish of St. James, Westminster, in the said city, being one of the seven public Offices established pursuant to an Act of Parliament, made and passed in the thirty-second year of our reign, intituled, "An Act (*b*)," &c. (*setting out the title of the Act, 32 Geo. 3. c. 53,*) bearing date subsequent to the establishment of the said seven public Offices, that is to say, upon the 20th day of September last, whereby J. Liston was convicted of setting up, maintaining, and keeping a certain fraudulent game, to be determined by the chance of dice, under the denomination of the game of hazard, against the statute, &c. for which the said J. Liston was adjudged before the said N. C. and P. N. at the public Office aforesaid, to have forfeited the sum of £200 (as is said,) be sent by you before us, Do command you, and every of you, that you, or one of you, do send, under their seals, or the seal of one of you, before us, on the Octave of St. Hilary, wheresoever we shall then

(*b*) This was before the Act 42 Geo. 3. c. 76, which would now be inserted instead.

then be in England, the said record of Conviction, with all things touching the same, as fully and perfectly as it hath been taken and made by you or any of you, together with this our writ, that we may further cause to be done thereon what of right and according to the law and custom of England we shall see fit to be done. Witness Lloyd Lord Kenyon, at Westminster, the 28th day of November, in the thirty-third year of our reign.

By the Court,

Templer.

For the Conviction, and Order of Sessions confirming the same, see Precedents, title *Gaming*.

V. *Returns to a Writ of* Certiorari *by a single Justice.*

On the back of the *Certiorari*, "The Execution of this writ appears in the schedule hereto annexed.

R. R." (the name of the convicting Magistrate.)

On a separate parchment:

Glamorgan. I, Robert Richards, one of the Keepers of the Peace and Justices of our Lord the King, assigned to keep the peace within the said county, and to hear and determine divers felonies, trespasses, and other misdemeanors committed in the said county, by virtue of this writ to me delivered, do under my seal certify unto his Majesty in his Court of King's Bench the record of Conviction, of which mention is made in the same writ. In witness whereof I the said R. Richards have to these presents set my seal. Given at L. in the said county, this 10th day of April, in the 17th year of the reign of our said Lord the King, and in the year of our Lord 18—.

R. R. (L. S.)

The Conviction is to be annexed to the writ, and returned along with it, but not the informations or depositions otherwise than as they appear on the Conviction.

The *Certiorari* being to return "all *records* of Conviction," the Conviction should regularly, as a record, be returned on *parchment;* and if it be returned on paper, the return may be quashed. There are however some, though very few, instances of Convictions remaining upon the files engrossed on paper: but these must have been cases where no objection was made on that account.

VI. *Return by the Chairman to a* Certiorari *directed to the Justices in Sessions, to remove a Conviction or Order confirmed upon Appeal.*

On the back of the *Certiorari:*

"The answer of J. Croxton, Esquire, one of the Keepers of the Peace of our Lord the King, and of the Justices of our said Lord the King, assigned to hear and determine divers felonies, trespasses, and other misdemeanors committed in the county Palatine of Chester.

"The execution of this writ appears in certain schedules hereto annexed.

"*John Croxton.* (L. S.)"

It is sufficient if the seal only be affixed without the name.

With the *Certiorari* indorsed as above must be returned as well the original Conviction filed at the Sessions, as also the Order or Orders of Sessions confirming it, with the adjournments if any have taken place. The Order of Sessions is returned in this form:

At

At the General Quarter Sessions of the Peace of our Lord the King, held at the Castle of Chester, in and for the said county, on Tuesday in the first week after the close of Easter, to wit, on the 27th day of April, in the year of our Lord 1756, and in the 29th year of the reign of our Sovereign Lord George the Third, before R. C. &c. Justices of our said Lord the King, assigned to keep the peace of our said Lord the King in and for the county of Chester, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed within the said county.

Return of order of Sessions confirming Conviction.

Whereas by a Conviction or judgment, bearing date the ——— day of ———, in the year ———, under the hands and seals of, &c. thereby setting forth, &c. *(set out the whole of the Conviction in the third person, and in the past tense)* (a). And whereas he the said T. M. *(the person convicted)* did appeal against the said Conviction or judgment to the then next and now last court of General Quarter Sessions of the Peace held at Nantwich, in and for the said county of Chester, on Tuesday, the 30th day of January, in the year, &c. when the said appeal was ordered to be continued to this present Sessions, and of which said order of continuance the said T. W. *(the prosecutor)* had ten days notice previous to this present Sessions: Now, upon hearing the said appeal, and what hath been alledged and proved on each party's behalf, and full debate and consideration had in the premises, It is ordered by this Court, that the first mentioned Conviction or judgment shall be and is hereby confirmed and made absolute: And it is further ordered by this Court, that the said T. M. upon sight of this order, or a copy thereof left with him, pay to the said T. W. the sum of £———, towards the costs and charges in the law by him the said T. W. reasonably expended in and about the defence of the said appeal.

(a) See the observations at the end of this Form.

Adjournment.

Confirmed.

Award of costs.

N. B. This was a case where the Sessions are required by the statute to award costs on appeal.

By the Court.

Note. Though the whole Conviction as returned by the Magistrate is here set out, it is sufficient, as appears from other Precedents, of which one is found, *post*, tit *Gaming*, to state the substance of the Conviction. But on the Vagrant Act, where the party is committed to the Sessions on the Justices Conviction, and a fresh Conviction is there made by the Sessions, the return, instead of reciting the whole Conviction of the Justice, and the confirmation thereof, sets forth the evidence, &c. and judgment of the Sessions; as in the Form hereinafter found, under tit. *Rogue and Vagabond.*

PRECEDENTS,

OF CONVICTIONS, &c.

1. *Form of* mitigating Penalty, *with* Award of Costs *out of mitigated Penalty.*

After the other formal parts of the Conviction, say, And we do award and adjudge that the said J. W. hath forfeited for his said offence the sum of £50 of lawful money of Great Britain, the one moiety thereof to the use of our Sovereign Lord the King, and the other moiety thereof to the use of the said J. F. the said informer *(or, according as the directions of the statute are)* according to the form of the statute in such case made and provided; and We the said Justices seeing cause to mitigate and lessen the said penalty, do, at the request of the said Defendant, according to the statute, mitigate and lessen the same to the sum of £25, over and above the reasonable costs and charges of the said informer by him laid out and expended in and about the said information and Conviction, to be distributed and go and be applied, one moiety thereof to the use of our said Lord the King, and the other moiety to the said J. F. the said informer, and which said costs and charges of the said J. F. the said informer, we the said Justices do allow, assess, and adjudge to him with his assent, at the sum of £—— of like lawful money, according to the statute in that case made and provided. In witness whereof, &c.

ALEHOUSE-KEEPER.

1. *Conviction on View by a Justice for suffering Tippling in his House, contrary to* 1 *Jac.* 1. *c.* 9.

Glamorgan. Be it remembered, that on the 14th day of October, in the 16th year of the reign of our Sovereign Lord George the Third, by the grace of God, &c. and in the year of our Lord 1776, T. Johns, keeper of the alehouse called and known by the name of the Cross-keys, in the town of L. in the parish of L. in the said county of Glamorgan, is, to wit, on this 14th day of October aforesaid, at L. aforesaid, found by me R. Richards, clerk, one of the Justices of our said Lord the King, assigned to keep the peace of our said Lord the King in and for the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors done and committed in the said county, upon my view permitting and suffering the following persons, to wit, A. B., C. D., &c. to remain and continue drinking or tippling in his said alehouse, between the hours of eleven and twelve in the evening of this 14th day of October, against the form of the statute in that case made and provided, they the said persons not being invited, nor either of them being invited, by any traveller, and accompanying him only during his necessary abode there, and neither of them being a labouring or handicraftsman at his dinner, and neither of them being a labourer or workman who, for the following his work in the said town of L. sojourns, lodges, or victuals in the said alehouse, and neither of them being at the time for urgent and necessary occasions allowed by two of his Majesty's Justices of Peace to tipple there: and the said T. Johns being now on the aforesaid day before me the said Justice, and by me charged with the said offence, the said T. Johns is asked by me why he doth permit or suffer the persons aforesaid to continue drinking or tippling in his said alehouse, but the said T. Johns hath nothing to say, nor can he say any thing

thing in his own defence, touching or concerning the premises, and thereupon the aforesaid T. Johns, on this 14th day of October, in the 16th year of the reign of our said Sovereign the King, before me the said Justice, on my view, according to the form of the statute aforesaid, is convicted, and for his offence aforesaid hath forfeited the sum of ten shillings of lawful money of Great Britain, to the use of the poor of the said parish of L. in the said county of Glamorgan. In witness whereof I the said Justice to this present record of Conviction aforesaid have set my hand and seal, at L. aforesaid, in the county aforesaid, the day and year first above written.

R. R. (L. S.)

This Conviction was removed by *certiorari*, and affirmed by rule of Court, East. Term, 17 Geo. 3.

AUCTIONEER.

2. Conviction *for acting as an* Auctioneer *without a Licence, on* 17 *Geo.* 3. *c.* 50. *s.* 3. *(a)*. (*See* Treatise, p. 71.)

Information.

———, *to wit.* Information before two Justices, setting forth that M. Vasey, on, &c. at, &c. *(b)*, did, in the capacity of an auctioneer, put up to public sale by way of auction, and did then and there vend and sell, by public sale by way of auction, divers goods and effects of the said M. V. without first taking out a licence in the manner prescribed by the statute in that case made and provided: whereby, and by force of the said statute, the said M. V. hath for his said offence forfeited the sum of £50, one moiety, &c. &c.—— Summons, Appearance, and plea of Not Guilty by the Defendant.—And thereupon, on the same day and year last aforesaid, at R. aforesaid, G. F. a credible witness, being

(b) See Treatise, p. 64.

(a) This Act is in part repealed, and new regulations made by 19 Geo. 3. c. 56; but the clause of the latter, sect. 5, relating to the licence, is *verbatim* as in the former. The above Precedent may therefore be applied to the present Act.

sworn,

sworn, &c. in the presence of the said M. V. does upon his said oath depose, that on the —— day of ——, in the year ——, he saw the said M. V. in the market-place in time of market, in the borough of R. in the county of Berks, mounted in a cart or rostrum, putting up goods to sale by way of auction, and the said M. V. did then and there sell publicly several goods by way of auction and outcry, to the persons then and there assembled, he the said M. V. acting therein as an auctioneer; and that the said G. F. then and there bought of the said M. V. by way of auction at the sale, one lot of goods or wares of the said M. V. containing several articles, that is to say, &c. for which the said G. F. being best or highest bidder, paid to the said M. V. one shilling and one penny. And the said M. V. does not produce any evidence to contradict the proof aforesaid. Wherefore it manifestly appears, &c. Conviction and forfeiture of £50, mitigated to £5, to be distributed as the law directs.

Evidence.

This Conviction, which was confirmed on argument, being given at length in Mr. Boscawen's work, it was thought sufficient to insert here only the Information and Evidence, and that principally for the purpose of shewing the distinction between this and the Conviction in *R.* v. *Little*, Treatise, p. 69, n. (*x*).

BAKER.

A Conviction *of a* Baker, *for selling Bread under the Assize.*

Note. Instead of the penalty imposed by 31 Geo. 2. c. 29. s. 24, (the general Act establishing the assize), upon a deficiency in each loaf, it is now imposed by 48 Geo. 3. c. lxx. as to offences in London and the Bills of Mortality, and by 50 Geo. 3. c. 73 as to offences elsewhere, upon the average of the whole weight of all the loaves found which have been baked

baked within twenty-four hours. By both the latter statutes the provisions and directions of 31 Geo. 2. c. 29. in other respects are preserved; by the 35th section of which act a general form of Conviction is given, agreeable to which the following precedent is framed.

————, *to wit.* Be it remembered, that on ———— in the ———— year of the reign of our Sovereign Lord George the Third, of the United Kingdom, &c. and A. D. ——, W. L. was convicted before me ————, Esquire, one of his Majesty's Justices of the Peace for the said county of ————, for that he the said W. L. at the time of the committing of each of the offences hereinafter mentioned, being a person making bread for sale within the parish of ————, in the said county, on the —— day of ————, unlawfully did make for sale, within the limits to which the assize hereinafter mentioned, at the time of the making thereof, and at the time of committing of each of the offences hereinafter mentioned, did extend, sixty-two loaves of wheaten bread as and for quartern loaves, which were all the loaves then and there found in the shop of the said W. L. which had been baked within twenty-four hours next preceding the time of weighing the same, deficient in weight according to the assize before then duly and legally set and then in force for loaves of wheaten bread, being quartern loaves, to be sold at, in, and throughout the limits aforesaid, in pursuance of the statute in such case made and provided, by which said assize a quartern loaf of wheaten bread was to weigh four pounds five ounces and eight drams avoirdupois, that is to say, the said loaves being then and there deficient in weight according to the said assize, upon the average of all the said loaves which were then and there found, and which had been baked within twenty-four hours, —— ounces avoirdupois, and every of them, having been brought before me within twenty-four hours after the baking thereof, and it not appearing to my satisfaction that any of the deficiency in the weight of any of the said loaves arose from unavoidable accident, or was occasioned by or through any contrivance or confederacy: And I do adjudge him the said W. L. to forfeit and

Within three days, 31 Geo. 2. c. 29. s. 41.

31 Geo. 2. c. 29. s. 4. No. 1. part 2.

39 & 40 Geo. 3. c. 74. s. 4.

and pay for the said offences the sum of £33 and 5*s*., being the sum of 5*s*. for every ounce of bread which was wanting and deficient in the weight each and every of the said loaves ought to have been of, according to the said assize. Given under my hand and seal, at ———, in the said county of ———, this ——— day of ———, A. D. ——.

BUILDING ACT.

4. Information *on the* Building Act, *for beginning to build without giving Notice to the Surveyor of the District.* 14 *Geo.* 3. *c.* 78. *s.* 64.

Middlesex, to wit. Be it remembered, that on this ——— day of ———, in the year of our Lord 1789, at the Rotation Office, in Litchfield-street, in the parish of Saint Ann, Soho, in the county of Middlesex, A. B. of ———, cometh in his proper person, before us ———, and ——— two of his Majesty's Justices of the Peace in and for the said county, and now here giveth us the said Justices to understand and be informed, that J. Spilling, of ———, in the said county of Middlesex, after the 24th day of June, in the year of our Lord 1774, to wit, on the ——— day of ———, in the year of our Lord 1789, at the parish last aforesaid, in the county aforesaid, did begin a certain building there, on *new* (*a*) foundations, within the limits of a certain Act of Parliament made and passed in the 14th year of the reign of his present Majesty, intituled, " An Act for the further and better regulation of buildings and party walls, and for the more effectually preventing mischiefs by fire within the cities of London and Westminster, and the liberties thereof, and other the parishes, precincts, and places within the weekly Bills of Mortality, the parish of Saint Mary le Bone, Paddington, Saint Pancras, and Saint Luke at Chelsea, in the county of Middlesex, and for indemnifying, under certain conditions,

(*a*) As the case may be, sec. 63.

conditions, builders and other persons from the penalties to which they are or may be liable for erecting buildings within the limits aforesaid, contrary to law," without first giving twenty-four hours notice thereof to the said A. B. (he the said A. B. before and at the time of beginning the said building being the surveyor or supervisor within whose district the same was situated,) contrary to the form and effect of the said Act of Parliament, whereby, and by force of the said Act of Parliament the said T. Spilling forfeited and became liable to pay to the said A. B. so being such surveyor or supervisor as aforesaid, a certain sum of money, to wit, the sum of pounds, being treble the satisfaction which he the said A. B. as such surveyor or supervisor, would have been entitled to receive for his trouble in viewing such building, and seeing the rules and regulations of the said act well and truly observed therein, in case such notice had been given, all which the said A. B. is ready to prove before us the said Justices; and the said A. B. prays the judgment of us the said Justices in the premises, and that we will proceed therein according to the directions of the said Act of Parliament.

COALS.

6. Conviction *for using unmarked Sacks for the Carriage of Coals.* 47 *Geo.* 3. *Sess.* 2. *c.* lxviii. s. 107.

The general form of Conviction is given by the Act, s. 152.

Middlesex, to wit. Be it remembered, that on the ——— day of ———, in the year of our Lord ———, H. H. late of Abingdon-street, in Westminster, in the said county of Middlesex, dealer in coals, is convicted before me, ———, one of his Majesty's Justices of the Peace for the said county. For that after the 4th day of October, 1807, and within the space of one calendar month next before the exhibiting of this information, to wit, on the ——— day of ———, in the year of our Lord ———, in the parish of Saint George,

This must be within one calendar month of the offence, s. 146.

George, in the said county of Middlesex, he the said H. H. then being a dealer in coals, and then and now living within the said county of Middlesex, to wit, in Abingdon-street aforesaid, did make use of five sacks in the carriage and delivery of certain coals from a certain wharf, called ———'s wharf, on the river Thames, within the city and liberty of Westminster, in the said county of Middlesex, to and at the dwelling-house of one E. D. situate and being in a certain street, called Torrington-street, in the said parish of Saint George, in the said county of Middlesex, the said five sacks not being, nor any nor either of them being at the time they were so made use of, sealed and marked with white paint in oil, at Guildhall, London, or at the Exchequer office at Westminster, by the proper officer there, and the said coals so carried and delivered in the said sacks not being conveyed by gang labour, contrary to an Act of Parliament made in the 47th year of the reign of King George the Third, intituled, "An Act for repealing the several Acts for repealing the vend, and delivering of coals within the cities of London and Westminster, and liberties thereof, and in certain parts of the counties of Middlesex, Surry, Kent, and Essex, and for making better provision for the same." Given under my hand and seal, at ———, in the said county of Middlesex, the day and year first above written.

FISH.

6. Information on Oath *before a Justice for fishing in a River without Consent of the Owner of the Fishery, on* 5 *Geo.* 3. *c.* 14. *s.* 3.

West Riding of Yorkshire, to wit. Be it remembered, that on the 15th day of November, in the year of our Lord 1812, at Gisburn, in the West Riding of the county of York, Edward Marton, of Great Mitton, in the said Riding, labourer, on behalf of Jane Clark, widow, the owner of the fishery, of

of a part of the river Ribble, which runneth in the lands of the said Jane Clark, in the township of Waddington, in the said Riding, cometh before me, the Reverend Thomas Collins, Doctor in Divinity, one of the Justices of our said Lord the King, assigned to keep the peace of our said Lord the King in and for the said Riding, and also to hear and determine divers felonies, trespasses, and other misdemeanours in the said Riding committed, and upon oath to him by me now here administered upon the Holy Gospels of God, giveth me the said Justice to understand and be informed, that on Sunday, the 1st day of November instant, at the township of Waddington aforesaid, in the Riding aforesaid, James Winckley, of Great Mitton aforesaid, labourer, did attempt to take, kill, and destroy the fish in that part of the said river Ribble, which runneth in the said lands of the said Jane Clark, in the township of Waddington aforesaid, in the Riding aforesaid, without her authority, and without and against her consent, contrary to the form of the statute in that case made and provided, she, the said Jane Clark, being then and there owner of the said part of the said river, and of the fishery of the same; and he the said James Winckley, not then and there having any just right, or any just, reasonable, or probable claim, or cause, to take, kill, carry away, or destroy any of the fish in that part of the said river, or to attempt to take, kill, or destroy any fish in that part of the said river, and the said part of the said river, wherein the said fish were so attempted to be taken, killed, and destroyed by the said James Winckley as aforesaid, not then being in any park or paddock, or in any garden, orchard, or yard adjoining or belonging to any dwelling house, but then being in other inclosed ground, then being the private property of the said Jane Clark, *at the township of Waddington aforesaid, in the West Riding aforesaid:* whereby, and by force of the statute in that case made and provided, the said James Winckley hath forfeited for his said offence the sum of five pounds to the said Jane Clark, the owner of the fishery aforesaid: whereupon the said Edward Marton, on behalf of the said Jane Clark, the owner of the fishery aforesaid, prayeth the judgment of me, the said Justice, in the said premises, and

and that the said James Winckley may be forthwith apprehended and brought before me to answer the said complaint.

Exhibited and sworn at Gisburn aforesaid, the 16th day of November, 1812.

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7. Warrant *on the preceding Information to bring the Defendant to answer the Charge, pursuant to Sec.* 3 *of the Statute.*

West Riding of Yorkshire, to wit. To the Constables of Waddington, in the said Riding, and also to A. B.

Whereas information and complaint on oath hath been made on behalf of Jane Clark, widow, the owner of the fishery of a part of the river Ribble, which runneth in the lands of the said Jane Clark, in the township of Waddington, in the said Riding, before me, Thomas Collins, Doctor in Divinity, one of his Majesty's Justices of the Peace in and for the said Riding, that on Sunday, &c. *(as in the information verbatim to the words "at the townships of Waddington aforesaid, in the West Riding aforesaid," in italics inclusive.)*

These are therefore to require you to apprehend the said James Winckley, and bring him before me the Justice aforesaid, to answer the said complaint, and to be further dealt with according to law. Herein fail you not. Given under my hand and seal, the 16th day of November, in the year of our Lord 1812.

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8. Conviction *(on the above Information) on* 5 *Geo.* 3. *c.* 14. *for attempting to kill* Fish *in a private River, without the Consent of the Owner.*

Information on behalf of the owner.

West Riding of Yorkshire, to wit. Be it remembered, that on the 16th day of November, in the 53d year of the reign of

of our Sovereign Lord George the Third, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, defender of the faith, and in the year of our Lord 1812, at Gisburn, in the West Riding of the county of York, Edward Marton, of Great Mitton, in the said Riding, labourer, on behalf of Jane Clark, widow, the owner of the fishery, of a part of the river Ribble, which runneth in the lands of the said Jane Clark, in the township of Waddington, in the said Riding, comes before me the Reverend Thomas Collins, Doctor in Divinity, one of the Justices of our said Lord the King, assigned to keep the peace of our said Lord the King in and for the said West Riding, and also to hear and determine divers felonies, trespasses, and other misdemeanours in the said West Riding committed, and upon oath to him by me now here administered upon the Holy Gospels of God, giveth me the said Justice to understand and be informed, that on Sunday, the 1st day of November instant, at the township of Waddington aforesaid, in the Riding aforesaid, James Winckley, of Great Mitton aforesaid, labourer, did attempt to take, kill, and destroy the fish in that part of the said river Ribble, which runneth in the said lands of the said Jane Clark, in the township of Waddington aforesaid, in the Riding aforesaid, without her authority, and without and against her consent, contrary to the form of the statute in that case made and provided, she the said Jane Clark being then and there owner of the said part of the said river; and the said James Winckley not then and there having any just right, or any just, reasonable, or probable claim, or cause, to take, kill, carry away, or destroy any of the fish in that part of the said river, or to attempt to take, kill, or destroy any fish in that part of the said river wherein the said fish were so attempted to be taken, killed, and destroyed by the said James Winckley as aforesaid, not then being in any park or paddock, or in any orchard, garden, or yard adjoining, or belonging to any dwelling-house, but then being in other inclosed ground, then being the private property of the said Jane Clark, at the township of Waddington aforesaid, in the West Riding aforesaid; whereby and by force of

Complaint on oath, sec. 3.

This negative allegation being introduced by a separate proviso, s. 5. seems unnecessary to be stated, and is omitted in the deposition of the witness, see *ante*, p. [37].

of the statute in that case made and provided, the said James Winckley hath forfeited for his said offence the sum of £5, to the said Jane Clark, the owner of the fishery aforesaid; whereupon the said Edward Marton, on behalf of the said Jane Clark, the owner of the fishery aforesaid, prayeth the judgment of me the said Justice in the premises, and that the said James Winckley may be forthwith apprehended and brought before me to answer the said complaint; whereupon afterwards, to wit, on the 18th day of November, in the year aforesaid, he the said James Winckley, being by virtue of my warrant brought before me the Justice aforesaid, at Guisburn aforesaid, in the Riding aforesaid, to answer the said complaint contained in the said information, and having heard the same read, and the said Edward Marton being also present before me, and complaining before me, against the said James Winckley, of and for the offence aforesaid, and praying that he may be convicted thereof, the said James Winckley is asked by me the said Justice, if he can say any thing for himself why he the said James Winckley should not be convicted of the premises above charged upon him in form aforesaid, to which he the said James Winckley says, that he is not guilty thereof; nevertheless, on the said 18th day of November, in the 53d year aforesaid, at Guisburn aforesaid, in the Riding aforesaid, John Sanderson, of Bolton, in Bolland, in the Riding aforesaid, yeoman, a credible witness, cometh before me the said Justice, in his proper person, and before me the said Justice, to wit, on the said day and year last aforesaid, at Guisburn aforesaid, in the Riding aforesaid, being duly sworn, touching the premises, upon the Holy Gospels of God, upon his corporal oath to him the said John Sanderson, then and there administered by me the said Justice, (I the said Justice having then and there full power and authority to administer the said oath to the said John Sanderson) deposeth, sweareth, and upon his oath aforesaid affirmeth and saith, in the presence of the said James Winckley, that on the 1st day of November instant, in the year aforesaid, he saw the said James Winckley, at the township of Waddington aforesaid, in the Riding

Defendant apprehended by warrant, sec. 3.

Plea not guilty.

Evidence.

(See 1 East. 648.)

Evidence.

Riding aforesaid, attempt to take, kill, and destroy the fish in that part of the river Ribble, which runneth in the lands of the said Jane Clark, in the township of Waddington, in the West Riding of the county of York, and that the said part of the said river was not then nor is in any park or paddock, or in any garden, orchard, or yard adjoining or belonging to any dwelling-house, but then was, and is in other inclosed ground then and there being the private property of the said Jane Clark, at the township of Waddington aforesaid, in the Riding aforesaid; and that the said Jane Clark, then and there was and is the true and lawful owner of the fishery of the said part of the said river: And thereupon he the said James Winckley, having heard the said evidence so given against him as aforesaid, is asked by me if he has any thing to say or prove in answer to such evidence, or to shew why he should not be convicted of the offence above charged upon him in form aforesaid; and because the said James Winckley doth not nor can say or prove any thing in his own defence, touching or concerning the offence so charged upon him as aforesaid, or shew why he should not be convicted of the same offence; and inasmuch as the said James Winckley has not proved or offered any evidence to prove, nor hath alledged that he had the authority or consent of the said Jane Clark, or of any owner of the said fishery, to take, kill, carry away, or destroy, or to attempt to take, kill, or destroy any fish in the fishery aforesaid, or any just right, or any just, reasonable, or probable claim or cause, or any right or claim whatsoever so to do. Therefore it is on the said 18th day of November, in the 53d year aforesaid, at Gisburn aforesaid, in the Riding aforesaid, by me the said Justice adjudged, upon the testimony of the said John Sanderson, a credible witness as aforesaid, according to the form of the statute in such case made and provided, that the said James Winckley is guilty of the offence so charged upon him as aforesaid, and that he the said James Winckley be, and he is hereby by me the said Justice convicted of the offence aforesaid, according to the statute aforesaid, and I the said Justice do award and adjudge, that for such

Judgment.

offence,

offence, he, the said James Winckley, hath forfeited the sum of £5, to the said Jane Clark, the owner of the fishery of the said part of the said river so running as aforesaid, to be paid as the statute aforesaid doth direct. Given under my hand and seal, at Gisburn aforesaid, in the Riding aforesaid, the 18th day of November, in the year of our Lord 1812.

GAME.

9. *General Form of* negativing the necessary Qualifications *in Convictions on the Game Laws.*

———, That A. B. (being a person not then having lands and tenements, or any other estate of inheritance in his own right, or his wife's right, of the clear yearly value of one hundred pounds *per annum*, for term of life, nor having lease or leases of ninety-nine years, or for any longer term, of the clear yearly value of one hundred and fifty pounds, not then being son or heir apparent of an esquire or other person of higher degree, nor then being owner or keeper of any forest, park, chase, or warren, being stocked with deer or conies for his necessary use, in respect of such forest, park, chase, or warren, [nor (*a*) then being lord of any manor, lordship, or royalty, nor then being game-keeper of any lord or lady of any lordship, manor, or royalty, duly made, constituted, and appointed, by writing under his or her hand and seal, to take, kill, or destroy game, or any sort of game whatsoever in or upon any lordship, manor, or royalty, nor then being truly or properly a servant of or to any lord or lady of any lordship, manor, or royalty, nor then being immediately employed or appointed to take, kill or destroy game, or any kind of game whatsoever for the sole use or immediate benefit of any lord or lady of any lordship, manor, or royalty,] nor then being a person in any manner whatsoever qualified or authorized by the laws of this realm to kill game) did, &c.

(*a*) This qualification to the word "royalty" being only constructive, it has been held unnecessary to negative it. *See* Treatise, p. 93. Bosc. 157. It is inserted here in compliance with the majority of precedents which I have had an opportunity of perusing.

As

As the Conviction in *Rex* v. *Hartley* is now become an authority, (see Treatise, p. 122.) I have thought it proper to insert a copy of it; as follows: Rex v. Hartley.

10. Conviction *for* keeping and using *a Greyhound.*

West Riding of the County of York, to wit. Be it remembered, that on the 21st day of September, in the 21st year of the reign of our Sovereign Lord George the Third, by the grace of God, &c. at the parish of Bingley, in the said West Riding of the county of York, John Bottomley, of the parish of Kildwick, in the said West Riding, labourer, cometh before me, I. A. Busfield, Esquire, one of the Justices, &c. and giveth me the said Justice to understand and be informed, that on the 20th day of September, in the 21st year aforesaid, at the parish of Thornton, in the West Riding aforesaid, John Hartley, of the parish of Bingley aforesaid, in the West Riding aforesaid, butcher, being a person not then having lands and tenements, nor any other estate of inheritance in his own right, or in his wife's right, of the clear yearly value of £100, or for term of life, nor then having any lease or leases of ninety-nine years, nor for any longer term, of the clear yearly value of £150, nor then being the son and heir apparent of an esquire, or other person of higher degree, nor then being the owner or keeper of any forest, park, chase, or warren, then being stocked with deer or conies for his necessary use, in respect of such forest, park, chase, or warren, nor then being lord of any manor, lordship, or royalty, nor then being game-keeper to any lord or lady of any lordship, manor, or royalty, duly made, constituted, or appointed, by writing under his or her hand and seal, to take, kill, or destroy the game, or any sort of game whatsoever, in or upon any lordship, manor, or royalty, nor then being truly and properly a servant of or to any lord or lady of any lordship, manor, or royalty, nor then being immediately employed or appointed to kill, take, or destroy the game, or any kind of game whatsoever, for the sole use or immediate benefit of any lord or lady of any lordship, manor, or royalty, *did*, within three months now last past, to wit, on the said 20th day of September, in the said 21st

Did keep and use, &c.

year aforesaid, at the parish of Thoruton aforesaid, *keep and use a certain dog called a greyhound, to kill and destroy the game*, against the form of the statutes in that case made and provided; and the said J. Bottomley, the informant, prays that the said J. Hartley may be convicted of the premises in manner and form aforesaid above laid to his charge. Whereupon he the said John Hartley, after having been duly summoned in this behalf to answer the premises before me the said Justice, afterwards, that is to say, on the 24th day of September in the 21st year aforesaid, at the parish of Bingley aforesaid, in the West Riding aforesaid, appeareth, and is present before me the said Justice, in order to answer and make good his defence to the said information and offence charged on him as aforesaid, and the said J. Hartley having heard the same, is asked by me, the said Justice, if he can say any thing for himself, why he the said J. Hartley should not be convicted of the premises above charged upon him in form aforesaid, who pleadeth that he is not guilty of the said offence: Nevertheless, on the 24th day of September aforesaid, in the 21st year aforesaid, at the parish of B. aforesaid, in the West Riding aforesaid, one credible witness, to wit, T. Foulds, being then and there, to wit, on the same day and year last mentioned, at the parish of B. aforesaid, in the West Riding aforesaid, sworn on the Holy Gospel of God, upon his corporal oath, to him then and there administered by me the said Justice, (having then and there full power and authority to administer the said oath to the said J. Foulds,) deposeth, sweareth, and upon his oath aforesaid affirmeth and saith, in the presence of the said J. Hartley, that within three months next before information was made before me the said Justice by the said J. Bottomley as aforesaid, to wit, on the 20th day of September aforesaid in the 21st year aforesaid, the said J. Hartley, at the parish of Thornton aforesaid, in the West Riding aforesaid, being a person not then having, &c. (negativing all the qualifications as in the information,) then and there, to wit, on the day and year last mentioned, at the said parish of Thornton, in the West Riding aforesaid, did keep and use a certain dog called a greyhound, to kill and destroy the game. Whereupon all and singular the matters, things, and evidences

dences being fully heard and understood by the said J. H. he the said J. H. is asked by me the said Justice, what he hath to say or offer in his defence against the said information and offence, and in answer to the evidence given as above mentioned, and what he hath to say why he should not be convicted of keeping and using a certain dog called a greyhound to kill and destroy the game, contrary to the form of the statutes in such case made and provided, and forasmuch as the said J. H. doth not offer, alledge, or say any thing, or produce or offer any evidence in answer to the said information, evidence, matters, things, and premises, or any of them, charged on him as aforesaid, it manifestly appears to me, the said Justice, that the said J. H. is guilty of the premises above laid to his charge: wherefore I, the said Justice, upon the oath of one credible witness, so taken before me as aforesaid, do adjudge that the said J. Hartley, on the 20th day of September aforesaid, in the 21st year aforesaid, at the parish of Thornton aforesaid, in the West Riding aforesaid, did keep and use a certain dog called a greyhound, to kill and destroy the game, and that the said J. H. had not then any lands and tenements, nor any other estate, &c. (negativing all the qualifications as in the information): And thereupon I the said Justice, on the 24th day of September aforesaid, in the 21st year aforesaid, at the parish of B. aforesaid, in the West Riding aforesaid, do convict the said J. H. of keeping and using a dog called a greyhound, to kill and destroy the game, and he the said J. H. is hereby convicted thereof by me the said Justice on the oath of one credible witness, according to the form of the statute; and I the said Justice do adjudge, that the said J. H. for his said offence aforesaid, hath forfeited the sum of five pounds of lawful money of Great Britain, and I do adjudge, that one half of the said sum of five pounds be paid to the said informer J. Bottomley aforesaid, and that the other half of the said sum of five pounds be paid to the poor of the parish of Thornton aforesaid, in the West Riding aforesaid, where the said offence was committed, according to the form of the statute in that case made and provided. In witness whereof I the said Justice, to this present record of conviction have set my hand and seal, at the parish of

Bingley

Bingley aforesaid, in the West Riding aforesaid, the 24th day of September, in the 21st year aforesaid, and in the year of our Lord 1781.

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11. Conviction *of an Innkeeper for having a* Partridge *in his Possession, and selling the same as an Innkeeper*, 5 Ann. c. 14. s. 2, 28 Geo. 2. c. 12. 2 Geo. 3. c. 19.

Lancashire.

Be it remembered, that on the 30th day of October, in the twenty-third year of the reign of our Sovereign Lord George the Third, by the grace of God, &c., at Warrington in the county of Lancaster, D. Poole, of ———, in the county of Cheshire, Esq. cometh in his proper person before me, C. O. Clerk, one of the Justices of our said Lord the King, assigned to keep the peace of our said Lord the King, in and for the said county of Lancaster, and also to hear and determine divers felonies, trespasses, and other misdemeanours committed within the said county, and then and there giveth me the said Justice to understand and be informed, that within three months now last past, that is to say, on the second day of October, in the twenty-second year of the reign of our said Lord the present King, at the parish of Manchester, in the said county of Lancaster, R. A. of Manchester aforesaid, innkeeper, being a person not then, &c. *(see the General Form*, p. [42]) and being then and there an innkeeper, unlawfully had in his custody two partridges, and did then and there sell (*a*) *(or*, " offer to sell," *as the case may be)* the same partridges, contrary to the form of the statute in such case made and provided; and the said D. P., the said informant, prayeth that the said R. A. be convicted of the said offence above laid to his charge: Whereupon the said R. A., after having been duly summoned in this behalf to answer and make his defence to the said information and offence therein charged upon him before me the said Justice, afterwards, that is to say, on the 13th day of November, in the twenty-

(*a*) Let this be according to the fact. If he only had them in his custody, omit the rest. If he actually sold them, omit the offer. If he offered only, omit the sale, &c.

twenty-third year aforesaid, at Warrington aforesaid, in the county of Lancaster, appeareth, and is present before me the said Justice, in order to answer and make good his defence to the said information and offence therein charged on him as aforesaid, and he the said R. A. having heard the same, is asked by me the said Justice, if he can say any thing for himself, why he the said R. A. should not be convicted of the premises above charged on him, in form aforesaid, who pleadeth that he is not guilty of the said offence: Nevertheless, on the said 13th day of November, in the twenty-third aforesaid, in the said county of Lancaster, one credible witness, to wit, T. B. of H. in the said county of Lancaster, cometh before me the said Justice, in his own proper person, and before me the said Justice, the said T. B. being then and there, to wit, on the day and year last aforesaid, at Warrington aforesaid, duly sworn touching the premises, upon the Holy Gospel of God, upon his corporal oath, to him then and there administered by me the said Justice (I, the said Justice, then and there, having full power and authority to administer the said oath to the said T. B.) deposeth and sweareth, and upon his oath aforesaid affirmeth, in the presence of the said R. A., that within three months next before the said information was made before me, by the said informant, as aforesaid, to wit, on the said second day of October, in the twenty-second year aforesaid, at the parish of Manchester aforesaid, he the said R. A. being a person not then having lands, *(pursue the words of the information exactly, to the words,* "in such case made and provided.") Whereupon all and singular the matters and things in the said information and evidence contained being by the said R. A. heard and fully understood, and he the said R. A., being by me the said Justice asked, what he hath to say or offer in his defence against the said information and offence and in answer to the evidence given as above-mentioned, and what he has to say, why he should not be convicted of the premises so charged upon him and forasmuch as upon hearing and fully understanding all and every the matters and things by the said R. A. alledged and proved in his defence, touching the premises in the said information specified, it manifestly

appears

appears to me the said Justice, that the said R. A. is guilty of the premises above charged upon him in the said information: It is therefore adjudged by me the said Justice, upon the testimony of the said T. B., a credible witness, upon his oath, before me the said Justice, so taken as aforesaid, that the said R. A., on the said second day of October, in the twenty-second year aforesaid, at the parish of Manchester aforesaid, within three months next before the said information was made before me the said Justice by the said D. P. as aforesaid, unlawfully had in his custody two partridges, and did then and there sell *(or*, "or offer to sell") them, contrary to the form of the statute in such case made and provided, and that the said R. A. had not then, &c. *(negativing all the qualifications)* nor then was a person in any manner whatsoever qualified to kill game, and was then and there an inn-keeper; and thereupon I the said Justice, upon the said thirteenth day of November, in the twenty-third year aforesaid, at Warrington aforesaid, do convict the said R. A. of the offence aforesaid, in and by the said information charged against him, and the said R. A. is hereby convicted thereof, by me the said Justice, upon the oath of one credible witness, according to the form of the statute in such case made and provided; and I the said Justice do adjudge, that the said R. A. for his said offence, hath forfeited the sum of £10, of lawful money of Great Britain, that is to say, the sum of £5 (*b*) for each of the said partridges; and I do adjudge that one half (*c*) of the said sum be paid to the said informant D. P., and that the other half of the said sum be paid to the poor of the parish of Manchester, where the said offence was committed, according to the form of the statute in that case made and provided. In witness whereof, &c.

(*b*) 5 Ann. c. 14. s. 2. 5*l*. for *each* partridge, &c.

(*c*) 5 Ann. c. 14. s. 2.

This conviction was drawn by a gentleman eminent at the bar, by whom the following observations were subjoined:—

The statute 5 Ann, c. 14. s. 2, which imposes a penalty upon any higler, chapman, *inn-keeper*, having partridges, &c. in their possession, or who shall buy, sell, or offer to sell the same,

same, makes no express distinction between such as are qualified by estate and such as are not; but it was thought safer to negative all the qualifications. If, indeed, the defendant actually sold the partridges, or offered them for sale, the case would come within 28 Geo. 2. c. 92, which inflicts the penalties upon selling, whether the person be qualified or not; and in such case it will be proper to omit the whole of what is stated in the above conviction respecting the qualifications, but it was not thought proper to consider the using the partridges in the house by an innkeeper, in providing for his guests, as an actual sale of them within the latter act.

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12. Conviction *for* using a *Lurcher, and killing a Hare.*

Wiltshire. Be it remembered, that on the first day of February, in the eighteenth year of the reign of our Sovereign Lord George the Second, by the grace of God, &c. at ———, in the county of Wilts, B. H. of ———, in the said county, yeoman, in his proper person, cometh before me, W. C. Esq. one of the Justices of our said Lord the King, assigned to keep the peace in and for the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanours committed in the said county, and then and there maketh information, upon oath, before me the said Justice, that J. P. of ——— aforesaid, labourer, (he the said J. P. not having lands and tenements, or any other estate of inheritance in his own, or his wife's right, of the clear yearly value of £100, or for term of life, nor having lease or leases of ninety-nine years, or for any longer term, of the clear yearly value of £150, nor being the son and heir apparent of an esquire, or other person of higher degree, nor being owner or keeper of any forest, park, chase, or warren, being stocked with deer or conies for his necessary use, in respect of such forest, park, chase, or warren, nor being gamekeeper of any lord or lady of any lordship or manor duly made,

made, constituted, or appointed, with power or authority to take, kill, or destroy the game in or upon any such lordship or manor, nor being truly and properly a servant of or to any lord or lady of any lordship or manor, nor being immediately employed and appointed to take and kill the game for the sole use and immediate benefit of such lord or lady, nor being in any other manner whatsoever duly qualified, empowered, licensed, or authorized by the laws of this realm, either to take, kill, or destroy any sort of game whatsoever, either for himself, or for any other person or persons whatsoever, nor keep, or use any greyhounds, setting-dogs, hoys, lurchers, funnels, or any other engine to take, kill, and destroy the game,) on the ——— day of ———, in the year aforesaid, at ——— aforesaid, in the said county of Wilts, one *lurcher*, and divers other dogs, did unlawfully keep and use for the destruction of the game, and with the said lurcher, and other dogs, did then and there take and kill one hare, contrary to the form of the statute in that case made and provided; and the said informant then and there prays that the said J. P. may be convicted of the said offence. Whereupon the said J. P., on the ——— day of ———, in the year aforesaid, had due notice to him given of the said information, and of the offence therein charged against him as aforesaid, and was then, that is to say, on the said ——— day of ———, in the year aforesaid, duly summoned to be and appear before me the said Justice, at my dwelling-house, at ——— aforesaid, in the said county of Wilts, on the ——— day of the said month of ———, in the said ——— year of his said Majesty's reign, to answer and make his defence to the said information and the offence therein charged upon him; and thereupon, afterwards, that is to say, on the said ——— day of ———, in the ——— year aforesaid, at ——— aforesaid, in the said county of Wilts, J. D. of ——— aforesaid, then being a credible witness, cometh before me the said Justice, in his proper person, and takes his corporal oath upon the Holy Evangelists of God, to say and depose the truth, touching and concerning the premises in the said information specified, (I, the said W. C. having then and there full power and authority to administer the said oath to him the

the said J. D. in that behalf,) and the said J. D. being so sworn, then and there, upon his said oath, so taken as aforesaid, deposes and swears of and concerning the premises in the said information specified, that he the said J. P. within three months next before the said information before me the said Justice made as aforesaid, to wit, on the said ——— day of ———, in the said ——— year of his said Majesty's reign, at ——— aforesaid, in the said county of Wilts, the said J. P. not having lands and tenements, or some other estate of inheritance in his own, or his wife's right, of the clear yearly value of £100, or for term of life, nor having lease or leases of ninety-nine years, or for any longer term, of the clear yearly value of £150, nor being the son and heir apparent of an esquire, or other person of higher degree, nor being owner or keeper of any forest, park, chase, or warren, nor being game-keeper of any lord or lady of any lordship or manor, duly made, constituted, or appointed, with power or authority to take, kill, or destroy the game in or upon such lordship or manor, nor being truly and properly a servant of or to any lord or lady of any lordship or manor, nor being immediately employed and appointed to take and kill the game for the sole use and immediate benefit of such lord or lady, nor being in any other manner whatsoever qualified, empowered, licensed, or authorized by the laws of this realm, either to take, kill, or destroy any sort of game whatsoever, either for himself or any other person whatsoever, nor to keep or use any greyhounds, setting dogs, hoys, lurchers, funnels, or any other engine to kill and destroy the game) did keep and use one lurcher, and other dogs, for the destruction of the game, and with the said lurcher, and other dogs, did then and there take and kill one hare, contrary to the form of the statute in that case made and provided; and thereupon the said J. P. after due notice and summons to him given as aforesaid, doth not appear before me the said Justice, but maketh default; but the same being now fully and duly proved before me the said Justice, upon the oath of the said J. D. as aforesaid, it manifestly appears to me the said Justice, that the said J. P. is guilty of the premises above charged upon him in the said information: it is therefore adjudged by me the said Justice, that

Defendant makes default.

that the said J. P., upon the testimony of the said J. D., a credible witness as aforesaid, upon his said oath before me the said Justice so taken as aforesaid, be convicted, and he is hereby convicted of the premise aforesaid, according to the form of the statute in such case made and provided; and that the said J. P. forfeit the sum of £——— for the offence aforesaid, to be levied and distributed according to the form of the statute in that case made and provided. In witness whereof, I the said Justice, to this present record of conviction have put my hand and seal, at ——— aforesaid, the said ——— day of ———, in the said ——— year of the of our said Sovereign Lord the King, and in the year of our reign Lord 1756.

This conviction was removed by *certiorari*, and after much litigation affirmed by rule of Court in Michaelmas Term, in the nineteenth year of Geo. 2.

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13. Evidence *stated in a* Conviction *for using Steel-traps to kill Game.*

——— deposeth, &c. that the said W. D. on, &c. at, &c. (not then being, &c., negativing all the qualifications as in the preceding forms) did keep and use divers steel-traps and engines, to kill and destroy the game, by placing and setting them upon certain arable lands in the said parish of E., then in stubble, and the borders thereof, where pheasants and other game usually come to feed, and in such manner as to take and destroy the same, and that the said traps and engines were appropriate in their nature for that purpose.

See *further*, tit. *Rogue and Vagabond.*

14. Plea

14. Plea *of a Conviction before a Justice to an Action for Penalties for killing Game without a* Certificate.

——, And as to the said offences, in the —— counts of the said declaration above supposed to have been committed by him, Defendant says, *actio non*, because, he says, that after the time of committing the said supposed offences, and before the exhibiting of this bill, to wit, on the ——— day of ———, A. D. ———, at ———, one R. A. went before E. F., then one of the Justices of our said Lord the King, assigned to keep the peace of our said Lord the King in and for the said county of ———, and also to hear and determine divers felonies, trespasses, and other misdemeanours committed in the said county, residing (*a*) near the place where the offence in the information hereinafter mentioned specified was committed, and then and there exhibited before the said E. F., his certain information against the said G. H. (the defendant) by the name and description of G. H. of ———, by which said information the said R. A. then and there informed the said Justice, that the said G. H. on the ——— day of ——— then last past, did, at the parish of M. aforesaid, use certain dogs (*b*), called spaniels, and a certain engine, called a gun, for the destruction of the game, without having the certificate required by law for that purpose; and such proceedings were thereupon had before the said E. F. the said Justice, that afterwards, to wit, on the ———(*c*) day of ———, A. D. ———, at ———, the said G. H. was duly convicted by the said E. F., so being such Justice as aforesaid, of the said offence charged upon him, in the said information as aforesaid; and the said Justice did then and there declare and adjudge, that the said G. H. had forfeited the sum of £20, of lawful money of Great Britain for the offence aforesaid, according to the form of the statute in that case made and provided (*d*), as by record of the said conviction fully appears, which said conviction is yet in full force and effect, not reversed, quashed, or vacated; and the said G. H. further says, that the said using of the said gun, in the said —— counts of the said declaration mentioned, and the said using of the dog in the said

(*a*) This does not seem necessary.

(*b*) See R. v. Hartley, *ante*, p. [43].

(*c*) The date of the Conviction.

(*d*) See *post*, p. [55], if the conviction has been removed by *Certiorari*.

—— count mentioned, for the purposes therein respectively mentioned, were done by the said G. H., together, on the very same day, and at one and the same time, and not separately, or on other or different days, or at other or different times, and were and constituted but one offence, and that the said gun in the said 5th count of the said declaration above mentioned, and the said gun in the said information mentioned, was and is one and the same gun, and not other or different; and that the said dog in the said last count of the said declaration mentioned, was and is one of the said dogs in the said information mentioned, and not other or different; and that the using the said gun and dog, in the said ——— counts of the said declaration respectively mentioned, and whereof the said ——— (the plaintiff) hath above complained against the said defendant as aforesaid, and the said using the said dogs and guns in the said information mentioned, and whereof the said G. H. was so convicted as aforesaid, were and are one and the same identical offence, and done and committed by him the said G. H. at one and the same time, and not other or different offences, or done, or committed at other or different times, and this, &c. wherefore he prays judgment of the said plaintiff, ought to have or maintain his aforesaid action against him, as to the said offence, in the said ——— counts of the said declaration respectively mentioned.

S. G.

Replication *nul tiel record.* And as to the plea of the said G. H. by him above pleaded in bar, as to the said ——— counts of the said declaration mentioned, plaintiff says, *(præcludi non)* in respect of those offences, because, he says, that there is not any such record of the said conviction, as the said G. H. hath in by the said plea alledged; and this, &c. wherefore, he prays judgment, and his debt aforesaid, in respect of those offences, together with his damages, by occasion of detaining that debt, to be adjudged to him, &c.

T. W.

Rejoinder,

Rejoinder, and praying *Certiorari*. } And the said G. H., says, that there is such record of the said conviction, as he the said G. H. hath in this said plea in that behalf alledged, and this he is ready to verify by the said record, and thereupon a day is given to the said G. H. until on ——— next after ———, before our said Lord the King, at W. to produce the said record, the same day is given to the said ——— (the plaintiff) there, &c.; and because the record of the said conviction is now in the custody of the said E. F. the Justice aforesaid, therefore the said G. H. prays a writ of our said Lord the King, to be directed to the said E. F., to certify to the Court here, whether there is such a record of conviction aforesaid, or not, and it is granted to him, returnable before our said Lord the King, at Westminster, on ——— next after ———, the same day is given to the said parties there.

S. G.

If the conviction has already been removed, the plea may be thus; "as by the said conviction, which our said Lord the King, for certain reasons, caused to be brought into the Court of our said Lord the King, before the King himself, and now remaining of record in the Court of our said Lord, before the King himself, to wit, at Westminster aforesaid, in the county of Middlesex, more fully appears" (then aver the identity of the offences, as in the foregoing plea.)

If the penalty was paid, add, "and that he the said G. H. after the said conviction, and before the exhibiting the bill of the said ——— plaintiff, to wit, on ———, in due manner paid the penalty so adjudged against him as aforesaid, to wit, at &c., and this, &c., wherefore, &c."

GAMING.

15. Conviction *for keeping* a Hazard Table, *on* 12 *Geo.* 2. *c.* 28.

Middlesex, to wit. Be it remembered, that on the 1st day of September, in the 32d year of the reign of our Sovereign Lord

Lord King George the Third, at the parish of St. James, in the city and liberty of Westminster, in the county of Middlesex, J. Warren of the parish of St. George, Hanover-square, in the city and liberty aforesaid in the said county, in his proper person cometh before us Nath. Conant and Ph. Neve, Esquires two of his Majesty's Justices assigned to keep the peace of our said Sovereign Lord the King in and for the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, and now here exhibiteth before us the said Justices a certain complaint and information, and therein complaineth and giveth us to understand and be informed, that J. Liston, yeoman, of Norris-street, in the parish of St. James, in the city and liberty of Westminster, in the county aforesaid, did, after the 24th day of June, 1739, to wit, on the 25th day of August, A. D. 1792, at a certain house in Norris-street aforesaid, set up, maintain, and keep, a certain fraudulent game, to be determined by the chance of dice, under the denomination of the game of Hazard, against the form of the statute in such case made and provided; and afterwards, on the 20th day of September, in the year aforesaid, at the parish of St. James aforesaid, in the city and liberty aforesaid, in the said county of Middlesex, the said J. Liston having been duly summoned in this behalf to appear before us the Justices aforesaid, appeareth and is present, in order to make his defence against the said charge contained in the said information, and having heard the same read, the said J. Liston is asked by us the said Justices if he can say any thing for himself why he should not be convicted of the premises above charged upon him in form aforesaid, who pleads that he is not guilty of the said offence: Nevertheless, on the said 20th day of September, in the year aforesaid, at the parish of St. James aforesaid, in the city and liberty aforesaid, in the said county, three credible witnesses, to wit, M. F. of the parish of St. Ann Soho within the liberty of Westminster in the said county, surgeon, S. Hamilton, of Charles-street, &c. one of the constables appointed to attend at the public office in Great Marlborough-street, in the said parish

Information.

Summons.

Appearance.

Plea, Not Guilty.

parish of St. James, Westminster, in the said county of Middlesex, and J. Buckley, of the parish of St. James aforesaid, yeoman, come before us Justices aforesaid, and before us the said Justices, upon their oaths on the Holy Gospel to them respectively then and there by us the said Justices administered, depose, swear, and on their oaths aforesaid, in the presence of the said J. Liston, say as followeth: And first, the said M. F. on his oath aforesaid saith, that on the 25th day of August last past, he was at the house of the said J. Liston, in Norris-street aforesaid, that there were then many persons playing at hazard in the said house for money; that the said J. Liston was then present there during the playing of the said game, and acted as master of the hazard-table there; that the said J. Liston, on the said 25th day of August, being applied to for change, gave eight tokens or pieces of silver, several of them marked with the initials of the said J. Liston's name, in change for a guinea, for which the said persons then played at the game aforesaid; and that the said J. Liston changed them back again when the said persons who had so played as aforesaid went away; and the said M. F. upon his oath further saith, that he hath frequently been at the said house of the said J. Liston, and hath often lost large sums of money there at hazard; that on those occasions the said J. Liston hath always acted as master of the house, and that often when disputes arose at the hazard-table he was called and decided them. And the said S. Hamilton upon his oath saith, that he is one of the constables appointed to attend at the public office in Great Marlborough-street as aforesaid; that Sunday, the 26th day of August aforesaid, he went to the said house of the said J. Liston, in Norris-street aforesaid; that near thirty people were then round a hazard-table there; that the said S. Hamilton took from the said table a dice-box, and two pair of dice, and several tokens, with the letters J. L. upon them, which he now produceth, and which pieces having been shewn to the said M. F. the said M. F. saith, that they are like those which the said J. Liston so gave in change as aforesaid: And the said J. Buckley upon his oath aforesaid saith, That he is and hath been for some time past collector of the poor's

Evidence.

rates of the said parish of St. James aforesaid; that he hath during that time constantly received the poor's rates for the said J. Liston's house in Norris-street, in the said parish, of the said J. Liston, and hath given him receipts for the same in his own name as occupier of the said house: And thereupon the said J. Liston, on the 20th day of September aforesaid, in the year aforesaid, before us the Justices aforesaid, by the oaths of the aforesaid credible witnesses, according to the form of the statute aforesaid, is convicted of the offence aforesaid, and for his said offence hath forfeited the sum of £200 of lawful money of Great Britain, to be distributed as the statute aforesaid doth direct. In witness whereof we the said Justices to this present record of conviction aforesaid have set our hands and seals, at the parish of St. James aforesaid, in the county aforesaid, the said 20th day of September, in the 32d year aforesaid, and A. D. 1792.

Conviction.

Forfeiture.

N. C.
P. N.

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16. Order of Sessions *on* Appeal, *confirming the above, returned together with it to the Writ of* Certiorari. *(For which see* ante, *p.* [24].)

Middlesex. At the General Quarter Sessions of the Peace, holden for the county of Middlesex, at the Guildhall, in King-street, Westminster, in the said county, on Wednesday the 17th day of October, in the 32d year of the reign of our Sovereign Lord George the Third, &c. Before W. Mainwaring, E. Read, Frederick Matthew, C. S. &c. Esquires, and others their fellow Justices of our said Lord the King, assigned to keep the peace of our said Lord the King in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed. That Session of

of the Peace is adjourned by the aforesaid Justices of our said Lord the King above named, and others their fellows aforesaid here, until Monday the 29th day of the same month of October, at the hour of ten in the morning of the same day, to be holden at the Sessions House on Clerkenwell Green in and for the said county: And that at the same Sessions of the Peace being holden by adjournment aforesaid, at the Sessions House aforesaid, in and for the said county, on the said Monday the said 29th day of October, in the 33d year of the reign of our said Sovereign Lord George the Third, &c. before the said Justices of our said Lord the King above named, and others their fellows aforesaid, that Session of the Peace is adjourned by the said Justices above named, and others their fellows here, until Tuesday the 30th of the same month of October, at the hour and place last above mentioned: And that at the same Session holden by adjournment, &c. (several intermediate adjournments as above) till Saturday the 8th day of December, in the year last aforesaid: And that at the same Sessions of the Peace, being holden by adjournment aforesaid, at the Sessions House aforesaid in and for the said county, on the said Saturday the said 8th day of December, in the said 33d year of our said Sovereign Lord the King, before W. Mainwaring, Esquire, the Reverend S. Glass, Doctor in Divinity, F. M., J. H. Esquires, and others their fellows, Justices of our said Lord the King, assigned to keep the Peace of our said Lord the King in the county aforesaid, and also to hear and determine divers, &c. in the said county committed.

Adjournment.

Second adjournment.

Further adjournment.

Appeal.

Whereas J. Liston hath at this present Session exhibited his petition and appeal, setting forth, that in and by a certain Conviction in writing, under the hands and seals of Nathaniel Conant and Philip Neve, Esquires, two of the Justices of the Peace of our said Lord the King, assigned to keep the peace in and for the said county, and also to hear and determine,

mine, &c. bearing date the 20th day of September last past, he was convicted by the said Justices, for that he on the 25th day of August last, at a certain house in Norris-street, in the parish of St. James, in the city and liberty of Westminster, in the county of Middlesex, did set up, maintain, and keep a certain fraudulent game, to be determined by the chance of dice, under the denomination of the Game of Hazard, against the statute in that case made and provided, and that the said Justices did adjudge the petitioner to have forfeited the sum of £200, to be distributed as the said statute doth direct, whereby the petitioner conceived himself aggrieved: Now, upon hearing the said appeal, and what hath been alledged by the respective parties, their counsel and witnesses, of and concerning the premises, It is ordered, that the said Conviction be, and the same is hereby confirmed.

By the Court.

Selby.

This Conviction was removed into the Court of King's Bench by *certiorari*; and among other things it was objected, that there was no sufficient evidence of a playing with dice, the first witness not having stated that dice were used in playing on the day spoken of by him, viz. 25th of August, and the second witness having spoken of a different day, viz. the 26th of August, and having only proved the fact of there being then dice upon the table, but no playing.

This objection however was over-ruled, as well as all the others that were taken, and the Conviction was confirmed. Lord *Kenyon* said, it was immaterial on this charge, whether the game of hazard were played with dice or cards, *hazard* being of itself declared an illegal game by the statute. However, if it were necessary to be stated, it appears that a dice-box and dice were found on the table the subsequent day, which, from the manner in which they were found, was sufficient to warrant the Justices in concluding that the game of hazard was there played; and the Justices were not confined to evidence on the particular day.

Rex v. Liston, 5 T. R. 338.

HAWKER

HAWKER AND PEDLAR.

17. Conviction, *for trading without a Licence.*

Note. As the Conviction in this case was confirmed (see Treatise, p. 115.), and has since been adopted in establishing a rule of considerable importance, it may be satisfactory to supply the conciseness of the report by a reference to the Conviction itself, which I have been favoured with a copy of; in the following words: Rex v. Aiken.

Rutlandshire, to wit. Be it remembered, that on the 17th day of November, in the 5th year of the reign of our Sovereign Lord George the Third, &c. at Uppingham, in the said county of Rutland, one Francis Weldon cometh in his own person before me Robert Holchkin, Esquire, one of the Justices, &c. in and for the said county of Rutland, and giveth me the said Justice to understand and be informed, that one Roger Aiken, after the 24th day of June, in the year of our Lord 1698, (that is to say), on the 15th day of November, in the 5th year aforesaid, was a hawker and pedlar, and did go and travel from town to town with horses, and to other men's houses, within the kingdom of England, carrying to sell, and exposing to sale, goods, wares, and merchandizes, to wit, linen handkerchiefs, and other linens, of which the said Roger Aiken was not the real worker and maker, nor the child, apprentice, agent, or servant of the real worker or maker thereof, and that the said Roger Aiken, being a hawker and pedlar, and travelling from town to town, and to other men's houses as aforesaid, and carrying to sell, and exposing to sale, such goods, wares, and merchandizes as aforesaid, on the 15th day of November, in the 5th year aforesaid, at Uppingham, in the county aforesaid, did carry to the parish of Uppingham, to sell and expose the same at Uppingham aforesaid, several goods, wares, and merchandizes, that is to say, Information, 17th November.

say, linen handkerchiefs, and other linens, and was then and there found so trading as aforesaid, without any licence so to do, contrary to the form of the statute, &c. he the said R. Aiken, not being then in any public mart, market, or fair, nor being the real worker or maker of the said goods, wares, and merchandizes, or of any part thereof, nor the child, &c. (as before): and the said Francis Weldon prays that the said Roger Aiken may be convicted of the offence aforesaid, according to the form of the statute in such case last made and provided: Whereupon afterwards, on the 19th day of November, in the 5th year aforesaid, the said Roger Aiken comes before me the said Justice, at Uppingham aforesaid, in order to answer the said charge contained in the said information, and having heard the same, he the said Roger Aiken is asked by me the said Justice if he can say any thing why he should not be convicted of the premises above charged upon him in form aforesaid; and thereupon the said Roger Aiken saith, that he is not guilty of the said offence, but doth not shew to me any sufficient cause why he should not be convicted of the offence aforesaid: *And afterwards, to wit, on the said 19th day of November*, in the 5th year aforesaid, William Goodhall, a credible witness in this behalf, cometh before me the said Justice, at Uppingham aforesaid, and on his corporal oath upon the Holy Evangelists of God, now administered by me the said Justice (I the said Justice having a competent authority to administer the said oath to the said W. Goodhall in that behalf), he the said W. Goodhall deposeth and saith, that the said Roger Aiken, after the 24th day of June, &c. (following the information precisely, negativing all the exemptions as is done there): Whereupon all and singular the premises being seen and fully understood by me the said Justice, and mature deliberation being thereupon had, it manifestly appears to me the said Justice that the said Roger Aiken is guilty of the premises above charged upon him in the said information. It is therefore adjudged by me the said Justice, that the said Roger Aiken be convicted, and he is hereby convicted by me the said Justice of the premises aforesaid; and I do award and adjudge that

Defendant appears, 19th November.

Same day and place, W. G. a credible witness, &c.

that the said Roger Aiken hath for his said offence forfeited the sum of £12 of lawful, &c. one moiety thereof to the said Francis Weldon, the informer aforesaid, and the other moiety to the poor of the parish of Uppingham aforesaid, wherein the said Roger Aiken was found trading in manner aforesaid, according to the form of the statute, &c. In witness whereof I the said Robert Hotchkin, the Justice aforesaid, to this record of Conviction have set my hand and seal, the said 19th day of November, 1764.

Conviction, 19th November.

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18. Conviction *of a Pedlar for selling Goods without a Licence, contrary to* 8 *&* 9 *Will.* 3. *c.* 27. *s.* 3, *and* 29 *Geo.* 3. *c.* 26. *s.* 11.

Note. The latter act gives a general form of Conviction to be used, s. 26.; but as a blank is left for the description of the offence laid in the information, which therefore must include every material averment, the following form of stating the offence, taken from a Conviction on the statute of Will. 3, the provisions of which are revived by 29 Geo. 3. c. 26. s. 2, will still be of use in those cases where the facts correspond, in supplying what is left to be filled up by the statute-form.

After the words, " and informed me that E. F. of ——, in the said county of ——," *thus,* on the —— day of ——, was a hawker, pedlar, and petty chapman, and a trading person going and travelling from town to town, and to other men's houses, within that part of the United Kingdom called England, carrying to sell, without any licence so to do, divers goods, wares, and merchandizes, that is to say, certain woollen cloths, of which the said E. F. was not the real worker or maker, or the child, apprentice, agent, or servant to the real worker or maker thereof; and the said E. F. being a hawker, pedlar, and petty chapman, and travelling from town to town,

See R. v. Little, Treatise, p. 69. These words are essential.

town, and other men's houses, within that part of the United Kingdom called England as aforesaid, carrying to sell such goods, wares, and merchandizes as aforesaid, on the ——— day of ———, in the year of our Lord ——— aforesaid, at ——— aforesaid, in the county aforesaid, exposed to sale and offered to sell, and did then and there actually sell by retail, and not by wholesale, a parcel, to wit, five yards and a half of narrow woollen cloth, he the said E. F. not being the real worker or maker of the said cloth, nor being the child, apprentice, servant, or agent of the worker or maker thereof, nor then being a person trading wholesale in the woollen or linen manufactures of this kingdom, and selling the same by wholesale, nor immediately employed under any such person or persons to sell by wholesale only, nor being then in any public mart, market, or fair, and that he the said E. F. was then and there found trading as aforesaid, without any licence so to do, contrary to the statute in that case made and provided.

HIGHWAYS.

19. Conviction *on* 13 *Geo.* 3. *c.* 78. *s.* 48, *of a* Surveyor of Highways, *for not delivering over his Books of Account to the Churchwardens and Overseers. See Schedule, No.* 35, *annexed to the Act.*

———, *to wit.* Be it remembered, that on the 27th day of December, in the year of our Lord 1813, at R. in the county of ———, J. S. came before me W. H. one of his Majesty's Justices of the Peace of the said county, and informed me that W. B. of the hamlet or division of B. in the township of C. in the said county, labourer, was surveyor of highways within the said hamlet, for the year ending at Michaelmas last past; and that afterwards, to wit, on the 25th day

day of November now last past, at O. in the county aforesaid, a certain book of accounts of the said W. B. as such surveyor, and certain assessments for repairs of the said highways, were settled and allowed by the Reverend J. H. Clerk, and J. W. Esquire, two of his Majesty's Justices of the Peace in and for the said county, pursuant to the statute in such case made and provided; and that afterwards, to wit, from thenceforth to the time of exhibiting the said information and complaint, there was a churchwarden and overseers of the poor duly appointed in and for the township of C. aforesaid, including the said hamlet or division, and that the said W. B., during all the time last aforesaid, neglected to transmit and deliver to such churchwarden and overseers, or any or either of them, the said book and assessments so settled and allowed as aforesaid, contrary to the form of the statute in such case made and provided (*a*): Whereupon the said W. B. after being duly summoned to answer the said charge, appeared before me on the ——— day of ———, at ———, in the said county, and having heard the charge contained in the said information, declared that he was not guilty of the said offence; but the same being fully proved upon the oath of J. S. and R. B. two credible witnesses, it manifestly appears to me the said Justice, that he the said W. B. is guilty of the offence charged upon him by the said information. It is therefore considered and adjudged by me the said Justice, that the said W. B. be convicted, and I do hereby convict him of the offence aforesaid, and I do hereby declare and adjudge, that he the said W. B. has forfeited the sum of £5 of lawful money of Great Britain, for the offence aforesaid, to be distributed as the law directs, according to the form of the statute in that case made and provided. Given under my hand and seal, the day and year last aforesaid.

(*a*) What follows to the end is pursuant to the chedule 35, annexed to the act.

If the party does not appear upon the summons, then, after the words, "being duly summoned to answer the said charge," *insert* ("did not appear before me, pursuant to the said summons"); or, if he appeared and refused to make defence, (did neglect and refuse to make any defence against the

the said charge, but the same being fully proved, &c. *as before.)*

If the party confesses, after the words, " contained in the said information," *insert* (acknowledged and voluntarily confessed the same to be true, and it manifestly appears to me the said Justice, *as above.)*

LAND-TAX.

20. Conviction *by Commissioners of Land-Tax, for not serving the Office of* Assessor *of the Land-Tax,* 38 *Geo.* 3. *c.* 5. *s.* 19.

Hundred of Bampton, in the county of Oxford. Be it remembered, that at a meeting of us A. B. C. D. and E. F. being commissioners duly appointed for the purpose of putting in execution certain Acts of Parliament for granting an aid to his Majesty by a Land-Tax, and acting as such commissioners in and for the hundred of Bampton, in the county of O. held on the ——— day of ———, in the ——— year of the reign of his present Majesty, at the George Inn at Barford, within the said hundred of B. the said place being the most usual and common place of our meeting, within the said hundred of B. We the said commissioners did direct our joint precept, bearing date the same day and year aforesaid, to John Doe, yeoman, then an inhabitant of the hamlet or liberty of H. within the said hundred of B. whom we the said commissioners thought most convenient to be one of the assessors of all and every the rates and sums of money imposed on the said hamlet or liberty of H. by virtue of the said acts, requiring him to appear before us the said commissioners as aforesaid, at the said George Inn at Barford aforesaid, within the said hundred of B. on the ——— day of ——— then next ensuing, the same day not exceeding eight days

days after the date of our said precept, according to the said acts: And the said J. D. thereupon appeared before us the said commissioners, at the said George Inn at B. aforesaid, within the said hundred of B. on the said ——— day of ———, and at such his appearance we the said commissioners then present, then and there caused to be read to the said J. Doe, the rates, duties, and charges, imposed upon the said hamlet or liberty of H. within the said hundred of B. by virtue of the said act, and openly declared the effect of our charge to him, and how and in what manner he should and ought to make his said assessment, and how he ought to proceed in the execution of the said act, according to the true intent and meaning of the same; and at and after such our charge given to the said J. D. we the said commissioners, on the said ——— day of ———, at B. aforesaid, within the said hundred of B. issued our warrant, bearing date the ——— day of ———, in the year aforesaid, and directed the same to the said J. Doe, then one of the most able and sufficient inhabitants of the said hamlet or liberty of H. within the said hundred of B. and also to one ———, another of the most able and sufficient inhabitants of the said hamlet or liberty, within the said hundred of B. requiring them to be assessors of all and every the rates or sums of money imposed on the said hamlet or liberty of H. within the hundred of B. by virtue of the said acts, and also therein appointed and prefixed the ——— day of ———, in the year aforesaid, at the Bull Inn at Barford aforesaid, within the said hundred of B. to be the day and place for him the said J. Doe and the said ———, assessors as aforesaid, to appear before the said commissioners, and to bring in their assessments of such rates and sums of money, in writing; and we the said commissioners, being now duly met and assembled on this present said ——— day of ———, in the year aforesaid, at the Bull Inn at B. aforesaid, being the time and place appointed and prefixed in and by our said warrant as aforesaid, the said J. Doe so as aforesaid appointed assessor, makes default in his appearance, and neglects to appear before us here at this time, so appointed by our said warrant for

for his appearance, not having any lawful excuse made out to us by the oaths of two credible witnesses, according to the said act: And hereupon at this present meeting, so holden by and before us the said commissioners, on this said ——— day of ———, in the year aforesaid, at the said Bull Inn in B. aforesaid, within the said hundred of Bampton, R. R. of, &c. a credible witness, cometh before us the said commissioners, and upon his oath on the Holy Gospel of God, to him duly administered by us, deposeth and saith, that the said R. R. on the ——— day of ———, in the year aforesaid, delivered our said warrant to the said J. Doe, by reason whereof and by force of the said act the said J. Doe hath forfeited and lost to his said Majesty, such sum as we the said commissioners now present, or the major part of us, shall think fit, not exceeding the sum of £40, to be levied as in and by the said act is directed: wherefore day is given by us the said commissioners here present to the said J. Doe, to appear before us on the ——— day of ———, to shew cause, if any, why we the said commissioners, or the major part of us, should not fine him for his said offence, in such sum not exceeding the sum of £40, as we the said commissioners, or the major part of us, shall think fit, according to the direction of the said act; and now at this day, to wit, on the ——— day of ———, in the year aforesaid, being the time and place appointed for the said J. Doe to answer for his said offence as aforesaid, the said J. Doe having been duly summoned in this behalf, appears before us A. B. C. D. and E. F. the said commissioners, we being now here met by virtue of the said statute, and the said J. Doe being now informed by us of the said charge, and having heard the said evidence of the said R. R. admits that one was delivered to him the said J. Doe by the said R. R. as he the said R. R. hath deposed, and being asked by us the said commissioners here present, what he hath to say why we the said commissioners should not fine him according to the directions of the said act, does not make out to us, by the oaths of two credible witnesses, any lawful or reasonable excuse for not appearing before us according to the tenor of our said warrant: whereupon it manifestly appears to us, that the said J. Doe

is

is guilty of the said offence; therefore it is considered by us the said commissioners here present, that the said J. Doe is convicted of the said offence; and we do think fit and adjudge, that the said J. Doe, for his said default, do forfeit and lose to his Majesty the sum of £5, to be levied as by the said act is directed, according to the form of the statute in such case made and provided. In witness whereof, we the said A. B. C. D. and E. F. commissioners as aforesaid, have set our hands and seals to this record of conviction, at B. aforesaid, within the said hundred of Bampton, this —— day of ——.

F. Buller.

If the defendant does not appear in pursuance of the summons, the conviction must be altered, and it should be stated, that the person who served the summons was sworn and proved the service, and the person who served the warrant should, in that case, or in case the defendant appears and does not admit the warrant being served, be again examined on oath, and his evidence set out again.

F. Buller, Nov. 1, 1775.

Warrant *of Distress to levy the Penalty on the foregoing Conviction, together with Costs of the Distress.*

Hundred of Bampton, in the County of Oxford. To E. W. and G. H. collectors, &c. Whereas John Doe, of the hamlet of H., within the hundred of B. in the county of Oxford, yeoman, at a meeting of us A. B., C. D. and E. F., named, &c. *(as in the conviction)* and acting as such, commissioners in and for the hundred of Bampton, in the county of Oxford, held on the ——— day of ———, in the ——— year of his Majesty's reign, at the George Inn in Barford, within the said hundred of Bampton, in the county of O., is duly convicted by us the said commissioners, for that we the said commissioners issued our warrant, bearing date the ——— day of ———, in the year aforesaid, and directed the

the same to the said J. Doe, then one of the most able and sufficient inhabitants of the said hamlet or liberty of H. in the said hundred of B., requiring him to be one of the assessors of all and every the rates and sums of money imposed on the said hamlet or liberty of H. within the said hundred of Bampton, by virtue of the said acts, and also therein appointing and prefixing the said ——— day of ———, in the year aforesaid, at the Bull-Inn in Barford aforesaid, within the said hundred, to be the day and place for him the said J. Doe, assessor as aforesaid, to appear before us the said commissioners, and to bring in his assessments of such rates or sums of money in writing: Yet the said J. Doe made default in his appearance, and neglected to appear before us at the time so appointed for his appearance, by our said warrant, not having lawful excuse made out, by the oaths of two credible witnesses, according to the form of the statute in such made: By reason whereof, and by force of the said statutes in that behalf, the said J. Doe, for his said offence, forfeited and lost to his said Majesty, such sum as we the said commissioners present, at the said meeting, or the major part of us should think fit, not exceeding the sum of £40, to be levied as in and by the said statutes is directed, whereupon we the said commissioners, present at that meeting aforesaid, thought fit and adjudged, that the said J. Doe, for his said default, should forfeit and lose to his said Majesty the sum of £5, to be levied as by the said acts is directed, as by the record of the said conviction under our hands and seals, relation being thereunto had more fully appears; these are therefore in his Majesty's name, to authorize and require you the said collectors, or either of you, to demand the said sum of £5 of the said J. Doe, if he can be found, or else to demand the same at the last place of abode of him the said J. Doe, and in case he shall not pay the same upon demand, then to levy the said sum of £5 upon the goods and chattels of the said J. Doe, by distress and sale thereof, and the said goods and chattels so taken by distress, to keep for the space of four days, at the costs and charges of the said J. Doe, and if the said J. Doe do not pay the said £5, the money so distrained for, within the space of four days,

days, that you then cause the said distress to be appraised by two or more of the said inhabitants, where the same shall be taken, or other sufficient persons, and to be sold for the payment of the said £5, and the overplus coming by such sale, if any be over and above the said £5, and the charges of taking, keeping, and selling the said distress, you return to the said J. Doe, and that out of the money arising from such distress and sale of the goods and chattels of the said J. Doe, you do pay the said £5 to his Majesty's Receiver-General of the Land-Tax for the county of Oxford, or to his lawful deputy, for the use of his Majesty, according to the form of the statutes in that behalf, and certify to us what you shall have done in the premises, at ———, on the ——— day of ——— next, as you shall answer the contrary at your peril. Given under our hands and seals, the ——— day of ——— n the year of our Lord 1775.

F. Buller.

LOTTERY.

1. Conviction *of an Offender apprehended (a) and brought before a Justice of the Peace, for insuring Tickets in a Little-Goe.*—(42 Geo. 3. c. 119. s. 5 & 6.)

———, *to wit.* Be it remembered, that after the 28th ıy of June, in the year of our Lord 1802, to wit, on the

ı) By sec. 6, "It shall and may be vful for any person whatsoever apprehend on the spot any per- ıs so (*i. e.* by insuring, as in sec. offending, and to convey, or se to be conveyed, before any gistrate or Justice of the ce, residing near the place ne such offence shall be com- ted, the person or persons so rehended, to be proceeded ist under this Act; and *when person or persons shall be ap- ended and brought before any istrate or Justice aforesaid*, for such offence, it shall be law- or such Magistrate or Justice roceed to examine into the circumstances of the case, and upon due proof, upon oath, &c. to give judgment and sentence accordingly; and where the party accused shall be convicted of such offence, and such penalty (viz. 100*l.* by sec. 5.) shall not be immediately paid, to commit such offender to prison, for any time, not exceeding six calendar months, nor less than one, without appeal, or until such penalty shall be satisfied," the penalty to go one-third to his Majesty, one-third to the informer, and the other third to the person or persons apprehending or securing the offender.

——— day of ———, in the year of our Lord ———, at ———, in the county of ———, C. D. late of ———, labourer, was apprehended and brought before me G. T., one of the Justices of our Lord the King, assigned to keep the peace of our said Lord the King in and for the said county of ———, residing near the place where the offence hereinafter mentioned was committed, by G. H., and was then and there charged before me, by the information of one T. S. for that the said C. D. on the said ——— day of ———, at ——— aforesaid, in consideration that one L. M. had then and there paid to the said C. D. the sum of ———, of lawful money of Great Britain, promised the said L. M., and agreed to pay to him the said L. M. the sum of £———, of like lawful money, if a certain ticket, numbered, (lot, number, or figure, *as the case may be)* in a certain illegal game and lottery, called a Little-Goe, being a lottery not authorized by Parliament (*a*), then and there, to wit, at ——— aforesaid, in the county aforesaid, kept to be played and drawn at with numbers and figures (or by dice, lots, cards, balls, *as the case may be)* should be drawn fortunate, (or otherwise, as the contingency insured against was;) and afterwards, to wit, on the same day and year aforesaid, at ——— aforesaid, the said C. D. being then present, and having heard the said information and charge, and being asked what he had to say in his defence, why he should not be convicted of the said offence so charged as aforesaid, saith, that he is not guilty of the same: Nevertheless, thereupon, at the same day and place aforesaid, one credible witness in this behalf, to wit, T. S. being duly sworn in the presence of the said C. D., deposeth as follows, in the presence and hearing of the said C. D., that is to say, *(here set out the evidence fully and circumstantially, as given by the witness:)* And the said C. D. being here present, and having heard the whole of the evidence now produced against him, and being asked by me the said Justice what he had to say, why he should not be convicted of the said offence contained in the said information and evidence, maketh no defence, nor doth he now offer or produce before me the said Justice, any evidence to contradict the testimony so given to me in support of the said information;

(*a*) *See* S. 2 of the Act.

If the defendant produces any evidence it should be stated.

information; whereupon all and singular the premises being considered, and mature deliberation being thereupon had, it manifestly appears to us the said Justices, that the said C. D. is guilty of the offence charged upon him in and by the said information of the said T. S.: it is therefore adjudged by me the said Justice, that the said C. D. be convicted, and he is hereby convicted of the offence charged upon him in and by the said information, according to the form of the statute in that case made and provided; and I do award and adjudge that the said C. D. hath for his said offence forfeited, and that he do pay the sum of one hundred pounds of lawful money of Great Britain, to be distributed, and go and be applied, one-third thereof to the use of our Sovereign Lord the King, and one-third thereof to the use of the said T. S. the said informer, and one-third thereof to him by whom the said offender was apprehended and secured, according to the form of the statute in such case made and provided. In witness whereof I, the said Justice to this present record of conviction, have put my hand and seal, at ——— aforesaid, in the county aforesaid, this ——— day of ———, in the year of our Lord ———.

Note. The stat. 27 Geo. 3. c. 1, taking away the jurisdiction of Justices as to Lotteries, applies only to State Lotteries, 5 T. R. 338.

MANUFACTURES—*Buttons.*

21. Conviction *by one Justice, on 7 Geo. 1. st. 1. c. 12, for wearing Buttons made of Cloth.*

West-Riding of Yorkshire, to wit. Be it remembered, that on the 8th day of March, in the 42d year of the reign of our Sovereign Lord George the Third, of the United Kingdom of Great Britain and Ireland, King, defender of the faith, at Sheffield, in the West-Riding of the county of York, John Grainger, of the same place, button-maker, in his own proper

person, cometh before me John Lowe Clerk, one of the Justices of our said Sovereign Lord the King, assigned to keep the peace of our said Lord the King in and for the said Riding, and also to hear and determine divers felonies, trespasses, and other misdemeanours committed within the said Riding and upon the oath of Enoch Allott a credible witness, by me the said Justice then and there duly administered, exhibiteth before me the said Justice a certain information, and thereby informeth me the said Justice on his said oath, that Francis Parker of Ecclesal Bierton in the parish of Sheffield, in the said Riding, Clerk, did within one month now last past, to wit, on the 4th day of March, in the year aforesaid, at Sheffield aforesaid in the said parish of Sheffield and in the Riding aforesaid, wear on a certain garment, commonly called a spencer, not made of velvet, one dozen of buttons made of cloth, whereof wearing garments then and there were and are usually made, against the form of the statute in that case made and provided, whereby, and by force of the same statute, the said Francis Parker hath forfeited the sum of forty shillings, of lawful money of Great Britain; and thereupon the said John Grainger prays judgment in the premises, and that the said Francis Parker may be convicted of the said offence, according to the form of the statute in such case made and provided, and that he may be summoned to answer the premises, and to make defence therein before me the said Justice: And afterwards, to wit, on the 16th day of March aforesaid, at a certain place called the Cutler's-Hall, in Sheffield aforesaid, in the Riding aforesaid, being the time and place appointed by the summons on the above information, the said Francis Parker being summoned, appeareth, and is present before me the said Justice, in order to answer and make good his defence to the said information and offence charged on him as aforesaid; and the said Francis Parker having heard the same, is asked by me the said Justice if he can say any thing for himself, why he should not be convicted of the premises above charged upon him as aforesaid, who pleadeth that he is not guilty of the said offence: Nevertheless, on the said 16th day of March aforesaid, in the year aforesaid, at the said place called the Cutler's

Complaint on oath, s. 2.

Appearance.

Plea of Not Guilty.

ler's Hall, in Sheffield aforesaid, in the Riding aforesaid, one credible witness, to wit, the said Enoch Allott, of Sheffield aforesaid, in the Riding aforesaid, button-maker, cometh before me the said Justice, and before me the said Justice upon his oath, by me the said Justice then and there in the presence of the said Francis Parker duly administered, deposeth, sweareth, and saith, in the presence of him the said Francis Parker, that on the said 4th day of March, in the year aforesaid, at Sheffield aforesaid in the said parish of Sheffield and in the Riding aforesaid, the said Francis Parker (*a*) did wear on a certain garment, commonly called a spencer, not made of velvet, one dozen of buttons made of cloth (whereof wearing garments were and are usually made:) And thereupon the said Francis Parker having heard and fully understood all and singular the matters and things in the said information and evidence contained, he the said Francis Parker is by me the said Justice asked what he hath to say or offer in his defence against the said information and offence, and in answer to the evidence given as aforesaid, and what he hath to say why he should not be convicted of the premises charged upon him as aforesaid; and forasmuch as the said Francis Parker doth not shew or alledge any sufficient cause, or produce or offer any evidence in answer to the said information, evidence, matters, or things charged upon him as aforesaid, it manifestly appears to me the said Justice, that the said Francis Parker is guilty of the offence above charged upon him in and by the said information: It is therefore, on the day and year last aforesaid, and at the place aforesaid, adjudged by me the said Justice of the offence charged upon him in and by the said information, according to the form of the statute in such case made and provided: And I award and adjudge that the said Francis

Evidence.

Judgment.

Forfeiture.

(*a*) The following observation was added in the margin by the gentleman who drew this conviction:—The Court of K. B. recommend and expect that the evidence really given should be stated, and not such a statement merely as literally corresponds with the information. *See* 7 T. R. 153, note (*c*), and 8 T. R. 222, note (*b*): not having the particulars of the evidence before me, I cannot state it, but I think the Magistrate should state it correctly if he has the minutes of it, and not leave it in the form it stands at present.

Parker,

Parker, for his offence aforesaid, hath forfeited the sum of forty shillings, to be distributed as the statute aforesaid (*b*) doth direct. In witness whereof I the said Justice to this present record of conviction have set my hand and seal, at Sheffield aforesaid, in the Riding aforesaid, the ——— day of March, in the year of our Lord 1802.

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22. Information, *before two Justices, for placing for sale Metal Buttons, marked* "Gilt," *which were not gilt, against the Statute,* 36 *Geo.* 3. *c.* 60. *s.* 2.

Warwickshire, to wit. Be it remembered, that on the 24th day of July, in the year of our Lord 1800, at the parish of Birmingham, in the county of Warwick, J. D. of the parish of Birmingham aforesaid, in the said county, yeoman, cometh in his proper person before us W. V. and W. H. esquires, two of his Majesty's Justices of the Peace for the said county, and as well for himself as for the poor of the parish of Birmingham aforesaid, in the county aforesaid, exhibiteth unto and before us an information and complaint, and thereby giveth us the said Justices to understand and be informed, that after the 1st day of August, 1796, and within the space of three calendar months now last past, to wit, on the 21st day of July, in the said year of our Lord 1800, at the parish of Birmingham aforesaid, in the county aforesaid, Anthony Baldwin and William Baldwin, both of the parish of Birmingham aforesaid, in the county aforesaid, manufacturers and makers of metal buttons, did unlawfully and fraudulently put and place, and caused to be put and placed, for sale, in and upon certain cards other than pattern cards, divers metal buttons, to wit, four hundred and twenty-eight gross and two dozen of metal buttons, each and every of the said

(*b*) This is by the statute one moiety to the person *on whose oath the defendant is convicted,* and one moiety to the poor of the parish where the offence was committed. This is an instance, therefore, in which a person interested in the penalty may be a witness, contrary to the general rule.

metal

metal buttons having then and there marked on the underside thereof a certain word, indicating the quality thereof, to wit, the word "gilt," the said metal buttons not then being, nor any nor either of them then being gilt with gold, they the said Anthony Baldwin and William Baldwin then and there *well knowing* the same metal buttons, and each and every of them, not to be gilt with gold, contrary to the form of the statute in such case made and provided; by reason whereof, and by force of the statute in such case made and provided, they the said Anthony Baldwin and William Baldwin have, for the said offence, forfeited the said metal buttons, together with the sum of £ of lawful money of Great Britain: wherefore the said ——— prays the judgment of us the said Justices in the premises, and that the said Anthony Baldwin and William Baldwin may be convicted of the said offence, according to the form of the said statute in such case made and provided; and that the said Anthony Baldwin and William Baldwin may be summoned to appear before us the said Justices, to the said information and complaint, and make their defence thereto before us the said Justices.

This allegation is indispensably necessary, R. v. Jukes, 8 T. R. 538.

The like, *on the same Statute, as to Buttons marked* "double Gilt," *and Buttons marked* "treble Gilt," s. 2, 3, 4.

——— And be informed, that after the 1st day of August, 1796, and within the space of three calendar months now last past, to wit, on the 21st day of July, in the said year of our Lord 1800, at the parish of Birmingham aforesaid, in the county aforesaid, Anthony Baldwin and William Baldwin, both of the parish aforesaid, manufacturers and makers of metal buttons, did unlawfully and fraudulently put and place, and cause to be put and placed, for sale, in and upon certain cards other than pattern cards, divers metal buttons,

to

to wit, ——— of metal buttons, each and every of the said metal buttons having then and there marked on the underside thereof certain words, indicating the quality thereof, to wit, on nine hundred and forty-two dozens, part thereof, the words "double gilt," and on ———, the residue thereof, the words "treble gilt;" the said metal buttons so marked "double gilt," not then having, nor any nor either of them then having, gold remaining, put, placed, and equally spread upon the upper surface of the same buttons, exclusive of the edges, in the proportion of ten grains to such quantity of the same buttons, the upper surfaces of which, exclusive of the edges, measured or were equal to the superficies of a circle twelve inches in diameter, nor then being double gilt, according to the statute in such case made and provided, nor being then so gilt as to be lawfully marked "double gilt," according to the same statute, and the said Anthony Baldwin and William Baldwin then and there well knowing the same; and the said buttons so marked "treble gilt," not then having, nor any nor either of them then having, gold remaining, put, placed, and equally spread upon the upper surface of the same buttons, exclusive of the edges, in the proportion of fifteen grains to such quantity of the same buttons, the upper surfaces of which, exclusive of the edges, measured or were equal to the superficies of a circle, twelve inches in diameter, nor then being "treble gilt," according to the statute in such case made and provided, nor then being so gilt as to be lawfully marked "treble gilt," according to the same statute; and they the said Anthony Baldwin and William Baldwin then and there well knowing the same, contrary to the statute in such case made and provided; by reason whereof, and by the force of the statute, &c. &c. (as in the foregoing information).

MANUFACTURES—*Cotton.*

3. Conviction *pursuant to* 17 *Geo.* 3. *c.* 56. *s.* 1 *and* 21, *for* embezzling Cotton Materials *entrusted to Defendant to be worked up; with Judgment of Imprisonment and Whipping, according to Sect.* 3.

County of Lancaster, to wit. Be it remembered, that on the 21st day of July, in the year of our Lord 1800, Thomas Pearson, of Blackburn, in the county of Lancaster, weaver, was convicted before us, John Clayton and Bertie Markland, Esquires, two of his Majesty's Justices of the Peace in and for the said county of Lancaster, of this, that the said Thomas Pearson, unlawfully and against the form of the statute in that case made and provided, on the 26th day of March, in the said year of our Lord 1800, at Blackburn aforesaid, in the county aforesaid, being then and there entrusted by Richard Birley and John Hornby, both of Blackburn aforesaid, manufacturers of cotton goods, with four pieces of cotton warp, and 9lbs. weight of cotton weft, of the cotton materials, goods and chattels of the said Richard Birley and John Hornby, and being then and there hired and employed by the said Richard Birley and John Hornby to work up and manufacture the same into pieces commonly called calicoes, for them the said Richard Birley and John Hornby, embezzled two pieces of the said cotton, and four pounds and a half weight of cotton weft, part of the said cotton materials with which he the said Thomas Pearson was so entrusted as aforesaid: And the said Thomas Pearson being so convicted as aforesaid, we the said Justices do adjudge that the said Thomas Pearson be committed to, and we the said Justices do accordingly commit him to his Majesty's gaol the House of Correction, at Preston, in the said county of Lancaster, there to be kept to hard labour, and that he be kept to

The Conviction must be before two Justices, s. 2.

Imprisonment, labour, and whipping, s. 3.

to hard labour for the space of three days, exclusive of the day of commitment; and we do deem it proper, and adjudge and order, that the said Thomas Pearson, on the last day of the said three days, at the hour of eleven in the forenoon of that day, be publicly whipped in the market-place in Preston aforesaid. Given under our hands and seals, at Blackburn aforesaid, the day and year first above written.

MANUFACTURERS—*Wages.*

Conviction *before two Justices of a* Master Weaver *in London, for paying a Journeyman less Wages for making a Turkey Gause, than directed by an Order of Sessions made pursuant to* 13 *Geo.* 3. *c.* 68, *contrary to that Act, Sect.* 2.

(*See* the Form given by 32 Geo. 3. c. 44.)

London, to wit. Be it remembered, that on the ——— day of ———, in the year of our Lord ———, R. S. of Friday-street, in the city of London, weaver, is convicted before us, ———, Esquire, Mayor of the city of London, and T. W. Esquire, one of the Aldermen of the said city, two of his Majesty's Justices of the Peace in and for the said city; for that, after the making of a certain Act of Parliament, made and passed in the 13th year of his present Majesty, intituled, "An Act to empower the Magistrates therein mentioned to settle and regulate the Wages of Persons employed in the Silk Manufacture within their respective Jurisdictions," before the said ——— day of ———, the Lord Mayor, Recorder, and Aldermen of the said city of London, at the General Quarter Sessions of the Peace of our Lord the King, holden in and for the city of London, at the Guildhall within the said city, by adjournment, on the 15th day

day of July, in the ——— year of the reign of his present Majesty, upon application made to them for the purpose of settling, regulating, ordering, and declaring the wages and prices of work of journeymen weavers working within their jurisdiction in the said manufacture, did settle, regulate, order, and declare the wages and prices of the work of journeymen weavers working within their jurisdiction in the several branches of the silk manufacture called the strong, plain, foot, figured, flowered, black, and fancy branches, and amongst other things did thereby settle, regulate, order, and declare the price of work of journeymen weavers working within their said jurisdiction in the said manufacture for making and manufacturing of Turkey Gauze, of the width of 36 inches or under, with one thread in the reed, made with the warp double silk raw, and containing 3000 counts or under, with 90 shoots or less to an inch, at the sum of 9*d.* by the yard; and that after such order was made as aforesaid, the same was printed and published at the request of the persons who applied for the same, three times in two daily newspapers, published in London, to wit, in a certain paper published in London, called ———, on the ——— day of ———, and in a certain other, &c.; and after the making and publishing the said order as aforesaid, to wit, on the 17th day of February, in the year of our Lord ———, R. S. of Friday-street, in the city of London, weaver, was, and from thence hitherto hath been, and still is, a master weaver in the silk manufacture, to wit, at the parish of St. Matthew, Friday-street, in the city of London aforesaid, and that one I. N. was also on the same day and year last aforesaid, and continually from thence hitherto hath been, and still is, a journeyman weaver in the silk manufacture, at the parish of St. Matthew, Friday-street, in the city of London aforesaid, and there employed as the journeyman of the said R. S. to work for him and for W. C. the co-partner in trade of the said R. S. in the silk manufacture aforesaid, and particularly in the making of a certain piece of silk called Turkey Gauze, containing therein 140 yards of wrought silk, of the width of 36 inches, with one thread in the reed, made with

Publication of order.

State the publications.

I. N. employed by Defendant as journeyman,

To make a Turkey Gauze.

The order of Sessions must be exactly followed.

with the warp double silk raw, with less than 90 shoots to an inch, and containing 3000 counts, being part of the works the prices whereof were so settled, regulated, ordered, declared, and published as aforesaid: And the said I. N. being so employed by the said R. S. as aforesaid, did make the said last mentioned work for them the said R. S. and W. C. containing therein the said 140 yards of wrought silk, of the width of 36 inches, with one thread in the reed, made with the warp double silk raw, with less than 90 shoots to the inch, containing 3000 counts as aforesaid: And on the ——— day of ———, in the year last aforesaid, at the parish of St. Matthew, Friday-street, in the city of London aforesaid, and within the jurisdiction of us the said Justices, the said R. S. did pay to the said I. N. for such work the sum of 6*d.* by the yard for each yard thereof, and no more, such price so paid being less by 3*d.* *per* yard for each yard thereof, than the price so settled, regulated, ordered, declared, and published as aforesaid, contrary to the form of the statute in such case made and provided: And we the said Justices do adjudge him to pay and forfeit for the same the sum of £50 of lawful money of Great Britain, to be paid, after deducting £—— for the expence of this prosecution, into the hands of the Master of the Weavers Company, to be disposed of as the statute aforesaid doth direct. Given under our hands and seals, the day and year first above written, at the Guildhall of the city of London aforesaid.

See 13 Geo. 3. c. 68. s. 2.

The same regulations and penalties extended to the manufacture of silk with other materials, in the same jurisdiction, by 32 Geo. 3. c. 44.

Certiorari taken away, 32 Geo. 3. c. 44. s. 3.

PARISH-APPRENTICE.

24. Conviction *of an Inhabitant and Occupier of Lands within the Parish, for not receiving a Parish Apprentice, bound to him by the Directors and acting Guardians of the Poor within the Hundred, with the Consent of two Justices,* 20 Geo. 3. c. 36. *(See* 8 & 9 Will. c. 30. s. 5. 18 Geo. 3. c. 47. 42 Eliz. c. 2. s. 5.)

Suffolk, to wit. Be it remembered, that on the ——— day of ———, in the ——— year of the reign of our Sovereign Lord George the Third, by the grace of God, &c., at ———, in the said county of Suffolk, Samuel Enefer, gentleman, cometh before us, two of the Justices of our said Lord the King, assigned to keep the peace of our said Lord the King in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanours in the said county committed, and maketh information and complaint, that at the several times hereinafter mentioned, one Everson English was a poor child, incapable of providing for himself, and whose parents were not then able to maintain him, and under the age of eighteen years, to wit, the age of ——— years and ——— months, or thereabouts, and then belonging to the parish of ———, within the hundred of Bosmere and Claydon, in the said county, and then maintained by the guardians of the poor within the said hundred, and then was and remained under the government of the said guardians, and that Jonathan Abbott, at those several times, was an inhabitant and occupier of land within the said parish of ———, in the hundred and county aforesaid, and exercised and carried on the trade and business of a ——— there; and that at those several times ———, &c. were the directors of the poor within the said hundred, and ———, &c. were the acting guardians of the poor within the said hundred, before those several times, or any of them, duly chosen to be such directors and acting guardians, according to the form and effect of the statute in that behalf made and provided; and the

The act in question being by a clause in it

made a public act, it was not necessary to set out the title at length.

the said Everson English so being such poor child as aforesaid, and the said Jonathan Abbott so being such inhabitant as aforesaid, and the said ———, &c. &c. so being such directors and acting guardians as aforesaid; the said directors and acting guardians on the ——— day of ———, in the year of our Lord 1791, at the hundred aforesaid, did, by and with the consent of ——— and ———, then and there being Justices of our said Lord the King *, assigned to keep the peace of our said Lord the King in the said county, and also to hear and determine, &c. by a certain indenture of two parts, each part thereof then and there made and sealed with the common seal (*a*) of the said guardians of the poor within the said hundred of Bosmere and Claydon, in the said county of Suffolk, bearing date the same day and year last aforesaid, and signed and confirmed by the said —— ——, then being such Justices aforesaid, appoint to be bound, and bind the said Everson English apprentice to the said Jonathan Abbott, for the term of seven years next ensuing the date of the same indenture, according to the form of the statute in such case made and provided; and that he the said Samuel Enefer, by the order, and on the behalf of the said directors and acting guardians, afterwards, on the ——— day of ———, in the year aforesaid, at the hundred aforesaid, did tender and offer the said Everson English to the said Jonathan Abbott, to receive and provide for the said Everson English as such apprentice as aforesaid, and the said Samuel Enefer did also then and there, by the like order of the said directors and acting guardians, shew and offer to deliver to the said Jonathan Abbott one part of the said indenture, and by the like order, and on behalf of the said directors and acting guardians, tender the other part of the same indenture to the said Jonathan Abbott to be executed by him, and request the said Jonathan Abbott that he would execute the same, according to the form and effect of the statute in that behalf made and provided; but the said Jonathan Abbott then and there wholly neglected and refused, as well to receive and provide for the said Everson English the said apprentice, as also to execute the said other part, or any counter-part of the said indenture, contrary to the form of the

Binding.

(*a*) See observation at the end.

Apprentice tendered to defendant.

Refusal.

the statutes in that case made and provided; whereby, and by reason of his said offence, the said Jonathan Abbott forfeited for his said offence the sum of £10, to be paid to the directors and acting guardians of the poor within the said hundred, their treasurer appointed, and to be applied to the relief of the poor within the said hundred; and the said Samuel Enefer now, to wit, on the day and year first above mentioned, at ——— aforesaid, in the said county, prays that the said Jonathan Abbott may be convicted of the said offence, in manner and form aforesaid, above laid to his charge, and that he may be adjudged to forfeit and pay for the same, the sum of £10, to be paid and applied as aforesaid: And thereupon, afterwards, upon the ——— day of ———, in the year aforesaid, at ———, in the county aforesaid, he the said Jonathan Abbott appeareth, and is present before us the said Justices, in pursuance of a summons by us duly issued for that purpose, and is charged with the said offence, and hears and fully understands the said matters and things contained in the said information, and is asked by us the said Justices if he can say any thing for himself why he the said Jonathan Abbott should not be convicted of the said offence above charged upon him, in form aforesaid, according to the form of the statutes in that case made and provided, whereupon the said Jonathan Abbott pleadeth and says that he is not guilty of the said offence: Nevertheless, afterwards, on the ——— day of ———, at ——— aforesaid, in the county aforesaid, the said Samuel Enefer, a credible witness in this behalf, cometh before the Justices aforesaid, to prove the truth of the charge in the said information contained, against the said Jonathan Abbott, and is by us the said Justices, in the presence of the said Jonathan Abbott, duly sworn, and takes before us the said Justices his corporal oath, upon the Holy Gospels of God, to speak the truth, the whole truth, and nothing but the truth, of and upon the matters and things in the said information contained, (we the said Justices then and there administering, and having competent power to administer, such oath to the said Samuel Enefer in that behalf;) and the said Samuel Enefer being so sworn as aforesaid, doth, on his said oath, in

Appearance.

Plea, Not Guilty.

Informer, witness.

Evidence.

in the presence of the said Jonathan Abbott, say, depose, and swear, that at the several times hereinafter mentioned, the said Everson English was a poor child, &c. (*as in the information verbatim to* * p. [84], then go on) and then and there produced before us the said Justices the said indenture so sealed, signed, and confirmed as aforesaid, and proved before us the execution thereof, and that the same was so signed and confirmed as aforesaid; and that he the said Samuel Enefer, by the order and on the behalf of the said directors and acting guardians, afterwards, on the ——— day of ———, in the year aforesaid, at the hundred aforesaid, did tender and offer the said Everson English to the said Jonathan Abbott, to be received and provided for by the said Jonathan Abbott as such apprentice as aforesaid, and then and there requested the said Jonathan Abbott to receive and provide for the said Everson English as such apprentice as aforesaid; and that the said Samuel Enefer did also then and there, by the like order of the said directors and acting guardians, shew and offer to deliver to the said Jonathan Abbott one part of the said indenture, and by the like order, and on behalf of the said directors and acting guardians, tender the other part of the said indenture to the said Jonathan Abbott to be executed by him, and did request the said Jonathan Abbott that he would execute the same, according to the form and effect of the statute in that case made and provided; but the said Jonathan Abbott then and there wholly neglected and refused, as well to receive and provide for the said Everson English the said apprentice, as also to execute the said other part, or any counter-part of the said indenture; and thereupon the said Jonathan Abbott is asked by us the said Justices, if he can say any thing in answer to the said evidence, and the said Jonathan Abbott says nothing in answer thereto; and thereupon we the said Justices, on the ——— day of ———, in the year aforesaid, at ———, in the county aforesaid, do convict the said Jonathan Abbott of the said offence, in and by the said information above laid to his charge, and adjudge that the said Jonathan Abbott hath forfeited for his said offence the sum of £10, to be paid to the directors and acting guardians of the poor for the hundred

No defence.

hundred aforesaid, or to their treasurer or appointee, to be applied to the relief of the poor within the said hundred. In witness whereof we the said Justices to this record of the conviction as aforesaid, have set our hands and seals, at ———, in the county aforesaid, the ——— day of ——— in the year aforesaid.

Opinion on the foregoing Conviction.

I am afraid that the indentures have not been regularly executed, and that the defendant cannot be legally convicted. The directors and acting guardians are not the corporation, but only the members of the corporation authorized to do particular acts. They have no common seal of their own, but act as individuals, and being directed by the statutes to bind apprentices in like manner as overseers and churchwardens, they should individually have executed the indentures, and not affixed the common seal; having affixed the common seal, the indenture appears as the deed of the corporation, and not the distinct act of the directors and acting guardians.

A. C.

PAWNBROKER.

25. Information *against a* Pawnbroker, *on* 39 *&* 40 *Geo.* 3. *c.* 99. *s.* 22, *for not exhibiting a Table of Interest.*

———, *to wit.* Be it remembered, that on the ——— day of ———, in the year of our Lord 18——, A. B. of ———, cometh before me ———, Esq. one of his Majesty's Justices of the Peace in and for the city of ———, (or in and for the county of ———) and acting near the place where the offence hereinafter mentioned was committed, and giveth me the said Justice to understand and be informed, that C. D. of ———, after the commencement of a certain Act of Parliament, made and passed in the 39th and 40th years of the reign of our said Lord the King, intituled, "An Act for

for the better regulating the business of pawnbrokers," to wit, on the ——— day of ———, in the year of our Lord ——— aforesaid, and from thence until and at the time of exhibiting this information, did follow and carry on the trade and business of a pawnbroker, at and in a certain shop, in and parcel of a certain dwelling-house, situate and being in ———, in the city of London aforesaid: Nevertheless, the said C. D. not regarding the said Act of Parliament, did not, nor would, whilst he so followed and carried on the said business as aforesaid, cause to be painted or printed, in large legible characters, the rate of profit allowed by the said act to be taken by him the said ———, and also the various prices of the note or memorandum to be given by him, according to the rates in and by the said act allowed, and an account of what notes or memorandums were to be delivered gratis, and of the expence of obtaining a second note or memorandum, where the former one has been lost, mislaid, destroyed, or fraudulently obtained, and place the same in a conspicuous part of the said shop, wherein he so carried on the said trade or business as aforesaid, so as to be legible by the persons pledging goods and chattels, standing in the places provided for such persons coming to pawn, or redeem goods and chattels at the said shop; but on the contrary thereof, he the said C. D., during the time aforesaid, wholly neglected and omitted so to do, contrary to the form and effect of the said Act of Parliament, whereby, and by force of the said Act of Parliament, the said C. D. hath forfeited for his said offence a penalty of not less than forty shillings, nor more than £10, in the discretion of me the said Justice: And thereupon the said A. B. prays the judgment of me the said Justice of and upon the premises, and that the said C. D. may be summoned to answer the same, and to make his defence thereto before me.

26. Information

26. Information *against a* Pawnbroker *for not having his Name and Description over the Door. On the same Statute.*

(Commencement as before.)

——— Did not, nor would, whilst he so followed and carried on the business as aforesaid, cause to be painted, or written in large legible characters over the door of the said shop, by him, during the time aforesaid made use of for carrying on the said trade or business of a pawnbroker, the christian and sirname of him the said C. D., so carrying on the said trade or business as aforesaid, and the word pawnbroker following the same, according to the form and effect of the said Act of Parliament; but on the contrary thereof, he the said C. D., during the time aforesaid, to wit, on, &c., and from thence for the space of one week, and upwards, then next following, made use of the said shop for carrying on the said trade and business of a pawnbroker, without having such christian and sirname of him the said C. D., and the word "pawnbroker" so printed or written as aforesaid, contrary to the form and effect of the said Act of Parliament, whereby, and by force of the said Act of Parliament, the said C. D. hath forfeited for his said offence the sum of £10; and thereupon, &c.

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27. Information *against a* Pawnbroker *for taking Pledges of a Child under twelve Years of Age. On the same Statute.*

———, *to wit.* Be it remembered, that on the ——— day of ———, in the ——— year of the reign of our Sovereign Lord George the Third, and in the year of our Lord 18——, &c., at the public Office, in the High-street, Shadwell, in the county of Middlesex, cometh A. B. of the parish of St. George, in the said county, in his proper person, before me G. H., Esq. one of his Majesty's Justices assigned to keep the peace of our said Lord the King in and for the

 said

said county, and also to hear and determine divers felonies, trespasses, and other misdemeanours committed within the said county, and acting as such Justice near to the place where the offence herein mentioned was committed, and now here exhibiteth before me the said Justice a certain complaint and information, and therein complaineth and giveth me to understand and be informed, that after the commencement of a certain Act of Parliament, made and passed in the 39th and 40th years of the reign of our said Lord the King, intituled, "An Act for better regulating the business of pawnbrokers," and within twelve calendar months next before the exhibiting of this information, to wit, on the ——— day of ———, in the year of our Lord ———, at the parish of St. George, in the said county of Middlesex, one C. D. of the parish aforesaid (he the said C. D. then and there being a pawnbroker) did unlawfully receive and take in pledge a certain cotton frock, of and from one E. F. she the said E. F. then and there being and appearing to be under the age of twelve years, against the form of the statute in such case made and provided; whereby the said C. D. for his said offence hath forfeited a penalty not less than forty shillings, nor more than £10, of lawful money of Great Britain, to be applied as the said statute directs; all which the said A. B. is ready to prove before me the said Justice, by a credible witness, when the said C. D. shall be summoned to make his defence touching the same; wherefore the said A. B. prays judgment of me the said Justice in the premises, and that I will proceed thereupon according to law, and that the said C. D. may be summoned to appear before me to answer the premises, and to make defence thereto.

28. Conviction

28. Conviction *on* 39 *&* 40 *Geo.* 3. *c.* 99. *s.* 6, *of a* Pawnbroker *for taking a Pledge without giving a Duplicate:* 39 *&* 40 *Geo.* 3. *c.* 99. *s.* 6, *where the Goods were pawned in an assumed Name.* (See *the Form prescribed by the Act, s.* 34.)

Middlesex, to wit. Be it remembered, that on this ——— day of ———, in the ——— year of his Majesty's reign, ——— (*a*), Martha Collins, of the parish of St. Leonard, Shoreditch, in the county of Middlesex, pawnbroker, is convicted before me J. M. one of the Justices of the Peace for the said county of Middlesex, for that, or on the ——— day of ——— last, in the parish aforesaid, in the county aforesaid, the M. C., who then and there used the trade and business of a pawnbroker, did then and there take of and from one J. Gillner, in the name of J. Needham, by way of pledge, certain goods and chattels, to wit, *(&c. &c.)* upon which the said M. C. lent and advanced the sum of ——— shillings, and which said J. Gillner, at the time he pawned the said goods and chattels, informed the said Martha Collins, that his name was John Needham, and that he lived in Leonard-street, and she the said Martha Collins did not at the time of taking the said pledge, give to the said John Gillner a note or memorandum, fairly and legibly written or printed, or in part written, and in part printed, containing therein a description of the said goods so pawned, and also the place of abode of the person by whom such goods were pawned, according to the information given by the said John Gillner to the said Martha Collins, at the time of such pawning as aforesaid, contrary to the form of the statute in such case made and provided; and I the said Justice do adjudge the said Martha Collins to pay and forfeit for the same, the sum of £———, of lawful money of Great Britain; and I do award that out of the said sum of £———, so forfeited as aforesaid, the sum of £———, being one moiety of the said sum of £——— be paid to J. S., the party complaining in this behalf, and that the sum of £——— being

(*a*) Within 12 calendar months of of the offence, s. 27.

Not less than 40*s.* nor more than 10*l.* s. 26.

Award of one half to informer, s. 26.

being the remaining moiety of the said sum of £——— so forfeited as aforesaid, be paid and applied as the law directs. Given under my hand and seal, at ———, in the county aforesaid, the day and year first aforesaid.

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29. *The like, for taking more than legal Interest.*

Middlesex, to wit. Be it remembered, that on this ——— day of ———, in the ——— year of his Majesty's reign, Thomas Townshend, of the parish of St. Leonard, Shoreditch, in the county of Middlesex, pawnbroker, is convicted before me I. N. Esq. one of his Majesty's Justices of the Peace for the said county of Middlesex, for that, on ——— day of ———, in the year of our Lord ———, at the parish of St. Leonard, Shoreditch, in the said county of Middlesex, he the said Thomas Townshend, who then and there used and exercised the trade and business of a pawnbroker, did unlawfully demand, receive, and take of and from one Hannah Gogay, on redeeming the pawn and pledge hereinafter mentioned, the sum of one penny of lawful money of Great Britain, as for and by way of profit upon the sum of one shilling and sixpence, of like lawful money, the said sum of one shilling and sixpence being a sum not exceeding the sum of two shillings and sixpence; theretofore, to wit, on (*a*) the ——— day of ———, in the year of our Lord ———, at and in the parish aforesaid, in the county aforesaid, lent and advanced by the said Thomas Townshend upon a certain pawn and pledge, that is to say, three cotton window curtains, to the said Hannah Gogay, which said pawn and pledge was redeemed by the said Hannah Gogay (*b*) within the space of seven days after the expiration of the first calendar month after the same had been so pawned and pledged as aforesaid, that is to say, on the said ——— day of ———, in the year aforesaid, to wit, at and in the parish aforesaid, in the county aforesaid, the said sum of one penny, so demanded,

(*a*) The day of the pledge.

(*b*) Sec. 5.

manded, received, and taken as aforesaid, being more than at and after the rate of one halfpenny for the loan of any sum not exceeding two shillings and sixpence by the calendar month, and being greater profit than he the said Thomas Townshend was then and there entitled, and ought to demand, receive, and take, contrary to the form of the statute in such case made and provided; and I the said Justice do adjudge him to pay and forfeit, &c. *(as in the foregoing precedent, to the end.)* Given under my hand and seal, the day and year first above written.

Observation.

The above is sufficient to exemplify the form directed to be used by the statute, (39 and 40 Geo. 3. c. 99.) which only varies according to the particular offence, for which a blank is left, directed to be filled up by inserting the fact as stated in the information. The following forms of informations may therefore be of use in supplying the necessary statements, according to the respective facts:

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30. Information *against a* Pawnbroker *for not giving a* Note legibly written, *describing the Thing pawned,* 39 & 40 *Geo.* 3. *c.* 99.

Be it remembered, that on the ——— day of ———, in the year of our Lord ——, A. B. of ———, cometh before me ———, one of his Majesty's Justices of the Peace in and for the city of London, and acting near the place where the offence hereinafter mentioned was committed, and giveth me the said Justice to understand and be informed, that C. D. of ———, after the commencement of a certain Act of Parliament, made and passed in the 39th and 40th years of the reign of our said Lord the King, intituled, "An Act for better regulating the Business of Pawnbrokers," to wit, on, &c. at, &c. he the said C. D. then and there being a pawnbroker, did take, by way of pawn or pledge, of and from E. F. of ———, a certain shirt, whereon the sum of 5*s.* was then and there advanced and lent by the said C. D. to the

the said E. F.: Nevertheless, the said C. D., not regarding the said Act of Parliament, did not nor would, at the time of taking the said pawn or pledge, give the said E. F. a note or memorandum fairly and legibly written or printed, or in part written and in part printed, containing therein a description of the said shirt, which he the said C. D. so received in pawn or pledge, and also the sum of money advanced thereon, with the day of the month and year on which, and the name and place of abode of the said ———, by whom the said shirt was so pawned or pledged as aforesaid, and whether the said E. F. was a lodger or housekeeper, according to the form and effect of the said Act of Parliament in that behalf, but on the contrary thereof the said A. B. giveth me the said Justice to understand and be informed, that although the said C. D., at the time of taking the said pawn or pledge as aforesaid, did give to the said E. F. a certain note or memorandum, as and for such note and memorandum as aforesaid, yet the said shirt, or the name and place of abode of the said E. F. and whether he was a lodger or house-keeper as aforesaid, were not fairly and legibly written or printed, or in part written and in part printed, in or upon the said note or memorandum so given by the said ——— to the said ——— as aforesaid, contrary to the form and effect of the said Act of Parliament; whereby and by force of the said Act of Parliament, &c. &c.

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31. Information *against a* Pawnbroker, *on* 39 *and* 40 *Geo.* 3. *c.* 99. *s.* 2, *for taking a greater Sum than is allowed by that Act on Redemption.*

Be it remembered, that on the ——— day of ———, in the year of our Lord ———, one A. B. of, &c. in, &c. cometh before me ———, one of his Majesty's Justices of the Peace in and for the city of London, and acting near the place where the offence hereinafter mentioned was committed, and giveth me the said Justice to understand and be informed,

ed, that C. D. of ———, on the ——— day of ———, in the year aforesaid, at ——— aforesaid, in the parish of ———, in the ward of ———, in the said city of London, (he the said C. D. then and there using and exercising the trade or business of a pawnbroker) did demand, receive, and take, of and from E. F. of ———, who then and there applied and offered to redeem, and did then and there redeem a certain cloak before then, to wit, on the ——— day of ———, in the year aforesaid, at ——— aforesaid, in the parish last aforesaid, and ward aforesaid, pledged by one ———, of ———, with the said C. D. as and by way of security for a certain sum of money, to wit, the sum of £4 of lawful, &c. then and there, to wit, on ——— last aforesaid, at ——, &c. aforesaid, lent and advanced by the said C. D. to the said ———, and which said pledge did remain in pawn from thence, to wit, from the day and year last aforesaid, until and upon the said ——— day of ———, in the year aforesaid, a certain sum of money, to wit, twelve shillings, of like lawful money, as and by way of profit, over and above the said sum of £4 so lent and advanced as aforesaid, upon and for the loan of the said sum of £4, for the time during which the said pledge did remain in pawn as aforesaid, the said sum of twelve shillings so demanded, received, and taken by the said ———, being a greater profit than was or is allowed by law to be taken by him the said C. D. for the same, contrary to the form of the statute in such case made and provided; whereby and by force of the said statute, the said C. D. forfeited for his said offence a penalty of not less than forty shillings, nor more than £10, in the discretion of me the said Justice: and thereupon the said A. B. prays judgment of me the said Justice, and that the said C. D. may be summoned to answer the premises, and to make defence thereto, before me the said Justice, &c.

POST-MASTER.

32. Information *against a* Post-Master *for delivering a false Certificate, 25 Geo. 3. c. 51. s. 23—48 Geo. 3. c. 99. s. 12.*

——, That Matthew Samuel, late of, &c. Innkeeper, after the 1st day of August, 1785, and within the space of six calendar months now last past, to wit, on the —— day of ——, at the said parish of ——, in the said county of ——, and near to the place where I the said Justice reside, let to hire to one J. Walker, two horses for a less period of time than a day, for drawing on a public road, to wit, from Gray's Inn, in the said county of Middlesex, to Chigwell, in the county of ——, of the distance of thirteen miles, a certain chaise, with four wheels, on the same day and year last aforesaid used by the said J. Walker for travelling post, that is to say, from Gray's Inn aforesaid to Chigwell aforesaid, the said chaise then and before that time at the parish aforesaid being kept by the said Matthew Samuel to be let out for hire, and not being then licensed by the commissioners for the duties arising by hackney coaches; and the said Matthew Samuel, after the said 1st day of August, 1785, and within the space of six calendar months now last past, to wit, on the said —— day of ——, in the year —— aforesaid, at the parish of ——, and near to the place where I the said Justice reside, wrongfully and collusively delivered to the driver of the said chaise, a note or certificate supplied from the stamp-office, on which was then and there engraved the words (hired for two or more days), and to which the said Matthew Samuel then and there added the day of the month and the name of the place of his abode; and the said Matthew Samuel, in letting out the said horses for the purpose aforesaid, did, by the said device and collusion, then and there pretend to let out his said horses for a longer space of time than the time for which the same were actually hired as aforesaid, with an intent to evade the duty imposed by

by the statute in such case made and provided, for and in respect of the said horses so let out to hire as aforesaid, contrary to the form of the statute in such case made and provided: whereby, &c. (Penalty £10.)

Note. A summary form is given by the act 25 Geo. 3. c. 51. s. 62, which may be filled up with the assistance of the foregoing.

PROFANE SWEARING.

33. Conviction *on* 19 *Geo.* 2. *c.* 21, *for profane Swearing; according to the Form of Conviction given by the Statute*, s. 8.

———, *to wit.* Be it remembered, that on the ——— day of ———, in the ——— year of his Majesty's reign, A. B. yeoman, not being a day labourer, common soldier, common sailor, or common seaman, and being under the degree of gentleman, was convicted before me, one of his Majesty's Justices of the Peace for the county, (riding, division, or liberty aforesaid, or before the Mayor, Justice, Bailiff, or other chief Magistrate of the city or town of ———, within the county, &c. of ———, *as the case may be*) of swearing five profane curses, to wit, in the words "God damn you," five several times repeated, and ten profane oaths, to wit, the words "by God," ten several times repeated; for which said offence he the said A. B. hath forfeited the sum of thirty shillings, for the use of the poor of the parish of ———, where the said offence was committed, to wit, two shillings for each of the said curses, and two shillings for each of the said oaths, together with the sum of ——— for the costs and charges of this conviction. Given under my hand and seal the day and year aforesaid.

RENT.

34. Conviction *for fraudulently removing Goods to prevent Distress for Rent, under* 11 *Geo.* 2. *c.* 19. *s.* 3 *&* 4. See R. *v.* Morgan, Cald. Cas. 156.

(This is more usually the subject of an *order*, see R. *v.* Middlehurst, 1 Burr. 369, *post*, p. [104].—R. *v.* Bissex, 1 Burn, 538, and *ante*, Treatise, 130.)

Lancashire. Be it remembered, that on the —— day of ——, in the —— year of the reign of our Sovereign Lord George the Third, of the United Kingdom of Great Britain and Ireland, King, defender of the faith, and in the year of our Lord 1813, at W. in the county of Lancaster, J. D. of W. aforesaid, huckster, in his proper person cometh before us, J. H. Esquire, and J. D. Esquire, being two Justices of our said Lord the King, assigned to keep the peace of our said Lord the King in and for the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, and residing near to the place whence the goods and chattels hereinafter mentioned were removed, we or either of us not being interested in the cottage or dwelling-house from which such goods or chattels were removed, and exhibited before us the

Complaint. said Justices, a certain complaint, in writing, against B. G. wife of H. G. of W. aforesaid, labourer, and thereby giveth us the said Justices to understand and be informed, that M. S., late of the said place, weaver, for twenty-nine weeks next before, and ending at and upon the 23d day of January last, held and enjoyed a certain cottage or dwelling-houses, with the appurtenances, situate, lying, and being in W.

Demise. aforesaid, as tenant thereof to the said J. D. under a demise thereof theretofore made, at the weekly rent of 2*s.* 6*d.* payable to the said J. D. weekly, that is to say, on Saturday in each and every week, and that on the 23d day of January last, the sum of £3. 12*s.* 6*d.* of rent aforesaid, for twenty-nine weeks, ending on the said 23d day of January last, on the

the same day became due, and ever since and still is due in arrear and unpaid from the said M. S. to the said J. D., and that the said sum of £3. 12*s.* 6*d.* of the rent aforesaid, so being due in arrear and unpaid from the said M. S. to the said J. D., the said M. S. afterwards, to wit, on the 28th day of January last, fraudulently and clandestinely conveyed away and carried off and from the said demised premises, one pair of looms, one pair of blankets, one bed, and quilt, &c. *(setting out the goods)*, being the proper goods and chattels of the said M. S., and the same not exceeding the value of £50, but being of less value, to wit, of the value of £3. 4*s.* of lawful money of Great Britain, to prevent the said J. D. from distraining the same for the said arrears of rent so then due and unpaid as aforesaid; and that the said B. G. on the same day and year last aforesaid, at W. aforesaid, did wilfully and knowingly aid and assist the said M. S. in such wilfully conveying away and carrying off and from the said demised premises, the said goods and chattels, and every part thereof, contrary to the form of the statute in such case made and provided; whereby and by force of the said statute, the said B. G. hath forfeited to the said J. D., from whose estate the said goods and chattels were so fraudulently carried off as aforesaid, double the value of the said goods so carried off as aforesaid; and thereupon the said J. D. humbly prays us the said Justices, that the said B. G. may be convicted of the said offence, according to the form of the statute in that case made and provided, and that the said B. G. may be summoned to answer the said premises, and to make her defence thereto before us the said Justices: Whereupon the said B. G., having been duly summoned in this behalf to answer and make her defence to the said complaint, and the said offence therein charged upon her before us, afterwards, that is to say, on the 1st day of March, in the said year of our Lord 1813, at W. aforesaid, in the county aforesaid, appears and is present before us the said Justices, in order to answer and make good her defence to the said complaint, and the said offence therein charged upon her as aforesaid; and she the said B. G. having heard the same, is asked by us the said Justices, if she can say any thing for herself, why she should not

Appearance.

not be convicted of the premises above charged upon her in form aforesaid, who pleads that she is not guilty of the said premises: Nevertheless, on the said 1st day of March, in the said year of our Lord 1813, at W. aforesaid, in the county aforesaid, one credible witness, to wit, S. S. wife of the said M. S. cometh before us the said Justices, and the said S. S. being then and there duly sworn, touching the premises, on the Holy Gospels of God, on her corporal oath to her then and there administered by us, (we the said Justices having then and there full power and authority to administer the said oath to the said S. S.) deposeth, sweareth, and upon her oath aforesaid affirmeth, in the presence and hearing of the said B. G. that the said M. S. was, on the 23d day of January last, and for four years preceding had been, tenant of the said cottage, under the said J. D., and the rent was *2s. 6d.* a week, and that *£3. 12s. 6d.* was due to the said J. D. for rent for the said cottage, on the said 23d day of January last; that on the 25th day of the said month of January last, the said M. S. told the said B. G., that he thought he should sell his goods for fear the said J. D. should distrain them for rent, to which the said B. G. replied, that if she were him, (meaning the said M. S.) she would; whereupon the said M. S. sold to the said B. G. one pair of looms, (&c. &c.) all of which were then in the said cottage, for the sum of *£3. 6s. 6d.* and it was agreed that the said looms so purchased by the said B. G. should be carried away from the said cottage after dark, and the same were so carried away accordingly by the said B. G. M. S. S. S. and one B. H. by direction of the said B. G. in the night of the said 25th day of January last; and that the said goods and chattels so as aforesaid carried away, were of the value of *£3. 4s.*: whereupon all and singular the matters and things in the said complaint and evidence contained, being by the said B. G. then heard and fully understood, the said B. G. is by us the said Justices asked what she hath to say or offer in her defence against the said complaint and offence, and in

Evidence (*a*).

(*a*) This being a *Conviction*, the Evidence must be set out particularly. R. v. Morgan, Cald. 156.

See Observation following the next Precedent, p. [103].

answer

answer to the evidence given as above mentioned, and what she hath to say why she should not be convicted of the premises so charged upon her, and forasmuch as upon hearing and fully understanding the said complaint, and evidence given as above mentioned, and also upon hearing and fully understanding all and singular the matters and things by the said B. G. alledged and proved in her defence, touching the premises in the said complaint specified, it manifestly appears to us the said Justices, that the said B. G. is guilty of the premises above charged upon her in the said complaint, and that the said goods and chattels, in the said complaint and evidence mentioned at the time of carrying off the same, as therein mentioned, were of the value of £3. 4*s*. of lawful money of Great Britain; therefore it is adjudged by us the said Justices, that the said B. G. be convicted, and she is hereby convicted by and before us the said Justices of the offence here charged upon her in and by the said complaint, according to the form of the statute in that case made and provided; and we do adjudge and order the said B. G. to pay to the said J. D. the sum of £6. 8*s*. being double the value of the goods and chattels in the said complaint mentioned, within four days next after notice of this our order, according to the form of the statute in that case made and provided. In witness whereof, we the said Justices to this record of conviction have put our hands and seals, at W. aforesaid, the 1st day of March, in the fifty-third year of the reign of our said Sovereign Lord the King, and in the year of our Lord 1813.

Judgment.

Forfeiture of double value.

——— (L. S.)

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35. Form *of* Order *of two Justices, for the fraudulent Removal of Goods by a Tenant.*

(See the References prefixed to the foregoing Precedent.)

Gloucestershire, to wit. Whereas a certain complaint in writing has been duly made and exhibited before us Samuel Haywood

Haywood Esquire, and Benjamin Newton Clerk, two of the Justices of our Lord the present King, assigned to keep the peace, &c. residing near to the said premises from whence the goods and chattels hereinafter mentioned were removed (we or either of us not being interested in the said premises, or any part thereof) by Thomas Parker, of the city of Gloucester, apothecary, against James Dobbins, late of Hailes, in the said county of Gloucester, yeoman, by which he the said Thomas giveth us to understand and be informed, that Hannah Felstead, before and at the time when the said goods and chattels were conveyed away, as hereinaftr mentioned, enjoyed certain tenements, with the appurtenances, situate, lying, and being at Prestbury, in the said county, as tenant thereof, under and by virtue of a certain demise which theretofore and before the rent hereinafter mentioned to be due became so due and in arrear, as hereinafter set forth, had been made by the said Thomas, at and under the yearly rent of £8, payable half yearly, to wit, upon the 29th day of September, and the 25th day of March, in every year during the continuance of the said demise, and that upon the 29th day of September now last past, the sum of £4, parcel of the said rent of the said demise, for half a year, ended on that day in that year, at the time of the offence hereinafter mentioned, was and remained, and yet is, due and in arrear to the said Thomas, under and by virtue of the said demise; and that whilst the same was so due and in arrear as aforesaid, to wit, on the 21st day of March now last past, the goods and chattels of the said Hannah, to wit, three beds, &c. and certain other goods and chattels of the said Hannah, under the value of £50, that is to say, of the value of £5, were then upon the said demised premises, and were then subject and liable to be taken as a distress for the said arrear of rent so reserved due and payable as aforesaid; and that the said Hannah, to prevent the said Thomas from distraining the said goods and chattels for the said arrear of rent so reserved due and payable as aforesaid, afterwards, that is to say, on the same day and year aforesaid, at the city of Gloucester aforesaid, fraudulently and clandestinely removed and conveyed

conveyed away the said goods off and from the said demised premises; and that the said James Dobbins, well knowing the premises, did wilfully and knowingly aid and assist the said Hannah in the fraudulent conveying away the said goods and chattels off and from the said demised premises: And thereupon we the said Justices having summoned the said James Dobbins to attend us thereon, to answer the said complaint, and the said James Dobbins having attended accordingly, and we in the presence of the said J. D. having heard and examined the witnesses produced by the said Thomas upon oath, and having heard what was alledged by the said J. D. in his defence, do, this ——— day of ———, in the year of our Lord ———, at ——— aforesaid, determine and adjudge that the said James Dobbins is guilty of the premises above laid to his charge, in manner and form as by the said complaint is above alledged; and that the said goods and chattels in the said complaint mentioned, and so fraudulently removed and conveyed away as aforesaid, were of the value of £5 of lawful money of this realm: Therefore it is considered by us the said Justices, and we the said Justices do order and adjudge that the said James Dobbins do pay to the said Thomas the sum of £10 of like lawful money, on the ——— day of ——— now next ensuing, being double the value of the said goods and chattels in the said complaint mentioned, according to the form of the statute in such case made and provided. In witness whereof we the said Justices have hereunto put our hands and seals, this ——— day of ———, in the 26th year of the reign of our Lord the present King, and in the year of our Lord 1786.

Drawn by G. S. H.

Observation.

This being an *order*, and not a conviction, R. *v.* Bissex, 1 Burn. 538, R. *v.* Middlehurst, Burr. 369, the evidence need not be set out at length: and upon that ground, in the former of those cases, this concise mode of stating the effect of the examination was held to be sufficient. See also R. *v.* Lloyd, Str. 999.

56. Rex v. Middlehurst.

The following order of Justices on the same Statute was returned to a *Certiorari*, Trin. 30 and 31 Geo. 2; and was confirmed on argument: (See 1 Burr. 369)—(On the File of *Orders* in the Crown Office of 30 and 31 Geo. 2.)

———, *to wit*. The Information states:

Information by bailiff of landlord.

Whereas T. W. of, &c. as bailiff or agent to Sir T. F. for and on behalf of the said Sir T. F. did, upon or about the ——— day of, &c. exhibit to and before us P. W. and R. L. Esquires, two of his Majesty's Justices of the Peace in and for the said county, and who reside near to the township of Marton and Over, in the said county, and who are not interested in the messuage and tenements, lands and hereditaments, hereinafter mentioned, his complaint and information in writing against T. Middlehurst, of W. in the township of Over aforesaid, in the said county of C. yeoman, thereby setting forth, that John Chesterson, late of Marton aforesaid, husbandman, had for several years last past held and occupied, &c. (stating the tenancy and arrears as in the last), and further setting forth, that the said T. Middlehurst did, upon or about the 11th day of that instant November, and now last past, wilfully and knowingly aid or assist in fraudulently removing and conveying away from off the said premises so held by the said John Chesterson, five cows, being the proper goods and chattels of the said John Chesterson, *or* (*a*) in concealing thereof, with intent to prevent the said cows being distrained for the said arrear of rent, and to defraud the said Sir T. F. of such arrears so due to him as aforesaid, which said five cows were under the value of

For assisting to carry off *or* conceal goods, &c.

(*a*) This manner of charging the offence in the alternative was objected to for uncertainty, but the objection was over-ruled, on the ground that this was an *Order*, and not a *Conviction*. It was agreed, that in the latter it would be bad. See Treatise, *ante*, p. 44.

£50,

£50, and of the value of £21."——After a regular summons and appearance of the Defendant, the order proceeds, "Now we the said Justices having, agreeable to such summons, in the presence of the said T. Middlehurst, examined divers proper witnesses upon oath touching the said complaint and information, and the matter therein contained, and having also inquired in like manner upon oath the value of the said cows, and upon due consideration had in the premises, we the said Justices hereby adjudge, that the said T. Middlehurst is guilty of the offence with which he is charged as aforesaid." The order then adjudges the value of the cows, and that the said T. M. "within three days after notice of this order, conviction, or judgment, do pay to the said T. W. as agent or bailiff of the said Sir T. F. and for the use of the said Sir T. F. the sum of £——, being double the value of the said five cows so fraudulently removed or concealed as aforesaid."

See observations following the last precedent.

ROGUE AND VAGABOND.

37. Conviction *by the Justices in Sessions, pursuant to the Vagrant Act* 17 *Geo.* 2. *c.* 5. *of one who had been committed to the Sessions by a Justice on a Conviction before him as a Rogue and Vagabond, for being found in a Plantation by Night with Engines for destroying Game, according to the Statute* 39 *&* 40 *Geo.* 3. *c.* 50.

Leicestershire. Be it remembered, that at the General Quarter Sessions of the Peace of our Sovereign Lord the King, holden at the Castle of Leicester, in and for the said county, on Tuesday in the week next after the Feast of the Epiphany of our Lord, to wit, on the 10th day of January, in the 44th year of the reign of our Sovereign Lord George

Style of the Sessions.

the Third, now King of the United Kingdom of Great Britain and Ireland, and A. D. 1804: Before Sir Ed. Cradock Hartopp, Bart., C. T. H. Esquire, W. T. and T. B. Clerks, Justices of our said Lord the King, assigned to keep the peace of our said Lord the King in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanours in the said county committed, William Patchett, *otherwise* Pagett, of Loughborough, in the said county, labourer, is brought before this Court, in the custody of the keeper of the house of correction of and for the county of Leicester aforesaid; and it appears to this Court that the said W. Patchett, *otherwise*, &c. was, on the 1st day of November last past, charged upon the oath of J. Gamble, of Prestwould, in the said county (servant to C. J. Packe, Esquire), before R. P. Storey, Clerk, one of the Justices of our said Lord the King assigned to keep the peace of our said Lord the King, in and for the said county of Leicester; for that the said W. Patchett, *otherwise*, &c. together with another person, amounting to the number of two, were found in a plantation in the lordship of Prestwould, belonging to Charles James Packe, called Meerhill Spinney, in the night, that is, between the hours of eight o'clock at night and six o'clock in the morning, on the 30th day of October last (*a*), having nets, engines, and other instruments, for the purpose and with the intent to destroy, take, or kill game, contrary to the statute in such case made and provided; and it also appears to the said Court by the warrant of commitment, under the hand and seal of the said P. Storey, Clerk, so being such Justice as aforesaid, bearing date the said 1st day of November, in the year aforesaid, that the said W. Patchett, *otherwise*, &c. was by the said Justice committed as a rogue and vagabond to the custody of the keeper of the said house of correction of and for the said county of Leicester, there to remain until the next General Quarter Sessions of the Peace to be holden in and for the said county, or until he should be discharged by due course of law: Whereupon the said W. Patchett, *otherwise*, &c. being under such commitment before this Court, being the next General Quarter Sessions in and for the said county holden

(*a*) If between the 1st of February and 1st of October, the hours must be between ten at night and four in the morning.

Commitment.

holden after such commitment, the said Court doth proceed to an examination of the circumstances of the case; and thereupon the said J. Gamble, being a credible witness in this behalf, is examined upon his oath duly taken before this Court, and in the presence of the said W. Patchett, *otherwise*, &c. and being so examined, the said J. Gamble upon his said oath says, in the presence of the said W. Patchett, *otherwise*, &c. that on the 30th day of October last past, between the hours of eight o'clock at night and six o'clock in the morning of the next day, the said W. Patchett, *otherwise*, &c. together with another person, were found by the said J. Gamble in a plantation called Meerhill Spinney, in the lordship of Prestwould in the said county, belonging to the said Charles James Packe, Esquire; and that the said W. Patchett, *otherwise*, &c. and the other person with him, then and there had nets, engines, and other instruments for the purpose and with the intent to destroy, take, and kill game; and that the said W. Patchett, *otherwise*, &c. was at the time and place aforesaid found armed with a certain offensive weapon, called a bludgeon, protecting, aiding, abetting, and assisting such other person; and the said W. Patchett, *otherwise*, &c. being called by this Court for his defence against this charge, makes no defence thereto: Therefore it is considered and adjudged by this Court, that the said W. Patchett, *otherwise*, &c. was and is a rogue and a vagabond; and it is further ordered and adjudged by this Court, that he be detained and kept to hard labour for the space of six months, and during such imprisonment, that he be once publicly whipped, at the usual place of whipping, at Leicester, in the said county; and at the expiration of such imprisonment, the said W. Patchett, *otherwise*, &c. being above the age of twelve years, is further ordered by this Court to be sent and employed in his Majesty's service—*(it should be here specified whether in the land or sea service)* (*a*), pursuant to the statute in such case made and provided.

Evidence.

Judgment.

(*a*) See Treatise, p. 164. 167.

(Signed) *T. F.*
Deputy Clerk of the Peace for the County of Leicester.

Note. When this Conviction was brought before the Court

of King's Bench by *Certiorari*, two objections were made to it: 1st, that the Justices had no power to order the punishment of whipping; but this objection was over-ruled: 2dly, that the judgment was defective, in ordering only that the Defendant, after his imprisonment, should be sent and employed *in his Majesty's service*, without ascertaining whether by *sea* or *land*. The Court concurred in the second objection, and likewise agreed that the judgment could not be severed, but that the Conviction must be set aside altogether; and for this reason the Conviction was quashed.

As no other objection appears to have been made to it, the precedent, after supplying the omission in the judgment, may be usefully resorted to. Though it would perhaps be rendered more secure from objection, by somewhat more specific Evidence of the *intent* to destroy game, which here stands entirely upon the witness's opinion, even the time of night at which the Defendant was found not being stated.

ROGUE.

38. Conviction *at the Quarter Sessions of an* incorrigible Rogue, *after a Commitment as such by a Magistrate*, by 17 Geo. 2. c. 5. s. 9.

For the form of conviction by the Justice out of Sessions, see 5 Burn's Justice, 747, 748. Ed. 1810.

Somersetshire. Be it remembered, that at the General Quarter Sessions of the Peace, holden at, &c. before John Berkley Burland, John Strode, Esquires, and other their companions, Justices of our Lord the King, assigned to keep the Peace of our said Lord the King, in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanours committed in the said county, George Wheeler,

Wheeler, late of, &c. labourer, having been committed to the custody of the gaoler or keeper of the gaol or house of correction at Shepton Mallet, in the same county, by virtue of a certain warrant, under the hand and seal of Thomas Horner, Esquire, one of the Justices of our said Lord the King, assigned, &c. and also to hear and determine, &c. and bearing date the 7th day of April, in the year of our Lord 1792, which said warrant was issued by the said Justice by virtue of a certain conviction made before the granting of the said warrant, bearing date the day and year last aforesaid, whereby the said George Wheeler was convicted before the said Thomas Horner, the Justice aforesaid, [in pursuance of an act passed in the 6th year of the reign of his Majesty King George the Third, for having in his custody, in the parish of Frome Selwood, in the said county of Somerset, on the 17th of February then last, a quantity of underwood, and not giving a satisfactory account how he came by the same,] whereby the said George Wheeler (the said offence being the third offence) was become an incorrigible rogue, within the true intent and meaning of the said act; and the said George Wheeler is now brought into this Court, and is now charged with the said offence; and the said court having examined into the circumstances of the said case, and the premises being seen and understood by the said Court: It is considered by the said Court here, that the said George Wheeler be, and he is accordingly adjudged an incorrigible rogue, the said offence in the said conviction being the third offence of the said George Wheeler; and this Court doth adjudge and order that the said George Wheeler be, and he is hereby committed to the house of correction at Shepton Mallet, for the space of six months.

The fact for which defendant was convicted as an incorrigible rogue.

Imprisonment for six months.

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39. Indictment *pursuant to* 17 *Geo.* 2. c. 5. *s.* 9, *against one who had been before adjudged an* incorrigible Rogue *for the same Offence.*

Somersetshire, The jurors, &c. that George Wheeler, late of, &c. labourer, on the 2d day of November, A. D. 1789, at

at the parish of Frome Selwood, in the county of Somerset, had a quantity of underwood in his possession, and did not give a satisfactory account how he came by the same, although then and there requested so to do, contrary to the form of the statute, &c.; and the said G. W. afterwards, to wit, on the 10th day of December, A. D. 1791, at Wells, in the county aforesaid, was, by and before Thomas Horner, Esquire, being then and there one of his Majesty's Justices of the Peace in and for the said county of Somerset, upon the oath of one R. B. a credible witness, duly convicted, according to the form of the statute in such case, &c. for having in his custody, in the parish of Frome Selwood aforesaid, in the county aforesaid, on the said 2d day of November then last past, the said quantity of underwood, and not giving a satisfactory account how he came by the same, contrary to the form, &c.; and the jurors, &c. do further present, that the said G. W. afterwards, to wit, on the 18th day of May, A. D. 1792, at the parish of Frome Selwood, in the county aforesaid, had another quantity of underwood in his custody, and did not give a satisfactory account how he came by the same, although then and there requested so to do, contrary to the form, &c. and that the said G. W. afterwards, to wit, on the 6th of August, in the same year, at Wells aforesaid, in the county aforesaid, was, by and before the said Thomas Horner, Esquire, being then and there such Justice as aforesaid, upon the oath of one Isaac Ayres, a credible witness, duly convicted, according to the form of the statute in such case made and provided, of having in his custody, in the parish of Frome Selwood, in the county aforesaid, on the said 18th of May then last past, the said last mentioned underwood, and not giving a satisfactory account how he came by the same, contrary to the form of the statute in such case made and provided: And the jurors, &c. further present, that defendant afterwards, (to wit) on the 17th of February, 1792, at the parish of Frome Selwood, in the county aforesaid, had another quantity of underwood in his custody, and did not give a satisfactory account how he came by the same, although

Conviction.

though then and there duly requested so to do, contrary to the form of the statute in such case made and provided: and defendant afterwards, (to wit) on the 7th of April, in the year aforesaid, in the county aforesaid, was by and before the said Thomas Horner, Esquire, being then and there such Justice as aforesaid, upon the oath of one John Carter, a credible witness, duly convicted, according to the form of the statute in such case made and provided, of having in his custody in the parish last aforesaid, on the said 17th of February then last past, the said last mentioned underwood, and not giving a satisfactory account how he came by the same, contrary to the form of the statute in such case made and provided, and was the same, being the third offence, of him defendant, then and there, (to wit) at Wells aforesaid, in the county aforesaid, declared and adjudged by the said Thomas Horner, Esquire, being then and there such Justice as aforesaid, to be an incorrigible rogue within the true intent and meaning of the said statute: And the jurors, &c. further present, that defendant being then and there present before the said T. H. Esquire, he the said T. H. Esquire, being then and there such Justice as aforesaid, did then and there make a certain warrant under his hand and seal, bearing date the 7th of April, in the year last aforesaid, directed to the constable and tithingman of Marston Biggot, in the said county, and to the keeper of the gaol or house of correction at Shepton Mallett, in the county aforesaid, and thereby commanded the said constable and tithingman, and either of them, immediately, on sight thereof, to convey the body of defendant to the said gaol or house of correction, and to deliver him to the said gaol-keeper thereof, together with that warrant, and did also thereby require the said gaol-keeper of the said gaol or house of correction, to receive defendant into his custody in the said gaol or house of correction, and to keep him safely there until the then next General Quarter Sessions of the Peace, to be holden for the county, or until he should be from thence discharged by due course of law: And the jurors, &c. further present, that the said warrant was then

and

and there delivered to one William Deacon, then and there tithingman of Marston Biggot aforesaid, to be executed in due form of law, and that the said W. D. by virtue of the said warrant, then and there took defendant and conveyed him to the said gaol or house of correction for the said county, and then and there delivered him in the said gaol or house of correction, together with the said warrant, into the custody of Henry Shroll, then keeper of the said house of correction, and that the next Quarter Sessions of the Peace for the said county, to wit, at the General Quarter Sessions of the Peace, holden in and for the said county, on the 18th day of April, 1792, at Wells, in the said county of Somerset, before John Berkley Burland, John Strode, Esquires, and others, their companions, Justices of our said Lord the King, assigned to keep the peace of our said Lord the King, in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanours committed in the said county, the said defendant was brought before the said Justices, and the said Justices duly examined into the circumstances of the said defendant's case, and did then and there adjudge the said defendant for his said last mentioned offence, being his third offence, to be an incorrigible rogue, and did then and there adjudge and order, that the said defendant should stand committed to the gaol of Shepton Mallett, in the said county, the same being the house of correction for the said county, for the space of six months then next following: And the jurors, &c. further present, that the said defendant, afterwards, to wit, on the 14th day of December, 1792, at the parish of Frome Selwood, in the county aforesaid, had another quantity of underwood in his custody, and did not, nor would give a satisfactory account how he came by the same, although then and there duly requested so to do, contrary to the form of the statute, &c. and thereby unlawfully and feloniously offended again in like manner, as he had before offended, by committing the said offence for which he the said defendant was by the said Justices, at the said General Quarter Sessions of the Peace adjudged

adjudged an incorrigible rogue, and adjudged and ordered to stand committed to the said house of correction, for the space of six months as above mentioned. To the evil example, &c. against the form of the statute in such case made and provided, and against the peace, &c.

SPIRITS.

40. Information *on* 19 *Geo.* 3. *c.* 69. *s.* 18, *against an Importer of Foreign Spirits, for not having those Words inscribed over his Door, &c.*

That the said C. D. after the ——— day of ———, in the year of our Lord ———, to wit, on, &c. (he the said C. D. then being an importer for sale, or dealer in and seller of foreign brandy, or such wine, spirits, and other foreign strong waters, did make use of a certain shop, warehouse, storehouse, cellar, vault, (or other place, *stating which, and describing it, according to the fact*), for the keeping of foreign brandy, and situate and being in the parish of ———, in the county of ———, without having the words, "importer of, or dealer in foreign spirituous liquors," painted or written in large legible characters over the outer door, or in the front or in some conspicuous part of the said house, &c. so made use of by the said C. D. as aforesaid, contrary to the form of the statute in such case made and provided, whereby, and by force of the said statute, the said C. D. hath forfeited for his said offence, the sum of £50.

STAGE-COACH DRIVER.

41. Conviction *of* Driver *of Stage-Coach, for permitting beyond the proper Number of Passengers,* (50 Geo. 3. c. 48.)

———, to wit. Be it remembered, that on the ——— day of ———, in the year of our Lord 18——, at ———, in the county of ——— aforesaid, A. B. came before me C. D. one of his Majesty's Justices of the Peace for the said county, and informed me that I. B. of ———, on the ——— day of ——— now last, at ———, in the said county, did drive a certain coach (*a*) called the Northampton coach, being a coach with four wheels, and then drawn by four horses, and then employed as a public stage-coach for the purpose of conveying passengers for hire, and licensed to carry ten outside passengers, and no more, and having painted on the outside of the said coach the words, "*licensed, &c.*" and then travelling on the King's highway, and did then and there carry, and permit and suffer to be carried, on the outside of the said coach, more than the number expressed in the licence for using such coach, and in the words so painted on the outside of such coach, to wit, that the said I. B. did then and there carry, permit, and suffer to be carried, twelve persons, at one and the same time, exclusive of the coachman, on and about the outside of the said coach, when so going and travelling for hire as aforesaid, none of the said persons so carried being a child in the cap, or under the age of seven years, contrary to the form of the statute made and passed in the 50th year of the

(*a*) The words of the Act are "such fines and penalties to be levied on the owner or proprietor, &c. or on any person driving the same." Under these words, it seems, that any person actually driving at the time and permitting a greater than the allowed number of passengers to get up, though not the driver regularly employed by the owner, would be liable to the penalty. See R. *v.* Barker, 3 East. 506, on the construction of the 28 Geo. 3. c. 57, relating to the same subject.

reign

reign of King George the Third, intituled "An Act to repeal three Acts made in the 28th, 30th, and 46th Years of his present Majesty, for limiting the Number of Persons to be carried on the outside of Stage-coaches, or other Carriages, and to enact other Regulations for carrying the Objects of the said Act into effect;" whereupon the said L. B. after being duly summoned to answer the said charge, *did not* appear (*b*) before me the said C. D. pursuant to the said summons, and did neglect and refuse to make any defence against the said charge, but the same being fully proved upon the oath of G. H. a credible witness, it manifestly appears to me, the said Justice, that the said I. B. is guilty of the offence charged upon him in the said information. It is therefore considered and adjudged by me the said Justice, that he the said E. F. be convicted, and I do hereby convict him of the offence aforesaid, and I do hereby declare and adjudge that he the said I. B. hath forfeited the sum of £——— of lawful money of Great Britain, for the offence aforesaid, to be distributed as the law directs, according to the form of the statute in that case made and provided. Given under my hand and seal, the ——— day of ———, 18—.

Where the driver does not *appear*.

If the driver appears, instead of the words "did not appear," *insert* "appeared before me the said C. D. on the ——— day of ———, at ———, in the said county, and having heard the charge contained in the said information, declared that he was not guilty of the said offence, but the same being fully proved," &c. *as before*.

If the defendant appears.

If the defendant confesses, after the words "contained in the said information," *insert*, "acknowledged and voluntarily confessed the same to be true, and it manifestly appears to me the said Justice," &c. *as above*.

If defendant confesses.

(*b*) If the driver does not appear, he may still be convicted if he be known, and summoned, although, by section 8, if he is not known or cannot be found, the owner is liable. This was so held on the repealed Act of 28 Geo. 3. c. 57, though that Act had the additional words that "in case the driver being found did not attend the summons, in every such case the owner should be liable." R. v. Barker, 3 East. 504.

STAGE-

STAGE-COACH.

42. Information *against the* Owner, *on* 50 *Geo.* 3. *c.* 48, *for carrying more than the Number licensed.*

Surrey, to wit. Be it remembered, that on the ——— day of ———, one thousand eight hundred and ——, A. B. of ———, in the said county, informeth me ———, one of his Majesty's Justices of the Peace for the said county, that C. D. late of the parish of St. Mary, in the said county, coach-master, on the ——— day of ———last, at ———, &c. in the said county, he the said C. D. then and there being the owner of a certain coach with four wheels, employed as a public stage-coach, for the purpose of conveying passengers for hire to and from different places in Great Britain, to wit, to and from London and Leatherhead, in the said county, and which said coach was then and there drawn by four horses, and licensed to carry ten outside passengers, and no more, exclusive of the coachman, on or about the outside of such coach, and the driver of which said coach was and is unknown to the said A. B. did then and there, by the said driver unlawfully carry more outside passengers than were or are specified or expressed in the licence for using such coach, to wit, fourteen outside passengers, exclusive of the coachman, on and about the outside of the said coach, none of the said passengers then and there being a child or children in the lap, nor under seven years of age, contrary to the statute made in the 50th year of the reign of King George the Third, intituled, "An Act to repeal three Acts, made in the 28th, 30th, and 46th Years of his present Majesty, for limiting the Number of Persons to be carried on the outside of Stage-coaches, or other Carriages, and to enact other Regulations for carrying the Objects of the said Acts into effect;" which hath imposed a forfeiture of £10 for each outside passenger beyond the number allowed by

by the said statute, amounting to the sum of £40 for the said offence.

Received the —— day of ——,
by me,

TOLLS.

43. Information *against a* Toll-gate Keeper, *on 25 Geo. 3. c. 51. s. 37, for refusing to receive a Ticket for two or more Days.*

Surrey, to wit. Be it remembered, that on the ——, day of ——, in the year of our Lord 18—, at ——, in the parish of ——, in the county of Surrey, before E. Reid, Esquire, one of his Majesty's Justices of the Peace, assigned to keep the peace of our Sovereign Lord the King in and for the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors done and committed within the said county, residing near the place where the offence hereinafter mentioned is alledged to have been committed, R. D. of the parish of St. Mary, Lambeth, in the said county of Surrey, yeoman, who prosecutes as well for our said Sovereign Lord the King as for himself in this behalf, cometh in his own proper person, and now here exhibiteth to and before me the said Justice a certain complaint and information, and herein as well for our said Lord the King as for himself, complaineth and giveth me to understand and be informed, that L. M. late of Lambeth, in the said county of Surrey, yeoman, after the making of a certain Act of Parliament, made and passed in the 25th year of the reign of his present Majesty, intituled, "An Act for repealing the Duties on Licences taken out by Persons letting Horses for the Purpose of travelling Post, and on Horses let

to

to Hire for travelling Post and by Time, and on Stage-coaches, and for granting other Duties in lieu thereof, and also additional Duties on Horses let to Hire for travelling Post and by Time," and after the first day of August, 1785, therein mentioned, and within six calendar months next before exhibiting this information, to wit, on the ——— day of ——— now last past, at a certain turnpike situate and being at Lambeth aforesaid (he the said L. M. then and there being a toll-gate keeper there), did wilfully refuse to receive of and from one C. D. (he the said C. D. then and there being the driver of a certain carriage with four wheels, commonly called a post-chaise, and being then and there about to pass therewith through the said turnpike), a certain Stamp-office ticket, purporting to be a note or certificate for two or more days, and being a ticket by the said Act of Parliament directed to be delivered to and received by the said L. M. so being such toll-gate keeper as aforesaid, the said turnpike being the first turnpike which the said carriage did pass through with the said ticket, and the said L. M. having notice of all and singular the premises aforesaid, and being duly required by the said C. D. to receive the said ticket, contrary to the form of the statute in such case made and provided; by reason whereof, and also by force of the said statute, the said L. M. hath forfeited for his said offence the sum of £5 of lawful money of Great Britain, one moiety thereof to the use of his Majesty, his heirs and successors, and the other moiety thereof to the said R. D. who prosecutes as aforesaid, all which the said R. D. is ready to prove before me the said Justice by credible witnesses, when the said L. M. shall be summoned to make his defence touching the same, whereof the said R. D. who prosecutes as aforesaid, prays that the said L. M. may be convicted of the said offence, according to the form of the statute in such case made and provided, and also prays judgment of me the said Justice, and that one moiety of the said forfeitures may be adjudged to our said Lord the King, and the other moiety thereof to him the said R. D. and that I will proceed thereupon according to law.

The

The penalties, and provisions for the recovery thereof, contained in this Act, are continued by 27 Geo. 3. c. 26. s. 10, and 48 Geo. 3. c. 98. s. 2 & 13. A form of Conviction is given by the first mentioned statute.

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44. Conviction *on the Local Act 44 Geo. 3. c. , of a Toll-gate Keeper for exacting Toll for Sheep driven to Pasture from one Parish to the next adjoining, in the same County, pursuant to the Form of Conviction given by the Act.*

Lincolnshire, to wit. Be it remembered, that on the 13th day of August, A. D. 1812, at, &c. in the county of Lincoln, and within the parts of Kesteven, in the same county, C. D., of ———, was duly convicted before me ———, one of his Majesty's Justices of the Peace for the parts of Kesteven, in the county aforesaid, for that the said C. D. on the 8th day of August, A. D. 1812 aforesaid, at Spittlegate, in the parish of Grantham, in the county of Lincoln aforesaid, and within the parts of Kesteven, in the same county (he the said C. D. being then and there the farmer of the tolls, payable at a certain toll-gate or bar, called Spittlegate-bridge Bar, in Spittle-gate aforesaid, and within the parts of Kesteven aforesaid) did unlawfully demand and take of and from one A. B. certain toll, to wit, the sum of one shilling and four-pence, of lawful money of Great Britain, as and by way of toll for certain cattle, to wit, sixty-four sheep, which were then and there going to pasture, and driven from the parish of Grantham aforesaid, to the parish of Sowerby, in the county aforesaid, being the next adjoining parish to the said parish of Grantham, and which did not pass upon the road hereinafter next mentioned, more than two miles in going to pasture as aforesaid, contrary to an act passed in the 44th year of his said Majesty King George the Third, intituled, "An Act," &c. *(set out the title of the Act exactly:)* And I do therefore adjudge and declare that the said

said C. D. has forfeited for his said offence the sum of £5. Given under my hand and seal, the day and year first above written.

TREES.

45. *On 29 Geo. 2. c. 36. s. 8, for cutting down and carrying away Trees on a Common. Penalty given by 6 Geo. 1. c. 16. and 1 Geo. 1. st. 2. c. 48.*

Liberty of St. Albans, in the county of Hertford, to wit. Be it remembered, that on the 18th day of February, 1760, before us R. Hassel and R. Hassel the younger, Esqrs. two of the Justices of our Lord the King, assigned to keep the peace of our said Lord the King in and for the liberty of St. Albans, in the said county of Hertford, and also to hear and determine divers felonies, trespasses, and other misdemeanours committed in the said liberty, comes Charles Pickfatt, lord of the manor of Boreham-wood, within the said liberty, at the house of me the said R. Hassel the elder, situate in the parish of B. in the said liberty of St. Albans, and giveth us the said Justices to understand and be informed, that on the 12th day of the said month of February, in the said year of our Lord 1760, Edward Crane the younger, of I. in the said liberty, labourer, did, at Boreham-woods aforesaid, in the parish of I. aforesaid, and liberty aforesaid, unlawfully cut down, take, and carry away upon and from Boreham-wood Common, within the parish and liberty aforesaid, a great number of young oaks, ashes, hazels, and other sorts of wood and timber, until the cutting thereof as aforesaid, standing and growing on Boreham-wood Common as aforesaid, in the liberty aforesaid, in which said Boreham-wood Common divers persons then had right of common, and which said young oaks, ashes, hazels, and other wood and timber were the property of the said Charles Pickfatt, against the form of the statute in that case made and provided; and thereupon

thereupon, afterwards, to wit, on the 19th day of February, in the said year 1760, before us the said Justices, at the Mitre-Inn, in the parish of Barnett aforesaid, in the said liberty of St. Albans, comes, as well the said Edward Crane, he having been duly summoned before us the said Justices for that purpose, as the said Charles Pickfatt: And the said E. Crane having heard the said information read, he the said E. Crane is asked by us the said Justices, if he can say any thing for himself why he should not be convicted of the premises above charged against him, who pleadeth that he is not guilty of the said offence; and thereupon the said C. Pickfatt being duly sworn by us the said Justices, upon the Holy Gospels of God, to give evidence of the truth of and concerning the premises aforesaid, contained in the said information, (we the said Justices having full power to administer the said oath to the said C. Pickfatt in this behalf, and he the said C. Pickfatt being a credible witness in this behalf, and being so sworn upon his oath aforesaid, deposeth and giveth in evidence to us the said Justices, that on the 12th day of the said month of February, in the year aforesaid, he saw the said E. Crane, with a cart and two horses on Boreham-wood Common, in the said liberty, loading the same with a great number of young trees of oak, ash, hazel, and other wood and timber, which he owned he had cut on the said common called Boreham-wood Common, (and which were the property of the said C. Pickfatt,) and avowed and attempted to justify himself in the said cutting and taking, and so carried the same away; and the said E. Crane not shewing to us any cause why he should not be convicted of the said offence charged against him in and by the said information, and we having fully heard all and every the matters and things by him alledged in his defence of and concerning the premises, and having fully and maturely understood and considered the same, do adjudge and consider upon the evidence of the said C. Pickfatt, being a credible witness as aforesaid, that the said E. Crane is guilty of the said offence charged against him in and by the said information, and do accordingly convict him of the said offence, and do consider, order, and adjudge, that the said E. Crane be committed to the house of

Judgment of imprisonment.

correction in and for the said liberty, there to be kept to hard labour for the space of three months, without bail or mainprize, and do also consider, order, and adjudge the
Whipping. said E. Crane to be publicly whipped by the master of the said house of correction, once every month, during such three months, in the market town where the said house of correction stands, between the hours of eleven and two of the clock, according to the form of the statute in such case made and provided. In witness whereof we the said R. Hassel and R. Hassel the younger, have hereunto set our hands and seals this 7th day of May, in the year of our Lord 1760.

WATERMAN.

46. Conviction *for rowing a Barge on the Thames for Hire, not having served as a Waterman.* 11 & 12 Will. 3. c. 21.

———, *to wit.* Be it remembered, that on the 3d day of August, in the year of our Lord 1797, at Old Brentford, in the county of Middlesex, George Sloat and William Chapman, of the city of London, watermen, two of the rulers and overseers of the Company or Society of Watermen, Wherrymen, and Lightermen, come before me John Spiller, Esquire, one of the Justices of our Lord the King, assigned to keep the peace of our said Lord the King in and for the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, and gave me the said Justice to understand and be informed, that Thomas Honey, of the parish of Ealing, in the said county of Middlesex, labourer, within one month next before exhibiting this information, (to wit) on the 2d day of August aforesaid, not having served, for the space of seven years, to any waterman, lighterman, or wherryman, and not being a trinity-man, fisherman, ballast-man, or person employed in rowing,

rowing, or anyways navigating a western barge, mill boat, chalk hoy, faggot or wood lighter, dung boat, or gardener's boat, in such manner as had been accustomed before the passing of a certain Act of Parliament, made in the 11th and 12th year of King William III. intituled, "An Act for the Explanation and better Execution of former Acts, made touching Watermen and Wherrymen, rowing on the River of Thames, and for the better ordering and governing the said Watermen, Wherrymen, and Lightermen, upon the said River, between Gravesend and Windsor," and in such manner as allowed and reserved by the said Act, at Old Brentford aforesaid, in the county aforesaid, upon the river Thames there, between Gravesend, in the county of Kent, and Windsor, in the county of Berks, did, for hire and gain, row and work, and cause to be rowed and worked, a certain vessel, (to wit) a barge, against the form of the statute in such case made and provided; and afterwards, (to wit) on the 3d day of August aforesaid, at Old Brentford aforesaid, in the county of Middlesex aforesaid, the said Thomas Honey, after being by me summoned to appear before me the said Justice, in order to make his defence against the said charge in the said information contained, and having heard the same, is asked by me the said Justice, if he can say any thing why he should not be convicted of the premises therein contained: whereupon the said Thomas Honey pleadeth, that he is guilty of the premises in the said information contained; and the said Thomas Honey moreover before me saith, that he works for the Grand Junction Canal Company, upon the River Thames, and has two guineas a-week wages: and thereupon I the said Justice do adjudge that the said Thomas Honey is guilty of the premises in the said information contained, in manner and form as in the said information contained, and he is accordingly by me convicted thereof, and I do adjudge that he hath forfeited the sum of £10 of lawful money of Great Britain to the rulers and overseers of the said Company or Society of Watermen, Wherrymen, and Lightermen, to be disposed of according to the form of the statute in such case made and provided. In witness whereof I the said Justice,

Confession.

to this present record of conviction at Old Brentford aforesaid, in the county of Middlesex aforesaid, have set my hand and seal, the 3d day of August aforesaid, in the year aforesaid.

John Spiller, (L. S.)

This conviction was removed by *certiorari* into the Court of K. B. and confirmed without argument: the counsel for Thomas Honey thinking it was good and not liable to objection.

J. B.

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47. Conviction, *(on 16 Geo. 3. c. 17, for building a Bridge over the Severn), of a Wherryman for ferrying over a Passenger within 500 Yards of the Bridge.*

Salop, to wit. Be it remembered, that on, &c. at, &c. Thomas Aldenbroke, clerk to the trustees duly appointed and admitted under and by virtue of an Act of Parliament made in the 16th year of the reign of our Lord the King, intituled, &c. for carrying on, building, completing, and maintaining, at their own proper costs and charges, a bridge of cast-iron, stone, brick, or timber, across the said river, at or near a house at the time of the making of that Act, in the occupation of S. B., at Benthall, in the county of Salop, to the opposite shore, near the house then of T. C. at Madely Wood, in the said county, and for making and keeping in good and sufficient repair proper roads and avenues to and from the same, in his proper person, cometh before me T. Mytton, Esquire, one of the Justices of our said Lord the King, assigned to keep the peace in and for the said county of Salop, and also, &c. and giveth me the said Justice to understand and be informed, that after the last day of April, 1776, and after the said bridge in the said Act mentioned was built, to wit, on the 20th day of June, in the year of our Lord 1785, Thomas Armstrong, of the parish of B., in the said county, fisherman, not regarding the said statute, nor fearing the penalties

nalties therein contained, did use and employ a boat to ferry a person, to wit, one ———, across the said river Severn, and did then and there, in the said boat, ferry over the said ——— across the said river in the said Act mentioned, within the distance of five hundred yards of the said bridge, and across from the Madely side in the said county, to the opposite shore at B. aforesaid, in the said county, in order to avoid the payment of the tolls by the said Act granted, to wit, at B. aforesaid, contrary to the form of the statute in such case made and provided; whereby and by force of the said statute the said Thomas Armstrong, for his said offence, has forfeited the sum of twenty shillings, to be paid to the said trustees, their clerk or treasurer, and applied to the purposes of that Act; and the said Thomas Aldenbroke, the said informant, prays that the said Thomas Armstrong may be convicted of the said offence above laid to his charge: whereupon, &c. Defendant being summoned, appears (*see* p. 55) pleads not guilty, (*see ib.*) prosecutor's witnesses, sworn and examined in defendant's presence—defendant is asked for defence—no defence, (*see* [86]). It is therefore adjudged by me the said Justice, that the said Thomas Armstrong be and he is upon the testimony of the said ———, a credible witness, convicted of the offence above charged against him; and I the said Justice do adjudge, that the said Thomas Armstrong, for the offence aforesaid, hath forfeited the sum of twenty shillings of lawful money of Great Britain, to be paid to the said trustees, or to their clerk or treasurer, and applied to the purposes of the said Act, according to the form of the statute in that case made and provided. In witness, &c.

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